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ARTICLES

LEGAL BACKGROUND ON RECREATIONAL USE OF MONTANA WATERS*

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There is neither a statute nor a recent case defining the right of the public to make recreational uses of the water which flows over private lands in Montana.[1] But surely with the pressure of more people and the explosive expansion of their recreational uses of water it is inevitable that conflicts will mount between recreationists and landowners which will compel the defining of the public's right to use waters overlying private lands. It will happen every time a landowner wishes to fill in and build structures over his lake or stream land or otherwise interfere with or prohibit members of the public from the use of the overlying waters. The question of what are the public's rights is already perplexing personnel in state agencies and persons in wildlife and sportsmen's organizations;[2] there is an equal, opposite, and justifiable concern on the part of ranchers and homeowners whose lands lie alongside of lakes and streams.[3] All of those people seek some legal

[1]There are a few statutes and a case which should be acknowledged as having to do with such public or recreational uses. REVISED CODES OF MONTANA, §89-501 (1947) [hereinafter cited R.C.M. 1947] states: "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways for the purposes of navigation and such transportation . . ." but does not speak of any recreational uses, and does not state what liberties are permissible in the course of navigation and transportation. R.C.M. 1947, § 26-306 permits the licensing of private fishponds on artificial lakes or ponds although it does not confer upon the licensee a water right to supply such ponds or lakes. R.C.M. 1947, § 89-801 (2) authorizes the Fish and Game Commission to appropriate water in certain particular streams for preservation of fish and wildlife habitat. *See also* R.C.M. 1947, §§ 26-336 to -338 pertaining to navigable waters. The case, *Herrin v. Sutherland*, 74 Mont. 587, 596, 241 P. 328, 331, 42 A.L.R. 937 (1925) contains language which would lead to the conclusion that the public has no recreational rights on waters where the beds are privately owned. That case will be discussed in some detail in Part II hereof.

[2]The State Water Resources Board is currently working on draft legislation which would affect public recreational rights and is faced with problems concerning those rights in proposed water conservancy districts. The Fish and Game Department provides access to recreational water but members express uncertainty as to what the public can do in both navigable and non-navigable streams after access is gained. The Montana Conservation Council is working on legislation which, among many other things, would clarify public rights. This list is only suggestive and is far from exhaustive.

[3]The author has witnessed conflicts along such streams as the Bitterroot River and Rock Creek, where landowners have obstructed the channel or otherwise attempted to interfere with persons who wish to float or to wade while fishing.

background to enable themselves to cope with the increasing incidents of conflict. This article is intended to assist by discussing that background.[4]

Before attempting to deal directly with Montana's prospects for legal developments which will affect the ways of life of recreationists and landowners alike, it is first necessary to review developments which have already occurred in the law elsewhere in the United States, for it is that law which will probably guide our courts and lawmakers in the formulation of law in Montana. These more general developments elsewhere have already been analyzed and discussed in previous writings by this author[5] and by others,[6] but a review of them will set a perspective for our own development. Following that review, this paper will discuss the legal position of Montana—if it can be said to have defined one—with respect to recreational use of water.

I. *GENERAL REVIEW:*

THE LAW GOVERNING RECREATIONAL USES OF WATER.

A. *Navigability.*

The word "navigability" has been properly described as "chameleon in character,"[7] for it has different meanings and definitions as it is used for different purposes. One cannot properly use the word without an understanding of the differences of meanings and an awareness of the purpose for which he is using it.

1. Navigability for the purpose of determining title.

In 1842, a case arose involving litigation over an oyster fishery off the coast of New Jersey, which required a determination of the title to lands under tidal waters.[8] The United States Supreme Court found that title to these beds was originally in the British Crown, that each of the thirteen original colonies succeeded to that title when they won their independence, and that there was no subsequent cession of that title to the United States or to anyone else upon the formation of the Union. So the original states have held title to these beds underlying navigable waters ever since the Revolutionary War.

[4]This article is pointed toward concerned Montanans and so differs from those law review articles aimed at a national audience of persons specializing in the area of its subject.

[5]Stone, "Public Rights in Water," CLARK, WATERS AND WATER RIGHTS, Chap. 3, §37 (1967).

[6]The excellent study, Johnson and Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NATURAL RESOURCES J. 1 (1967) has been most helpful in the review that follows. *See also* Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427 (1961); Munro, *Public v. Private: The Status of Lakes*, 10 BUFFALO L. REV. 459 (1961); Maloney and Plager, *Florida's Lakes: Problems in a Water Paradise*, 13 U. FLA. L. REV. 1 (1960); Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 WIS. L. REV. 335 (1958).

[7]Johnson and Austin, *supra* note 6.

[8]Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

LEGAL BACKGROUND

Three years later the same court held that states subsequently admitted to the Union were admitted on an "equal footing" and that therefore they also took title to the beds of their coastal navigable waters upon their admission to the Union.[9] In effect, then, there was a cession to the new states by the federal government of title to the lands under navigable waters at the time that the federal territories became states: the United States reserved title to the upland, subject to various public land laws, but title to the beds of navigable waters was automatically transferred to new states. In a long line of cases, this doctrine has been applied to inland non-tidal waters as well as to tidal waters, confirming state ownership of the lands beneath navigable lakes and streams to the high-water mark.[10]

With respect to lands beneath inland non-tidal waters which were *not* navigable, there was no change of ownership upon the occurrence of statehood, so the federal government simply retained ownership of the beds of such streams as well as the upland.[11] Upon disposition of lands under the various federal land laws, title to the beds of these streams was conveyed to various riparian patentees and thus was simply a part of the newly settled private land.[12]

But how does one tell whether a particular body of water is navigable for the purpose of determining whether the bed of a lake or stream was ceded to the state or patented to private ownership? We have been taught to use an often repeated quotation from an 1870 decision of the United States Supreme Court:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[13]

The Court's language is imprecise and therefore difficult to apply. It is made still more difficult by certain important refinements concerning its application. One refinement is that for the purpose of determining title navigability must be determined as of the date the state

[9]Pollard v. Hagen, 44 U.S. (3 How.) 212, 223 (1845).

[10]*E.g.*, United States v. Oregon, 295 U.S. 1 (1945); United States v. Utah, 283 U.S. 64 (1926); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Packer v. Bird, 137 U.S. 661 (1891); Hardin v. Jordan, 140 U.S. 371 (1891); Barney v. City of Keokuk, 94 U.S. 324 (1876). The last three cited cases assumed that the states could use their own law for determining navigability of title; the first three establish that the federal test governs.

[11]State v. Brace, 76 N.D. 314, 36 N.W.2d 330, 332 (1949). *See* cases cited, *supra* note 10.

[12]State, by Burnquist v. Bollenbach, 241 Minn. 103, 116, 63 N.W.2d 278, 286 (1954).

[13]The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).

acquired statehood, because it was precisely then that there was a cession (albeit unexpressed, undeclared) to the new state of the beds of navigable water.[14] So, as the issue of title inexorably arises from time to time today and will arise in the future, fading evidence must be scrutinized to determine the susceptibility of a stream's use for commerce at a day long past. And thus the landowner who can trace his title back to a federal patent will eventually find out whether he or the state has owned his subaqueous land for perhaps the last century or so. Satisfactory evidence of trade and travel (or absence of trade and travel) on water at the time of statehood may be difficult or impossible to obtain now, and cannot become easier to prove in the future.

The language of the Supreme Court quoted above[15] comes from a case involving navigability for the purpose of federal regulation of commerce, but the case has frequently been used without discrimination in cases concerned with title determinations.[16] Its language suggests that navigability is determined by the susceptibility of the water for commercial use in its "ordinary condition" without need for improvements. That is a likely interpretation but we cannot yet be sure. Since it is now the law that navigability for *commerce* may occur at any time that it becomes feasible to improve a waterway for commerce,[17] it is possible that the Supreme Court may hold either (1) a stream was navigable at the date of statehood if it could later have been made navigable by reasonable improvements, or (2) it was then navigable if it could have been made so by improvements which would have been reasonable back when statehood was acquired. We must await Supreme Court clarification of this aspect of applying the language of the case which we are working with, but in the meantime we are advised in an article in the *Natural Resources Journal* that neither of those two qualifications is likely to be adopted because they seem to somewhat alter the tenor of the Court's original language and they would introduce further uncertainty into title determinations.[18]

Exactly how much trade and travel is required to qualify a stream as navigable at the date of statehood depends upon the individual characteristics of the water in question and upon the local activity of the time.[19] An early leading case stated:

> . . . [T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

[14]Cases cited, *supra* notes 9-12.
[15]Ball, *supra* note 13.
[16]Utah, *supra* note 10 at 83; Brewer-Elliott Oil, *supra* note 10 at 86; Packer, *supra* note 10 at 666.
[17]United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).
[18]Johnson and Austin, *supra* note 6 at 18-19.
[19]Utah, *supra* note 10 at 87; Appalachian Electric, *supra* note 17 at 407-10.

LEGAL BACKGROUND

> It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.[20]

Navigability for title purposes cannot be determined by examining whether a body of water has been meandered on the maps of the U.S. government survey.[21] If the surveyor's lines run across the body of water in disregard of its presence, it shows that the surveyor thought the water so insignificant that any later patentee should pay for the underwater acreage just as he would the uplands.[22] If, however, the surveyor has drawn lines along the vicinity of the edge of the water and stopped his survey lines at those boundary lines, it is said that the body of water was "meandered," and it shows that the surveyor thought that the water was so significant that a later patentee would not have to pay for the subaqueous acreage.[23] But navigability for title purposes is strictly a federal question, and the final arbiter is the United States Supreme Court.[24] That Court has given scant consideration to the fact that on the government survey the stream or lake was or was not meandered.[25]

2. Navigability for federal regulation of interstate commerce.

As has been noted, the cases determining navigability for purposes of ownership of the beds under waters relied on the definitions of navigability developed in cases concerned with the federal jurisdiction over commerce in navigable waters.[26] But the application of tests for navigability for the purpose of commerce does not require going back to the date of admittance to statehood, or indeed, back anywhere. Navigation for federal commerce jurisdiction may arise in the future if a stream can be made into an avenue of commerce by reasonable improvements. It does not depend upon the "natural and ordinary condition" of the water under consideration. There is no more authoritative expression of criteria for navigability for commerce than this language by Justice Reed of the United States Supreme Court:

> To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must

[20]The Montello, 37 U.S. 430, 441-42 (1874).
[21]This popularly held belief is erroneous. Oregon, *supra* note 10; Oklahoma v. Texas, 258 U.S. 574, 585 (1922); Hardin, *supra* note 10 at 380; Railroad v. Schurmeir, 74 U.S. (7 Wall.) 272, 286-87 (1868).
[22]Oklahoma, *supra* note 21; Schurmeir, *supra* note 21.
[23]*Id.*
[24]Cases cited, *supra* note 21.
[25]"A legal inference of navigability is said to arise from the action of the surveying officers who, when surveying the lands in that region, ran a meander line along the northerly bank and did not extend the township and section lines across the river. But this has little significance . . . Besides, those officers were not clothed with power to settle questions of navigability." Oklahoma, *supra* note 21 at 585.
[26]Cases cited, *supra* note 16.

> also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken....
>
> Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed or riparian rights is determined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. . . . It cannot properly be said that the federal power over navigation is enlarged by the improvements to the waterways. It is merely that improvements make applicable to certain waterways the existing power over commerce.[27]

3. Navigability for public use.

Of course, if a stream is navigable for title purposes, the bed normally belongs to the state, and so the public has the right to use the waters;[28] and if it is navigable for purposes of commerce, then travel and transportation on the water are under the jurisdiction of the federal government and again the public can generally make use of the water.[29] But each of these determinations of navigability has to do with problems of federalism: does the state or the United States own the land under the water; and who has jurisdiction to regulate the use of the water. Those determinations of navigability have to do with a state's relationship to the United States rather than with the state's relationships with its citizens. Neither a determination of navigability or non-navigability for commerce nor for title need have anything to do with the body of internal state law which governs the use of property and the activities of citizens within a state, in connection with water over which the federal government exercises no paramount jurisdiction.[30] When the problems of federalism are separated from the problems between citizens concerning water use, the latter problems can be dealt with simply as matters of intrastate law, unencumbered by definitions and determinations which are neither pertinent nor useful.

Many state courts have developed a broad definition of navigability for their intrastate purpose of determining what waters the public may resort to, frequently requiring only that the water be capable of floating a skiff, a canoe, or most frequently a log.[31] In some of the earlier

[27]Appalachian Electric, *supra* note 17 at 407-09.

[28]Cases cited, *supra* note 10.

[29]*Id.*

[30]Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689, 694 (1960). *See also,* Duval v. Thomas, 114 So.2d 791 (Fla. 1959); Snively v. Jaber, 48 Wash.2d 815, 296 P.2d 1015 (1956); Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955).

[31]Collins v. Gerhardt, 237 Mich. 432, 11 N.W.2d 193 (1942); Johnson v. Johnson, 14 Idaho 561, 95 P. 499, 24 L.R.A. (N.S.) 1240 (1908); Village of Bloomer v. Town of Bloomer, 128 Wis. 297, 107 N.W. 974 (1906); Lamprey v. Metcalf, 52 Minn.

LEGAL BACKGROUND

state cases the courts assumed that the bed of the body of water had to be owned by the public for there to be a right of public use,[32] and also that the criterion for determining title was a state rather than a federal test of navigability.[33] That latter assumption subordinated problems of federalism to intrastate law, and so permitted the courts to hold that a stream was navigable (for title and therefore for public use) whenever the waters in question were susceptible of substantial recreational use. The 1893 decision in *Lamprey v. Metcalf*[34] uses an approach, rationale, and language which others have followed:

> . . . yet we have extended the meaning of that term [navigable] so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. . . . Certainly we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. . . . To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.[35]

More recent federal cases have established that one of the assumptions underlying the more liberal state cases on public uses was erroneous: that the criterion for determining title was a state rather than a federal test of navigability.[36] But title determination is a problem in the state's relationship to the federal government and should require a uniformly applied federal test. The state courts can continue to use their own self-developed liberal definitions of navigability for their separate purpose of regulating intrastate uses of the waters of the state by citizens of the state. The recognition of a separate state purpose in defining waters suitable to substantial public beneficial use has enabled the state courts to establish a trend favoring public use.[37]

Shoreline owners on western lakes have long paddled their canoes, swum, and waterskied all over the surface of lakes without regard to whose land they may have floated over. They have simply assumed that legal access to a particular lake carried with it a right to share the use of the lake's surface. That popular assumption has been vindi-

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181, 53 N.W. 1139, 18 L.R.A. 670, 38 Am. St. Rep. 541 (1893); Olson v. Merrill, 42 Wis. 203 (1877); Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308 (1874).

[32]Griffith v. Holmon, 23 Wash. 347, 63 P. 239 (1900); Lamprey, *supra* note 31; Gaston v. Mace, 33 W.Va. 14, 10 S.E. 60, 5 L.R.A. 392 (1889); Railroad v. Brooks, 39 Ark. 403, 43 Am.Rep. 277 (1882); Morgan v. King, 35 N.Y. 454, 91 Am.Dec. 58 (1866); Rhodes v. Otis, 33 Ala. 578, 73 Am.Dec. 439 (1859); Moore v. Sanborne, 2 Mich. 520, 59 Am.Dec. 209 (1853); Brown v. Chadbourne, 31 Me. 9 (1849).

[33]Cases cited, *supra* note 32.

[34]Lamprey, *supra* note 31.

[35]*Id.* at 1143. *See also,* Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937); Roberts v. Taylor, 74 N.D. 146, 181 N.W. 622 (1921).

[36]Holt, *supra* note 10 at 55-56.

[37]Bach v. Sarich, 74 Wash.2d 575, 445 P.2d 648 (1968); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961); Johnson, *supra* note 30; Snively, *supra* note 30; Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Bohn v. Albertson, 107 Cal.App.2d 738, 238 P.2d 128 (1951); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

cated in recent cases which have held that on non-navigable (for title) lakes where the bed is privately owned, persons who obtain legal access also have the right to make reasonable use of the entire lake[38] and can prohibit or remove obstructions which would unreasonably interfere with their use.[39] These decisions are logically as applicable to a stream as a lake, and just as logically for the benefit of members of the public as for riparian landowners, if the stream is susceptible to substantial public use. Consider, for example, this language from a 1952 Wisconsin case:

> . . . It is no longer necessary in determining navigability of streams to establish a past history of floating logs, or other uses of commerical transportation, because any stream is **'navigable in fact'** which is capable of floating any boat, skiff or canoe, of the shallowest draft used for recreational purposes. . . .[40]

B. *Public waters.*

Two Rocky Mountain states, New Mexico and Wyoming, have premised their conclusions upon a proposition long recognized in Western states: that waters do not belong to the owners of land through which they flow; they belong to the public.[41] The New Mexico case, *State v. Red River Valley Co.*,[42] arose as a result of the construction by the Army Engineers of the Conchas Dam on the South Canadian River. Defendant had owned the land, but conveyed the damsite as well as a flowage easement (not the ownership) covering the large area to be flooded, reserving to himself all other rights to the area affected by the flowage easement. The state brought this action for a declaration whether it could open these waters, over private land, to public fishing. The New Mexico Supreme Court found that fishing is a beneficial use which pertains to public waters. It said:

> We hold that the waters in question were, and are, public waters; and that appellee has no right of recreation or fishery distinct from the right of the general public. . . . The right of the public, the state, to enjoy the use of the public waters in question cannot be foreclosed by any circumstances relied upon.[43]

The Wyoming case, *Day v. Armstrong*,[44] arose because the plaintiff sought a declaration of his right and that of the public to float the non-navigable North Platte River across defendant's lands. Some of the pertinent statements of the court follow:

> . . . the actual usability of the waters is alone the limit of the public's right to so employ them. . . .[45]

[38]Johnson, *supra* note 30; Duval, *supra* note 30; Snively, *supra* note 30.
[39]Bach, *supra* note 37; Duval, *supra* note 30; Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117 (1946).
[40]Muench v. Public Service Comm., 261 Wis. 492, 53 N.W.2d 514, 519 (1952).
[41]Brennan v. Jones, 101 Mont. 550, 567, 55 P.2d 697, 702 (1936); Allen v. Petrick, 69 Mont. 373, 377, 222 P. 451, 452 (1924); Norman v. Corbley, 32 Mont. 195, 202, 79 P. 1059, 1060 (1905).
[42]Red River Valley, *supra* note 37.
[43]*Id.* at 434.
[44]Day, *supra* note 37.
[45]*Id.* at 143.

> The title to waters within this State being in the State, is concomitance, it follows that there must be an easement in behalf of the State for a right-of-way through their natural channels for such waters upon and over lands submerged by them or across the bed and channels of streams or other collections of waters. . . . The waters not being in trespass upon or over the lands where they naturally appear, they are available for such uses by the public of which they are capable. . . .[46]

C. *Reasonableness, or limitations on the public use.*

There is good reason for concern over the privacy and enjoyment of life by the riparian landowner. Justice Sadler, dissenting in *State v. Red River Valley Co.,* expressed it:

> The common law has dramatized the sanctity of the home and premises of the individual against invasion by strangers and trespassers in the age-old maxim: 'A man's house is his castle.' So it was and immemorially has been but no more, to view the matter realistically, since henceforth a rod, reel and fly are to perform the office of a writ of entry.[47]

In the Wyoming case of *Day v. Armstrong,*[48] although the Court protected the public's right to float the North Platte, somewhat illogically it denied a right to wade the stream, saying that such a use would be a trespass on the privately owned bed. Perhaps the Court was indirectly attempting to limit the public to streams which are large enough to permit floating, but to restrict the public from wading up rivulets through landowners' farmyards. That will be the effect of the decision, but it may go too far in restricting uses of state waters to floating. Wading while fishing and fishing from the streambank of non-navigable (for title) streams has become prohibited in Wyoming.

There is very little law directly restricting public uses of public waters, either for the benefit of members of the public by affording protection from over-congestion and unsuitable uses by others, or for the benefit of landowners who need similar protection. The problem has been considered in an article by Messrs. Johnson and Austin, who state:

> Although few cases have raised the question of legal controls of lake or stream use to date, many more will undoubtedly arise in the future as greater pressure is put on the smaller streams and lakes of the West. The very purpose for which these bodies of water are thought desirable, recreation and homesite location, may be thwarted unless some rational means for allocating their use is found. Whether the courts articulate a 'nuisance' theory, or one based on 'riparian rights,' the standard of 'reasonableness' will probably be controlling. Just what this will mean in a given state will have to be worked out on a case by case basis. . . .[49]

D. *Navigability, title and public use: conclusion.*

Having now considered the historical background and the modern developments pertaining to the public recreational use of water, several

[46] *Id.* at 145.
[47] Red River Valley, *supra* note 37 at 456.
[48] Day, *supra* note 37.
[49] Johnson and Austin, *supra* note 6 at 51.

conclusions emerge. The problems which call for our careful attention and for resolution are created by conflicts between private landowners and members of the public who seek recreation. Solutions to the problems will require evaluation of the suitability of particular bodies of water to particular uses by the public, as well as where and how the public should be regulated for its own benefit and for the benefit of the private landowner. It is time to stop worrying about "navigability" and "title;"[50] they do not contribute to a solution, and they distract and divert our attention from what is relevant to a solution.

II. *MONTANA: PROBLEMS AND PROSPECTS.*

A. *Problems.*

> The defendant trespassed also when he waded up and down Fall Creek fishing. The channel of the creek belonged to the plaintiff (1 Tiffany on Real Property sec. 302), and while the plaintiff did not own the fish, *ferae naturae,* he had the exclusive right to fish for them while they were in the waters of Fall Creek within his land. (26 C.J. 598.) It would seem clear that a man has no right to fish where he has no right to be. So it is held uniformly that the public have no right to fish in a non-navigable body of water, the bed of which is owned privately.
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> —Callaway, C. J., in *Herrin v. Sutherland,* 74 Mont. 587, 596, 241 P. 328, 331, 42 A.L.R. 937, 942 (1925).

The foregoing opinion, written in 1925, represents the Montana Supreme Court's only attempt to deal with the rights of the public to make recreational use of waters over private land. But there are some good reasons why the Court may choose not to adhere to so simple, and essentially mechanical a solution of the conflict between landowners and recreationists. Curiously, it was entirely unnecessary to any decision in the case for the court to announce that recreationists have no right to use water over private land. More curiously, the case was not vigorously contested, and so the Court was not called upon to give the question of public recreational rights the serious and thoughtful consideration that it deserved. These weakening aspects of the case come forth when one considers the case in detail.

The complaint in *Herrin v. Sutherland*[51] alleged eight causes of action arising out of defendant's approaching plaintiff's land from the navigable Missouri River, trampling the banks along plaintiff's land while hunting and fishing, breaking plaintiff's fence, entering plaintiff's fast land, and fishing in a small pond and the small Fall Creek on plaintiff's land. In all but the seventh cause of action, plaintiff expressly alleged that defendant trespassed *above* the high-water

[50] Johnson, *supra* note 30 at 694.
[51] Herrin, *supra* note 1.

mark of the Missouri or elsewhere on plaintiff's *uplands;* and in the seventh, plaintiff implicitly alleged a trespass on his uplands because he alleged that defendant fished in a pond and stream which were entirely surrounded by plaintiff's land.[52] So defendant necessarily trespassed on plaintiff's uplands in the seventh cause of action because he had to obtain access to the landlocked pond and stream. The Supreme Court expressly inferred such a trespass.[53]

That part of the opinion in *Herrin v. Sutherland* which declares that "the public have no right to fish in a non-navigable body of water, the bed of which is owned privately"[54] is seriously weakened by the fact that each cause of action alleged explicitly or implicitly a trespass by defendant which had no relationship either to water or to the bed of a non-navigable body of water. Justice Calloway, writing for the majority of the Court, found that plaintiff's complaint alleged a trespass upon plaintiff's *uplands* in each of the eight causes of action. In discussing the second cause of action, the Justice did place emphasis upon defendant's fishing in the non-navigable Fall Creek[55]—a finding which was unnecessary since the Justice also found, with respect to that cause of action, that defendant trespassed on plaintiff's fast land when he tramped upon and destroyed plaintiff's hay.[56] So it was quite unnecessary to the decision to state that defendant had no right to fish Fall Creek.

Defendant put up a minimum defense. Notwithstanding that plaintiff had alleged a trespass on his uplands in each cause of action, defendant entered a general demurrer: he conceded as true all of the facts alleged by plaintiff and claimed that they did not constitute a basis for a complaint. The demurrer was overruled by the trial court, but defendant refused to file an answer in his own defense. So there was no trial—merely the entry by the trial court of a default judgment. Surprisingly, defendant appealed and the matter was submitted to the Supreme Court on briefs, without appearance of counsel.[57] It was not extensively briefed.[58] Of course the judgment was affirmed. In concurring, Justice Holloway pointedly and appropriately said: " . . . the appeal does not merit serious consideration, but should be disposed of summarily. . . ."[59]

Leaving *Herrin v. Sutherland,*[60] there is another aspect of Montana law which deserves discussion because it is so different from the law

[52]*Id.* at 593.
[53]*Id.* at 600.
[54]*Id.* at 596, a part of the longer quotation which heads this section.
[55]*Id.*
[56]*Id.* at 597.
[57]*Id.* at 589.
[58]Appellant's only brief was of thirteen pages, double spaced, printed, with lines only 3½ inches long. Ruling Case Law is relied on generally, and the argument is general. The nine cases cited do not really reach the gist of the complaint.
[59]Herrin, *supra* note 1 at 602.
[60]Herrin, *supra* note 1.

elsewhere. Under federal law each state acquired title to the beds and banks of navigable streams[61] up to the high-water mark upon the occurrence of statehood. When later settlers patented riparian land from the federal government they received title from the United States only to the highwater mark of navigable streams because the state already owned the land below that mark. But by statute[62] and case law,[63] commencing in 1895, Montana has conceded to the riparian landowners title extending to the low-water mark. The United States Supreme Court has thought it permissible for a state to so concede property already vested in the state for the benefit of the public,[64] so each time a person obtained a federal patent to land bordering a navigable stream in Montana, the state generously conferred upon the federal patentee the strip of land between high and low water, which the state had owned since 1889.[65]

But ownership of subaqueous land is quite different from ownership of dry land.[66] That is illustrated by one of the well established fundamentals of water law: with respect to those streams which are navigable for both title and commerce, the states own the beds but they do not have authority over the use of the overlying water—that lies with the federal government.[67] In *Gibson v. Kelly*,[68] the case which first stated Montana's peculiar rule that private ownership extended to low water, the Montana Supreme Court recognized that ownership of land which is periodically covered with public water is a limited ownership. The Court said:

> It is true that while the abutting owner owns to the low-water mark on navigable rivers, still the public have certain rights of navigation and fishery upon the river and upon the strip in question. . . .[69]

Forty-six years after *Gibson v. Kelly* the Montana Supreme Court rendered a decision on another matter which can be related to the public's use of the private land adjacent to navigable or public water. In *Laden v. Atkeson*,[70] the plaintiffs owned a right-of-way for a ditch across defendant's land, and maintained a dam in the river from which their water was taken. Defendant refused to permit plaintiffs the use of a road over defendant's land or the use of defendant's soil and materials alongside the ditch. Plaintiffs desired the use of defendant's

[61] *I.e.*, navigable for title purposes.
[62] R.C.M., 1947, § 67-712; CIVIL CODE OF 1895, § 1291.
[63] Gibson v. Kelly, 15 Mont. 417, 39 P. 517 (1895).
[64] Harden v. Shedd, 190 U.S. 508 (1902); Barney, *supra* note 10; Hardin, *supra* note 10.
[65] R.C.M., 1947, § 67-712; CIVIL CODE OF 1895 § 1291; Gibson, *supra* note 63.
[66] Wilbour v. Gallagher, 77 Wash.2d ....., 462 P.2d 232 (1969); Guilliams v. Beaver Lake Club, 90 Ore. 13, 175 P. 437, 441-42 (1918); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273, 275-76, 42 L.R.A. 305 (1898); cases cited, *supra* note 37.
[67] United States v. Grand River Dam Authority, 363 U.S. 229 (1960); United States v. Rio Grande Dam & Irr. Ditch Co., 174 U.S. 690 (1899).
[68] Gibson, *supra* note 63.
[69] *Id.* at 423.
[70] Laden v. Atkeson, 112 Mont. 302, 116 P.2d 881 (1941).

road for access for maintenance, and the soil for maintenance materials. The Supreme Court found that plaintiffs not only had an easement for their ditch, but also a secondary easement "for the purpose of obtaining full enjoyment of their primary easement consisting of their ditch right. . . ."[71] So the Court held for the plaintiffs. If a private party is entitled to that which is necessary to obtain the full enjoyment of an easement, there must be an analogous right in the public: the primary public right is to travel on navigable streams and public waters, and that carries with it a secondary easement to utilize the banks of the stream as required to ensure full public enjoyment of its primary right. It logically follows that members of the public should be permitted to enter upon the uplands for the purpose of portaging around obstacles or impassable places along a stream where that is necessary for travel in or along the stream itself.[72]

B. *Can the public acquire a water right by beneficial use?*

It was natural for our water laws to use the term "diversion" in connection with the acquisition of a water right for a beneficial use. Water rights law began its growth when mining and irrigation were the only substantial uses of water, and diversion by weir and ditch were physically necessary because there were no electric pumps or gasoline engines. Montana's codes bear witness to history in directing a person desiring to appropriate water to post a notice "at the point of intended diversion"[73] and to file with the county clerk a statement containing the "name of the stream from which the diversion is made."[74]

Mining and irrigation are still important uses of water, and a diversion is still the principal means of putting the water to a beneficial use. But now there are additional important uses of water, some of which do not require a diversion. Indeed, for some uses a diversion would damage the use: The generation of hydro-electric power and the use for recreation are conspicuous examples.[75] Is it true or was it ever true that to obtain a water right there must have been a diversion?

In Hutchins' authoritative treatise on water law, the emphasis is placed upon the "beneficial use" rather than upon the means of transporting or applying the water.[76] Even the 1911 treatise by Weil empha-

[71]*Id.* at 312.

[72]Elder, *supra* note 37; Laden, *supra* note 70. R.C.M 1947, § 89-501: "Navigable waters and all streams of sufficient capacity to transport the products of the country are public ways . . ."

[73]R.C.M. 1947, § 89-810.

[74]*Id.*

[75]In *Broadwater-Missouri Water Users' Assn. v. Montana Power Co.*, 139 F.2d 998, 998 (1944), the Power Company, "asserted the right by prior appropriation to the use of all the waters of the Missouri River and its tributaries for the purpose of operating certain hydro-electric plants—seven in number—located on the upper reaches of that stream."

[76]HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST, 314-20 (1942).

sizes "beneficial use" rather than the means of use.[77] An early Colorado case says: "No principle in connection with the law of water rights is more firmly established than that the application of water to beneficial use is essential to a completed appropriation."[78] No "dam, ditch, reservoir or other artificial means was used" for watering cattle in one Nevada case, the court saying that *if* there must be a diversion with intent to apply the water to a beneficial use, then "if the drinking by cattle constitutes a diversion, then the necessary intent must be that of the cattle."[79] If the use of water in a streambed by cattle is a sufficient beneficial use to support a water right, can it be argued that the use in the same manner by people is not? Beneficial use rather than a diversion is the touchstone of a water right.[80]

The Montana Supreme Court has never closed the list of what comprises a beneficial use. In *Osnes Livestock Co. v. Warren*,[81] the Court recognized a right originated for a swimming pool and fish pond; and in *Quigley v. McIntosh*,[82] the court prohibited the use of water for a fish pond, but it did so only because that use extended and increased the use of water under a prior right acquired for other purposes and would have injured other water right owners. The Court protected a private use for fish ponds in a 1966 case[83] and a Montana statute authorizes the operation of such ponds.[84] If private persons can acquire a right to a quantity or flow of water for swimming pools, fish ponds, and the like, can it be argued that the public may not acquire similar rights for similar beneficial uses? In *Paradise Rainbow v. Fish and Game Commission*, the court said: "Under the proper circumstances we feel that such a public interest should be recognized."[85]

C. *Prospects.*

There are some recent developments in Montana law, and some recent proceedings in the Montana Legislature, which strongly indicate that the public's interest in the recreational use of Montana waters will be both protected and elaborated in the future.

In the most recent legislative session (1969), the Montana Legislature amended Revised Codes of Montana (1947) sec. 89-801, which is the basic statute authorizing the acquisition of water rights. The amendment authorizes the Fish and Game Commission to appropriate

[77]WEIL, WATER RIGHTS IN THE WESTERN STATES, 406-11, 418 (3rd ed., 1911).
[78]Conley v. Dyer, 43 Colo. 22, 95 P. 304, 306 (1908).
[79]Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 295 P. 772, 775 (1931).
[80]City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 52 P.2d 585 (1935); Steptoe, *supra* note 79; *In re* Silvies River, 115 Ore. 27, 237 P. 322 (1925). (natural irrigation); Thomas v. Guiraud, 6 Colo. 530 (1883). (no diversion, just a dam causing a meadow to receive water).
[81]Osnes Livestock Co. v. Warren, 103 Mont. 284, 62 P.2d 206 (1936).
[82]Quigley v. McIntosh, 110 Mont. 495, 103 P.2d 1067 (1940).
[83]Paradise Rainbow v. Fish and Game Commission, 148 Mont. 412, 421 P.2d 717 (1966). More will be said about this case in the subdivision which follows.
[84]R.C.M. 1947, § 26-306.
[85]Paradise Rainbow, *supra* note 83 at 418-20.

the waters of twelve recreational streams for the purpose of maintaining stream flows necessary for the preservation of fish and wildlife habitat.[86] This is legislation of the greatest significance, because it is a recognition that recreational uses of Montana waters are beneficial uses. Water will be appropriated—in effect, reserved—for such purposes.

This amendment also authorizes the reservation by the Fish and Game Commission of other streams and rivers in addition to the twelve named, if approved by the Water Resources Board, the State Soil Conservation Committee, the State Board of Health, and the Legislature.[87] The requirement of approval by so many agencies will make it a cumbersome or nearly impossible process to reserve additional streams. But recognition of the public's interest has always been a step-by-step process, and this part of the amendment is a step—albeit a step which needs to have an obstruction removed.

There were three bills introduced into the 1969 Legislature which were killed, but which are indicative of future legislation. The most far-reaching was House Bill No. 337, which attempted a complete recodification of Montana's surface and underground water rights law. It necessarily was a lengthy piece of proposed legislation. Among its many features was the express inclusion of fish, wildlife, and recreational uses as beneficial uses,[88] and that a right or reservation of waters could be effected with or without a diversion of the water.[89] Importantly, it expressly recognized as existing rights the uses by the public for recreational purposes as of the time that the public made a substantial use of the water in question.[90] It also provided for the reservation of any public waters for existing or future uses and for maintaining adequate streamflow.[91] It is likely that there will be more legislative activity on this bill or other comparable proposals.[92]

Had it passed, Senate Bill No. 45 would have added the following language to R.C.M. (1947) sec. 89-802:

> Beneficial purposes shall include, but shall not be limited to, domestic water, industrial water, irrigation, livestock water, municipal water, **public recreation,** and the preservation, propegation, [sic] and minimum **habitat of fish and other wildlife; providing that diversion,** when not essential to beneficial application of the water, is **not required** for protection of a right. (emphasis added.)

Quite obviously the italicized portions contained the purpose of this amendment, because the rest of the text surely presented no innovations. But in the *Paradise Rainbows* case,[93] to be discussed in more

[86]R.C.M. 1947, § 89-801(2); Chap. 345, § 1, Laws of 1969.
[87]*Id.*
[88]House Bill No. 337, § 3(4), 1969 Legislature.
[89]*Id.* at § 3(5).
[90]*Id.* at § 3(7).
[91]*Id.* at § 30.
[92]Study and drafting are currently in progress by the Montana Conservation Council and the Water Resources Board.
[93]Paradise Rainbow, *supra* note 83.

detail later, the Montana Supreme Court suggested that the law of Montana already encompasses the italicized portions. Therefore it would be advisable for such legislation to contain a paragraph recognizing existing rights of the public to recreational uses, as was done in H.B. 337.[94] Such an inclusion would avoid the implications that the public has not yet acquired rights and that the italicized wording was intended to operate only prospectively.

House Bill No. 414 was introduced to authorize the Fish and Game Commission to purchase water from reservoirs, and to assure that the purchased water would remain in streams, augmenting their flow for recreational uses. Purchases of water for recreational uses in streams require different treatment from purchases of water for other purposes. Most purchasers are unconcerned with stream volume of flow elsewhere along the stream than at the point of intended diversion. It is quite possible that the purchaser actually diverts little or none of the same water which was released from the reservoir pursuant to his purchase. That is because the stream may have been totally exhausted by upstream irrigation uses, and the water which the purchaser diverts may have come to his reach of the stream from drainage and return-flow from upstream uses.

The situation is different for the Fish and Game Commission or a sportsman's organization which purchases water for the purpose of augmenting stream-flow for recreational purposes. Here there *is* concern over the flow of the stream elsewhere than at some particular point of delivery. Neither fish nor fishermen can satisfactorily congregate at a few points along a stream where there is sufficient water, and neither fish nor fishermen desire water carrying heavy siltation. But there is now no satisfactory means of protecting purchased water throughout the length of a stream or a sizeable portion thereof.[95] House Bill No. 414 would have protected water purchased by the Fish and Game Commission from other uses "from the point of release of such waters and continue to the point or points of intended use."

Lastly, there is evidence that the Montana Supreme Court will decree that the public has acquired water rights by its beneficial uses of water for recreational purposes. In the recent *Paradise Rainbows* case,[96] one DePuy diverted water from Armstrong Spring Creek to Trail Creek in 1957, where he used it in private fish ponds. DePuy looked upon Trail Creek as a dry streambed which he artificially supplied with the diverted water. If those were the facts, then Trail Creek was artificial for the purpose of R.C.M. (1947) sec. 26-306 which authorizes

[94]House Bill, *supra* note 88.

[95]The Western Montana Fish and Game Association purchased water from the State Water Conservation Board (now the Water Resources Board) to be delivered into the Bitterroot River from the Red Rock Reservoir. The Association has been unable to protect that water to keep it in the River.

[96]Paradise Rainbow, *supra* note 83.

the operation of private fish ponds under license by the Fish and Game Commission. The Commission licensed his operation from 1958 until 1965, when it refused licenses on the ground that Trail Creek was not artificial. DePuy then brought mandamus to compel the issuance of licenses, and the factual issue was whether Trail Creek was a natural stream prior to DePuy's diversion of Armstrong Spring Creek into it. The trial court found that it was not a natural stream and the Supreme Court affirmed, finding that there was sufficient evidence to support the trial court's conclusion. Therefore, DePuy could sustain his claim that his ponds were artificial. It is significant that the Court here protected an appropriation of water for the purpose of operating fish ponds—a recreational beneficial use.

But there is more to this case. The Fish and Game Commission had asked the Court for a mandatory injunction against DePuy to compel him to install a fishladder on Armstrong Spring Creek. Neither the trial court nor the Supreme Court found a strong enough factual case for the Commission: the Commission had permitted the diversion of Armstrong Spring Creek without a fishladder since the spring of 1957, and Armstrong Spring Creek was found to be but a short stream and not a major migratory route for fish. The Commission had argued that it was guarding a public right acquired by the public's beneficial use of the stream for fishing. The Court held against the Commission because there were insufficient facts to support the Commission's argument, but the Court's treatment of the issue was prophetic:

> The Commission does maintain that the public has a prior right in the waters of the creek which would require DePuy to release some water through a fishladder. The public right urged by the Commission would be based on the fact that the public had used the creek as a fishing stream and natural fish hatchery before DePuy built his dam. Under the rule of Bullerdick v. Hermsmeyer, 32 Mont. 541, 554, 81 Pac. 334, DePuy could not use the water to the detriment of prior rights.
>
> Such a public right has never been declared in the case law of this state. California, an appropriation doctrine jurisdiction whose Constitutional provisions relating to water rights are virtually the same as Article III, sec. 15 of the Montana Constitution, has recognized such a right and has upheld statutes requiring fishways. [citation] **Under the proper circumstances we feel that such a public interest should be recognized.** This issue will inevitably grow more pressing as increasing demands are made on our water resources. An abundance of good trout streams is unquestionably of considerable value to the people of Montana.
>
> While the Commission's argument is plausible, we cannot yield to it, **given the facts at hand.** . . . (emphasis added.)[97]

D. *Conclusion.*

No statute yet exists in Montana defining the conflicting rights of landowners and recreationists, or settling whether the public has acquired water rights for recreational uses by resorting to the water for recreation, or determining whether a water right can be acquired

[97] *Id.* at 419-20.

by a private person for recreation as for a fish pond or swimming pool. While legislation is non-existent, case law is sparse: the Montana Supreme Court has not yet been called upon to develop deliberately, the law governing the conflict between landowners and recreationists in a vigorously contested case,[98] nor, has the Court expressly held that water rights can be obtained by either the public or a private person for recreational purposes, although it has at least intimated that such rights do exist.[99]

Those in state agencies who hold responsibility for providing public recreation, those members of the public who desire to make recreational beneficial uses of the waters, and those landowners who desire privacy and tranquillity are indeed frustrated and perplexed at the uncertain and unsettled state of the law concerning the public's recreational uses of Montana waters. Troublesome as it is, the tardy development of doctrine in Montana is probably fortunate for the best long-term interests of the public. Had Montana's law been developed and settled many years ago when the public's interest was not so pressing as it now is, the makers of the law might not have given the careful consideration to the public interest which that interest so strongly demands today. Moreover, the experience and development in the law in other states can be most helpful in guiding our own development. Free from the encumbrances of fixed and settled statutes and precedents binding us to the restrictions inherent in concepts of title, navigability, and diversions of water, the Montana courts and legislature have today an unrestricted opportunity to determine the public's rights to recreational use of Montana waters—waters which belong to the public.

[98] *See* comments on *Herrin, supra* note 1, in the text beginning at note 51.

[99] Paradise Rainbow, *supra* note 83; Quigley, *supra* note 82; Osnes Livestock, *supra* note 81.