



Water Policy Interim Committee

61st Montana Legislature

SENATE MEMBERS

DAVID WANZENRIED--Vice Chair
DEBBY BARRETT
BRADLEY MAXON HAMLETT
TERRY MURPHY

HOUSE MEMBERS

WALTER MCNUTT--Chair
RUSSELL BEAN
BILL MCCHESENEY
JP POMNICHOWSKI

COMMITTEE STAFF

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary

September 16, 2009

TO: Water Policy Interim Committee (WPIC)

FR: Todd Everts, WPIC Legal Staff

RE: Overview of the Legal Tests of Navigability

At the July 9, 2009, WPIC meeting, the Committee requested an explanation of the various legal tests of “navigability” under federal and Montana law relating to the title of the river/lake beds, use of state waters, and the scope of navigability as it is applied under the federal Clean Water Act (CWA) and subsequent proposed federal legislation amending the CWA.

Overview

Unlike other personal or real property rights, the right to use water and the right to own and control the underlying river and lake beds are not necessarily exclusive. Water is a resource in which multiple private parties may have a right to its use. In addition, the public also has embedded rights to use that same water resource. Throw in competing state, federal, and tribal law water control issues and you are in for a wild white-water ride through the legal morass known as “navigability”. The various legal tests and applications of navigability are designed to sort out “who” or “what” has legal control and use of waterways and water bodies and the underlying beds.

In Montana, the multiple meanings of navigability have taken center stage recently with regard to the following issues:

1. Whether the state of Montana can charge dam owners rent for the use of certain river beds.¹
2. Whether the state of Montana can charge rent from other users of certain river beds.²

¹PPL Montana, LLC v. State of Montana, Cause No. DCV-2004-846, First Judicial District (2008), currently on appeal to the Montana Supreme Court.

² See PPL Montana LLC and Senate Bill No. 507 (2009), Chapter 475, Laws of Montana (2009), related to the treatment of property in navigable river beds.

3. The determination of the State of Montana's ownership of underlying beds of water bodies and the delineation of private property for taxation purposes.³

4. The scope and nature of the federal government's regulatory power under current and pending federal legislation as it relates to dredging and filling wetlands in the State of Montana.⁴

5. The extent to which the public has the right to access water bodies in Montana for recreational purposes.⁵

The focus of this memorandum as requested by the WPIC is not to analyze each of the above issues (if requested I would be happy to conduct a thorough legal analysis of each issue), but to provide the WPIC with an explanation of the various navigability legal tests and to illustrate how those legal tests interrelate with the issues mentioned above.

Tests of Navigability

Over time, three tests of navigability have evolved: two of the tests are federal and one test is state-based.⁶ Multiple tests that use the same term can be very confusing. It is important to note up front here, that navigability used in one legal context can have a separate and distinct meaning from navigability used in another legal context. Set out below is an explanation and analysis of each navigability test.

Federal Test of Navigability for Title

The Equal Footing Doctrine provides that states admitted to the Union after the original 13 colonies were established, received title to the beds beneath the navigable water upon statehood.⁷ Pursuant to the Equal Footing Doctrine, the United States Supreme Court in Montana v. United States⁸, held that if a river is navigable, the state owns the bed of the river subject to the

³Senate Bill No. 465 (2009), Chapter 472, Laws of Montana, (2009) related to the treatment of property consisting of the bed of navigable rivers and streams and property taxes.

⁴ S. 787 Clean Water Restoration Act (2009), a bill introduced to amend the Federal Clean Water Act to clarify the jurisdiction of the United States over waters of the United States.

⁵ See House Bill No. 190; Bitterroot Protection Ass. and FWP v. Bitterroot Conservation Dist., Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984);

⁶ Tarlock, Dan, Law of Water Rights and Resources (1988), annual updates.

⁷ United States v. Oregon, 295 U.S. 1, 14 (1935), State Land Bd. v. Corvallis Sand & Gravel, 429 U.S. 363 (1977); Pollard's Lessee v. Hagan, 44 U.S. 212 (1845).

⁸ Montana v. United States, 450 U.S. 544 (1981)

paramount powers of the federal government, but if the river is not navigable, the abutting riparian landowners may own the adjacent river bed.⁹ Navigability determines ownership or title to the underlying beds.

The federal test of navigability for title was judicially developed and is used by courts to establish whether a water body is navigable. In order for a court to determine whether a water body is navigable for title purposes, the court must figuratively go back in time and factually recreate the conditions and uses of the water body that existed at the time the state entered the Union.¹⁰ Navigability is determined by natural conditions at the time of statehood and evidence of the use of the water before statehood is relevant.¹¹ The fact that a water body was navigable for a significant portion of time is sufficient to establish navigability.¹² So long as the water body was capable or susceptible of being navigable (i.e., useable for floating logs), it is not necessary to show that the water body was actually used for commerce.¹³ It is important to emphasize here that the federal navigability test for title resides with a court with the jurisdiction and authority to make the fact specific navigability determination.

If navigability for title has been established, title of the underlying beds rests with the state and the state is free, subject to other paramount federal powers and potential public trust doctrine constraints¹⁴, to allocate the title to or use of those beds underlying navigable waters. Montana has judicially and legislatively adopted the federal test of navigability for title to resolve allocation and use disputes.¹⁵

⁹ Id. at 551.

¹⁰ Tarlock at section 8:12, page 8-16.

¹¹ Id. See also United States v. Utah, 283 U.S. 64 (1931),

¹² Id.

¹³ The Daniel Ball, 77 U.S. 557 (1870); United States v. Utah, 283 U.S. 64 (1931), Edwards v. Severin, 241 Mont. 168, 785 P.2d 1022 (1990), Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984).

¹⁴ Montana Coalition for Stream Access v. Curran, 210 Mont. 38, 682 P.2d 163 (1984); Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984); Galt v. State, 225 Mont. 142, 731 P.2d 912 (1987).

¹⁵ See Curran, at 43 through 48 adopting the federal title definition. See Edwards, at 170 adopting the federal title definition. The Montana Legislature has also adopted the federal title test in Sections 2 and 8, Chapter 475, Laws of Montana (2009).

During the 2009 Legislative Session, the Montana Legislature passed two bills (Senate Bill No. 507 (SB 507) and Senate Bill No. 465 (SB 465)) that deal with state allocation issues regarding navigability for title.

In enacting SB 507, the Legislature clarified the treatment of property consisting of the bed of navigable rivers for state land management purposes and clarified the authority of the Department of Natural Resources and Conservation (DNRC) and the State Land Board.¹⁶ SB 507 defines a “navigable river” as a river that:

(a) was determined navigable at the time of the original federal government surveys of the public land as evidenced by the recorded and monumented surveys of the meander lines of the river; or

(b) has been adjudicated as navigable by a court of competent jurisdiction.¹⁷

In clarifying the authority of the Land Board and DNRC regarding ownership of the beds of navigable rivers, SB 507 requires that:

[t]he board or the department may only require a lease, license, or easement for the use of the bed of a river that has been adjudicated as navigable for title purposes by a court of competent jurisdiction or was meandered by official government survey at the time of statehood.¹⁸

Pursuant to SB 507, the DNRC has produced a map and a list of Montana navigable rivers and lakes that require DNRC permitting.¹⁹

There is an internal inconsistency within SB 507 that is worth noting here in that the definition of “navigable river” in Section 2 of the bill, does not include the requirement that the official government survey be conducted at the time of statehood that is required in Section 8 of SB507. The question becomes, in order to determine navigability of a river, whether the governmental surveys that have been conducted at or before the time of statehood are the only surveys that can be used to determine navigability or could governmental surveys conducted after the time of

¹⁶ Chapter 475, Laws of Montana (2009).

¹⁷ Section 2(3), Chapter 475, Laws of Montana (2009).

¹⁸ Section 8, Chapter 475, Laws of Montana (2009).

¹⁹ See the Montana Navigable Rivers and Lakes Map at: <http://dnrc.mt.gov/trust/MMB/NavigableWaterways/SB507NavigableWaterwayMap.pdf>; See List of Montana Navigable Rivers and Lakes that Require Permitting by Trust Land Management Division, MT-DNRC Pursuant to SB 507: <http://dnrc.mt.gov/trust/MMB/NavigableWaterways/SB507NavigableWaterwaysList.pdf>

statehood be used to indicate navigability? Federal law is the controlling authority in determining navigability for title purposes. Ultimately a court of competent jurisdiction would be the final arbiter regarding this SB 507 inconsistency.²⁰ I would suggest that the Legislature attempt to resolve this issue during the 2011 Session.

In enacting SB 465, the 2009 Montana Legislature clarified how the Department of Revenue (DOR) and the DNRC should procedurally handle claims in changes of ownership or disputes of title of river beds and streambeds related to DOR property taxation and DNRC regulatory jurisdiction. SB 465 sets forth specific legislative findings that acknowledge Montana's adoption of the federal definition of navigability for title:

- (1) for 120 years since the admission of Montana as a state in 1889, the department of revenue and its predecessor agencies have taxed some landowners whose property abuts a river or stream on the assumption that those riparian landowners owned the property to the middle of the river or stream;
- (2) in *Montana v. United States*, 450 U.S. 544 (1981), the United States supreme court recognized that if a river or stream is not navigable, the abutting riparian landowners own the land in the bed of the stream to the middle of the stream, but if a river or stream is navigable, the state owns the bed of the river or stream, having acquired ownership from the United States when the state was admitted to the union, and therefore Montana owns the bed of the Bighorn River where it flows through the Crow reservation;
- (3) for the purpose of determining the ownership of a riverbed or streambed, the test of navigability is whether logs could be floated in the stream at the time of statehood as stated in *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984), based upon *The Montello*, 87 U.S. 430 (1874), *Sierra Pacific Power Co. v. Federal Energy Regulatory Commission*, 681 F.2d 1134 (9th Cir. 1982), and *State of Oregon v. Riverfront Protection Association*, 672 F.2d 792 (9th Cir. 1982).²¹

SB 465 also established procedural due process mechanisms including notice and the opportunity to be heard for a claim of change in ownership of a river bed or streambed.²² The issue of navigability for title is also currently being considered before the Montana Supreme Court in *PPL Montana LLC v. State of Montana*.²³ The District Court in *PPL Montana*, concluded that the Missouri River, the Madison River, and the Clark Fork River are navigable rivers and that, therefore pursuant to the Equal Footing Doctrine, the State of Montana owns the beds of the rivers and those lands underlying navigable rivers are school trust lands. One of the

²⁰ See *Curran* at 43.

²¹ Section 1, Chapter 472, Laws of Montana (2009).

²²Section 1(6) and (8), Chapter 472, Laws of Montana (2009).

²³ See footnote #1.

issues on appeal to the Montana Supreme Court is whether the District Court's navigability determination made pursuant to summary judgement was procedurally correct.

Federal Test of Navigability in Fact (or Federal Regulatory Navigability)

The federal government's power to regulate the use of water has been historically based on the test of "navigability in fact". As Professor Tarlock notes in his treatise on Law of Water Rights and Water Resources:

"Navigability in fact" is a forward-looking test that determines the power of the federal government to regulate the use and enjoyment of rivers. The navigability in fact test was developed before the current expansive reading of the commerce clause and has been superseded by the recognition that the full commerce power over water resources encompasses the regulation of all water bodies for any legitimate federal interest. Still, navigability in fact remains important. It is the basis of FERC and some U.S. Army Corps of Engineers jurisdiction and it defines and limits the exercise of federal and state navigation servitudes.²⁴

The U.S. Supreme Court first articulated the navigability in fact test for purposes of federal regulation in The Daniel Ball case:

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.²⁵

The Court in The Daniel Ball defined navigable waters of the United States as follows:

And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.²⁶

This test articulated in The Daniel Ball should be familiar, because it is also the test for navigability of title for submerged lands discussed above. However, the type of commerce required to meet the navigability for title test is intrastate commerce.²⁷ As noted above, the navigability for title test is limited to the finding of navigability to the date that the state was

²⁴ See Tarlock at Section 8:3, page 8-3.

²⁵ The Daniel Ball, 77 U.S. 557, at 563 (1870)

²⁶ *Id.* at 563.

²⁷ Utah v. United States, 403 U.S. 9, at 10 (1971)

admitted to the Union.²⁸ The test for navigability of a body of water today is not limited to evidence of actual commerce, but to evidence of the susceptibility of useful commerce in its natural and ordinary condition or whether the water body could be made suitable for use in the future by reasonable improvements.²⁹

The State of Montana has codified, to some extent, the federal navigability in fact test within the State's water use and water resources laws. It is statutorily declared that "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."³⁰ Navigable waters under the water use and water resources laws include:

(1) All lakes wholly or partly within this state which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they have in and to any other navigable or public waters.

(2) All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the government of the United States and all rivers and streams which are navigable in fact are hereby declared navigable.³¹

In addition to the Montana Constitution, the codification of the navigability in fact test is the legal foundation and authority for the state to conduct state-wide water planning activities, construct water impoundments, finance water projects, generate hydro-electric energy, establish the renewable resource grant and loan program, and establish a water storage policy, among other state water related activities.

The Daniel Ball historical test for federal regulatory jurisdiction has become limited in its application over time, mostly because the Federal Courts and Congress expanded the use of the commerce clause as justification of federal regulation and in so doing, did not require that water bodies be navigable for purposes of federal regulatory jurisdiction. However, in recent years the U.S. Supreme Court has begun to limit the scope of the commerce power by setting a high standard for Congressional intent to extend federal regulatory jurisdiction.³²

²⁸ See footnote #7.

²⁹ Rochester Gas & Elec. Corp. v. FPC, 344 F.2d 594 (2d Cir.), cert. denied, 382 U.S. 832 (1965); City of Centralia v. FERC, 851 F.2d 278 (9th Cir. 1988)

³⁰ 85-1-111, MCA

³¹ 85-1-112, MCA

³² United States v. Lopez, 514 U.S. 549 (1995), Solid Waste Agency of Northern Cook county v. United States Army Corps fo Engineers, 531 U.S. 159 (2001), Rapanos v. United

The scope and nature of the federal government’s regulatory power under the commerce clause and the traditional navigability in fact test as it relates to the federal Clean Water Act and dredging and filling wetlands is currently a hotly debated topic in Montana and across the nation. This issue came up during the July WPIC meeting and the Committee in its work plan requested periodic updates on any pending federal legislation.

Two recent U.S. Supreme Court cases have limited the scope of the federal government’s wetland regulatory jurisdiction.³³ The Clean Water Act requires that any person seeking to discharge certain material into navigable waters under federal jurisdiction obtain a permit from the U.S. Army Corps of Engineers.³⁴ Navigable waters are defined under the Clean Water Act as “waters of the United States”.³⁵ The U.S. Army Corps of Engineer, has interpreted waters of the United States to include not only traditional navigable waters, but other defined waters including tributaries and wetlands adjacent to such waters and tributaries.³⁶ Adjacent wetlands include wetlands bordering, contiguous to, or neighboring waters of the United States.³⁷ In one case, the U.S. Supreme Court has ruled that nonnavigable, isolated, intrastate waters do not fall under the Clean Water Act.³⁸ In another case, a majority of the Court agreed to void a lower court ruling that affirmed the Army Corps of Engineers' interpretation of navigable waters to include not only traditional navigable waters but wetlands adjacent to navigable waters.³⁹ A plurality of the Court held that the Army Corps of Engineer’s regulatory jurisdiction under the Clean Water Act applies only to “relatively permanent, standing or flowing bodies of water.”⁴⁰

In response to these U.S. Supreme Court decisions, S. 787, The Clean Water Restoration Act, was introduced in Congress on April 2, 2009, to clarify and expand the scope of federal

States, 547 U.S. 715 (2006).

³³ Solid Waste Agency of Northern Cook county v. United States Army Corps of Engineers, 531 U.S. 159 (2001), Rapanos v. United States, 547 U.S. 715 (2006).

³⁴ 33 U.S.C. Section 1311(a) and 1342(a).

³⁵ 33 U.S.C. Section 1362(7).

³⁶ 33 CFR Section 328.3(a).

³⁷ *Id.*

³⁸ Solid Waste Agency of Northern Cook county v. United States Army Corps of Engineers, 531 U.S. 159 (2001)

³⁹ Rapanos v. United States, 547 U.S. 715 (2006).

⁴⁰ *Id.*

regulatory wetland jurisdiction. On June 17, 2009, S. 787 was passed out of the Senate Committee on Environment and Public Works. It is awaiting action on the Senate Floor.

S. 787 amends the Clean Water Act by replacing the term “navigable waters” throughout the existing Act with the term “waters of the United States” which are defined as follows:

all waters subject to the ebb and flow of the tide, the territorial seas, all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters or activities affecting these waters, are subject to the legislative powers of Congress under the Constitution.⁴¹

S. 787 sets forth several Congressional findings and a savings clause regarding the scope and applicability of the definition of “waters of the United States”. According to S. 787 nothing in the Act:

modifies or otherwise affects the amendments made by the Clean Water Act of 1977 (Public Law 95-217; 91 Stat. 1566) to the Federal Water Pollution Control Act that exempted certain activities, such as farming, silviculture, and ranching activities, as well as agricultural stormwater discharges and return flows from oil, gas, and mining operations and irrigated agriculture, from particular permitting requirements.⁴²

Waters of the United States do not include prior converted cropland used for agriculture or man made waste treatment systems neither created in waters of the United States nor resulting from the impoundment of waters of the United States.⁴³ S. 787 states that:

Congress supports the policy in effect under section 101(g) of the Federal Water Pollution Control Act (33 U.S.C. 1251(g)), which states that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.⁴⁴

One of the issues raised in the WPIC July meeting was whether S. 787 would result in more private property being potentially regulated via the dredge and fill pollution control mechanisms

⁴¹ S. 787, Section 4.

⁴² S. 787, Section 3 (13).

⁴³ S. 787, Section 3(14)

⁴⁴ S. 787, Section 3(15)

under the Clean Water Act. The answer is probably "yes", because the S. 787 definition of waters of the United States is more expansive than the current definition under existing law as interpreted by the U.S. Supreme Court.

State of Montana Test of Navigability for Use of State Waters

With the passage of House Bill No. 190 regarding public access at certain bridges crossing streams and rivers during the 2009 Session, the issue of recreational access and use of Montana's water bodies has once again garnered statewide attention. The test for navigability for use of state waters is a state determination.

The Montana Supreme Court has held that navigability for use of a water body is a matter governed by state law and it is a separate concept from the federal question of determining navigability for title purposes.⁴⁵ The Montana Supreme Court has determined that under the 1972 Montana Constitution and the public trust doctrine that:

The capability of use of the waters for recreational purposes determines their availability for recreational use by the public. Streambed ownership by a private party is irrelevant. If the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people. The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.⁴⁶

The public's recreational use right extends to the high water mark of the waters.⁴⁷ The public does not have the right to enter upon or cross over private property to reach waters for which there is a recreational use right.⁴⁸ However, the public may portage around barriers in water in the least intrusive way possible in order to avoid damage to the private property holder's rights.⁴⁹

In response to the Montana Supreme Court decision regarding recreational use, the 1985 Legislature enacted Title 23, chapter 2, part 3, MCA, providing for the scope of public recreational use of streams. This law was challenged on constitutional grounds by landowners requesting that the Court declare the recreational use statute an unconstitutional taking of private

⁴⁵ Montana Coalition for Stream Access v. Curran, 210 Mont. 38, at 51, 682 P.2d 163 (1984)

⁴⁶ Id. at 52.

⁴⁷ Id. at 55.

⁴⁸ Id.

⁴⁹ Id. See also Montana Coalition for Stream Access v. Hildreth, 211 Mont. 29, 684 P.2d 1088 (1984)

property without just compensation.⁵⁰ The Supreme Court held that the real property interests of the private landowners are as important as the public's interest in water and if these constitutionally protected competing interests are in conflict, they must be reconciled to the extent possible.⁵¹ The Court reconciled these rights by striking the provisions that the public has a right to hunt big game, build duck blinds and boat moorages, and camp overnight. The Court held as unconstitutional the requirement that a landowner pay the costs of constructing the portage route around artificial barriers.

The State of Montana also recognizes that navigable waters are public waters subject to fishing rights:

Navigable rivers, sloughs, or streams between the lines of ordinary high water thereof of the state of Montana and all rivers, sloughs, and streams flowing through any public lands of the state shall hereafter be public waters for the purpose of angling, and any rights of title to such streams or the land between the high water flow lines or within the meander lines of navigable streams shall be subject to the right of any person owning an angler's license of this state who desires to angle therein or along their banks to go upon the same for such purpose.⁵²

Other Considerations

Although mentioned in this memorandum, but not analyzed, the public trust doctrine is an issue that deserves some attention regarding its potential impact on title and access issues. Mr. Petesch has previously done some analysis regarding the applicability of the public trust doctrine in Montana.⁵³

Parting Thoughts

At the request of the WPIC, I have attempted to explain the multiple meanings of navigability as they are applied in different legal contexts. This is a very complicated area of law. As the Supreme Court has stated “any reliance upon judicial precedent must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case.”⁵⁴ In other words, look to who or what is invoking some type of legal control over a water

⁵⁰ Galt v. State, 225 Mont. 142, 731 P.2d 912 (1987)

⁵¹ *Id.* at 916.

⁵² 87-2-305, MCA

⁵³ Greg Petesch Legal Memorandum addressed to Rep. Bob Raney regarding an analysis of the Mono Lake case from California and whether the decision in that case could be applied in Montana. (March 6, 1998).

⁵⁴ Kaiser Aetna v. United States, 444 U.S. 164, 171 (1979).

body and analyze the reasons behind invoking that legal control and you will discover which concept of navigability is applicable under the circumstances.

CI2255 9259teea.