

June 1987

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Recommended Citation

8 Pub. Land L. Rev. 177 (1987)

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STREAM ACCESS IN MONTANA AFTER *GALT V. STATE*

Holly Hunter

I. INTRODUCTION

The state of Montana, home to countless scenic rivers and streams, provides a myriad of recreational activities. Fly fishing, kayaking, canoeing and duck hunting are among the activities available in Montana to the recreating public. In recent years, these recreationists have sought to gain unfettered access to state rivers and streams.¹ In contrast, private landowners located adjacent to state rivers and streams often seek to curtail the recreationists' quest for such unfettered stream access. Consequently, as recreation becomes more important to the lifestyle of Americans, and likewise to the economy of Montana, conflicts between private landowners and recreationists inevitably occur.

In 1984, two Montana Supreme Court decisions, *Montana Coalition for Stream Access v. Curran*² and *Montana Coalition for Stream Access v. Hildreth*,³ were the result of just such a conflict between recreationists and private landowners. These decisions broke new ground in Montana stream access law by providing liberal stream access for recreational purposes to the state's waters and underlying and adjacent lands. Legislative action quickly followed the two decisions, resulting in new statutes broadly interpreting the *Curran* and *Hildreth* decisions.⁴

1. Recreationists in other states have also sought to gain access to their state rivers and streams. See, e.g., *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961) (public granted right to use state waters for floating water crafts); *State v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945) (court held public entitled to use and enjoyment of waters regardless of underlying land ownership); *People v. Mack*, 19 Cal. 3d 1040, 97 Cal. Rptr. 448 (1971) (plaintiff granted mandatory injunction compelling defendant to remove wires and fencing from across the Fall River); *Southern Idaho Fish & Game v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974) (public granted right to use waters, beds and channel of state rivers and streams). But see *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979) (conviction of criminal trespass affirmed against recreational boater based on private ownership of streambed under headwaters).

2. ___ Mont. ___, 682 P.2d 163 (1984).

3. ___ Mont. ___, 684 P.2d 1088 (1984).

4. Codified at MONT. CODE ANN. §§ 23-2-301 to -322 (1985). Sections pertinent to this casenote are set forth below:

23-2-302. Recreational use permitted—limitations—exceptions.

(1) Except as provided in subsections (2) through (5), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

(2) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the land owner:

(a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;

(b) the recreational use of surface waters in a stock pond or other private impoundment

Immediately following the enactment of these new stream access statutes, Montana landowners challenged the statutes' constitutionality. The result, *Galt v. State*,⁵ is the most recent Montana Supreme Court decision addressing public access to state streams and rivers and the underlying and adjacent lands. While *Galt* is the most recent decision in this continuing debate over public and private rights to state waters and the corresponding lands, it is undoubtedly not the last. This casenote examines the *Galt* decision and its impact on both the public's recreational use rights and the rights of private landowners located adjacent to streams and rivers.

II. BACKGROUND

Until 1984, Montana stream access law appeared well settled. The streambed between low water marks on *navigable* streams belonged to the state in trust for the people of the state.⁶ Title to the lands bordering navigable waters above the low water mark belonged to the adjacent landowner.⁷ However, the landowner's title to these adjacent lands was

fed by an intermittently flowing natural watercourse;

(c) the recreational use of waters while diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access;

(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;

(e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling, whichever is less;

(f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or

(g) use of a streambed as a right-of-way for any purpose when water is not flowing therein. . . .

23-2-311. Right to portage—establishment of portage route. . . .

(3) . . . (e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of such route, which is the responsibility of the department. The cost of establishing a portage route around artificial barriers not owned by the landowner on whose land the portage route will be placed must be borne by the department.

5. ____ Mont. ____, 731 P.2d 912 (1987).

6. The concept of the public trust developed early in American history. The United States Supreme Court in *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) held the original states owned the beds of their navigable tidal waters to the high water mark. *Id.* at 413-16. Several years later the United States Supreme Court in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845) recognized the "equal footing" doctrine which extended the states' ownership to the beds of nontidal navigable waters. The Court also accorded the same proprietary rights that the original states possessed to newly emerging states. These streambeds were held in trust for the emerging states and passed to them upon statehood to be administered for the public benefit. *Id.* at 222.

7. In 1895, the Montana Supreme Court in *Gibson v. Kelly*, 15 Mont. 417, 39 P. 517 (1895) held that lands between low and high water marks of navigable streams belonged to adjacent landowners. *Id.* at 423, 39 P. at 519. Consequently, the court recognized state ownership of navigable beds below the low water marks. See also MONT. CODE ANN. § 70-16-201 (1985).

subject to a statutory public recreational fishing easement and the public's common law right to navigation, fishery and commerce.⁸ By contrast, adjacent landowners on *nonnavigable* streams owned to the middle of the streambed and no public right of access to these streams existed.⁹

In the early 1980s, the Montana Coalition for Stream Access¹⁰ instigated two lawsuits which resulted in the *Curran* and *Hildreth* decisions. At issue in *Curran* was the public's right to use six miles of the Dearborn River flowing through private land. The landowner claimed ownership and the right to regulate the use of the streambed and the banks of the Dearborn River that passed through his property.¹¹

A six member majority of the Montana Supreme Court affirmed the district court's holding that the public had a right to use the bed, banks and waters of the Dearborn River.¹² The court first recognized that the federal log floating test¹³ was appropriate for determining navigability for title purposes and then found the Dearborn River navigable under this test.¹⁴ Thus, the court stated that the bed of the Dearborn River belonged to the state and the use of waters flowing over them could be regulated only by the state, not by adjacent private landowners.¹⁵ However, the court further stated that title to the underlying bed was immaterial in deciding public recreational use of state owned waters.¹⁶ The court then adopted a broad recreational use test to determine when the state's streams and rivers and the adjacent and underlying lands were available for public recreational use, holding "any surface waters capable of use for recreational purposes are available for such purposes by the public . . ." ¹⁷ The court based this

8. MONT. CODE ANN. § 87-2-305 (1985).

9. *Id.* § 70-16-201.

10. The Montana Coalition for Stream Access is a nonprofit corporation dedicated to obtaining access to Montana's rivers and streams for public recreational use. *Curran*, ___ Mont. at ___, 682 P.2d at 165.

11. *Id.* at ___, 682 P.2d at 165.

12. *Id.* at ___, 682 P.2d at 165.

13. Ownership of a riverbed at the time of statehood substantially affects present ownership. Waters which were navigable for title at the time of statehood passed to the state and are owned by the state subject to the common law public trust doctrine. *See supra* note 6. Whether state waters are navigable or nonnavigable for title purposes is a federal law question. *Brewer-Elliott Oil and Gas Co. v. United States*, 260 U.S. 77 (1922). Navigability for title under federal law depends on whether the water was used or susceptible of use in its ordinary condition as a highway for commerce. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). One test commonly used by federal courts is the log floating test. In this test, waters are navigable if the court determines that upon statehood logs or shingles could be floated down them for purposes of interstate commerce. *Puget Sound Power and Light v. Federal Energy Regulatory Comm'n*, 644 F.2d 785, 788-89 (9th Cir. 1981), *cert. denied*, 454 U.S. 1053 (1981).

14. *Curran*, ___ Mont. at ___, 682 P.2d at 166.

15. *Id.* at ___, 682 P.2d at 170.

16. *Id.* at ___, 682 P.2d at 170, 172.

17. *Id.* at ___, 682 P.2d at 172.

recreational use test on the common law public trust doctrine and the 1972 Montana Constitution which provides that "[a]ll surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."¹⁸ The court also allowed a concurrent recreational use of streambeds to the high water mark irrespective of streambed ownership, and granted recreational users the right to portage around stream barriers in the least intrusive manner.¹⁹

Several weeks later, the Montana Supreme Court decided the companion case, *Montana Coalition for Stream Access v. Hildreth*.²⁰ In *Hildreth*, the landowner had installed an instream fence and was planning to install a subsurface cable for the opening day of fishing season.²¹ The court upheld the lower court's grant of a permanent injunction, preventing the landowner from interfering with the public's recreational use of the Beaverhead River.²²

The *Hildreth* decision, while not approaching the length and depth of the court's opinion in *Curran*, is more significant to Montana law. Unlike the *Curran* decision, the court in *Hildreth* did not address navigability for title but instead relied on the recreational use test. The court reiterated that the character of the stream, and thus its capability for recreational use, determined its availability for recreational use.²³ The court held that determining "navigability for title is not necessary or proper when the issue is one of navigability for use."²⁴

During the 1985 legislative session, House Bill 265²⁵ was introduced in an attempt to codify the *Curran* and *Hildreth* decisions. The bill's liberal stream access provisions were a broad interpretation of the decisions. The bill divided Montana's waters into Class I and Class II streams. Class I streams are considered navigable under a federal test for title,²⁶ whereas Class II streams are referred to as nonnavigable under a federal test.²⁷

The bill passed during the 1985 legislative session, but the new statute contained a number of controversial provisions, including a provision permitting recreational use to the high water mark of both Class I navigable streams and Class II nonnavigable streams. When authorized by

18. MONT. CONST. art. IX, § 3(3); *Curran*, ___ Mont. at ___, 682 P.2d at 170.

19. *Curran*, ___ Mont. at ___, 682 P.2d at 172.

20. ___ Mont. ___, 684 P.2d 1088 (1984).

21. *Id.* at ___, 684 P.2d at 1090.

22. *Id.* at ___, 684 P.2d at 1094.

23. *Id.* at ___, 684 P.2d at 1094.

24. *Id.* at ___, 684 P.2d at 1094.

25. Codified at MONT. CODE ANN. §§ 23-2-301 to -322 (1985). See *supra* note 4 for text of sections pertinent to this casenote.

26. MONT. CODE ANN. § 23-2-301(2) (1985).

27. *Id.* § 23-2-301(3).

the Commission, a recreationist could use Class I navigable streams to the high water mark for big game hunting by longbow or shotgun.²⁸ Recreationists could also camp overnight,²⁹ and erect permanent and seasonal boat moorages and duckblinds.³⁰ Recreational use to the high water mark of Class II nonnavigable streams included activities such as water fowl hunting, fishing and boating, but not big game hunting, overnight camping, boat moorages and duckblinds without permission of the landowner. Another controversial provision required landowners to establish and pay for portage routes around their artificial barriers.³¹

These statutes and the *Curran* and *Hildreth* decisions drastically altered the pre-1984 status of stream access in Montana. Recreationists were allowed broadly defined recreational rights on navigable streams and access to many nonnavigable streams and beds which had previously been under the control of the underlying streambed owner. These broadly defined recreational rights in Montana waters, beds and banks created discontent among private landowners, resulting in the *Galt* decision in 1987.

III. GALT v. STATE

A. *Factual Background and the District Court Decision*

In June of 1985, State Senator Jack Galt and nine other landowners³² petitioned the Montana First Judicial District Court to declare the new stream access statutes unconstitutional. These landowner-plaintiffs asserted ownership of the streambeds and control of the waters flowing over them. They alleged the statutes authorized the taking of private property without providing just compensation.³³

Both the landowners and the state of Montana moved for summary judgment.³⁴ The district court found no issues of material fact and granted summary judgment to the state of Montana.³⁵ Relying on the doctrine of *stare decisis*, the district court held that "since the very point in *Curran* and *Hildreth* is again at issue, this court *must* follow the principles of law

28. *Id.* § 23-2-302(2)(d).

29. *Id.* § 23-2-302(2)(e).

30. *Id.* § 23-2-302(2)(f). Under the statute, overnight camping and the placement of permanent and seasonal boat moorages and duckblinds were not allowed within sight of or within 500 yards of an occupied dwelling, whichever was less. *Id.* at § 23-2-302(2)(e) and (f).

31. *Id.* § 23-2-311(3)(e).

32. Plaintiff landowners included Jack Galt, Louise Galt, Phil Rostad, Robert Saunders, Ted Lucas, James Bottomly, J. Harrison Saunders, Jake Frank, Franklin Grosfield and Lowell Hildreth. *Galt v. State*, No. 85-565 (1st Judicial Dist. filed June 14, 1985).

33. *Galt*, ___ Mont. at ___, 731 P.2d at 913.

34. *Galt v. State*, No. 85-565, slip op. at 2 (1st Judicial Dist. February 13, 1986).

35. *Id.* at 3, 16.

established in those cases,³⁶ i.e., title to the beds and banks was irrelevant in determining the public's recreational use right. Consequently, the landowners had no claim to the waters and thus no taking of private property occurred.³⁷

B. *Montana Supreme Court Decision*

The Montana Supreme Court in *Galt* examined whether the Montana public trust doctrine contemplated the uses of the beds and banks set forth in the new stream access statutes.³⁸ In a 5-2 decision, the court in *Galt* reaffirmed its *Curran* and *Hildreth* positions that the public has a recreational right to use the state's waters and the beds and banks up to the high water mark.³⁹

However, the court declared certain subsections of the new statutes unconstitutional. Addressing those subsections which provided for a public right to build duck blinds and boat moorages, and to camp overnight on the Class I navigable streams, the court held the statute overbroad, stating these uses were not always necessary for the enjoyment of the water resource itself.⁴⁰ Likewise, the court found the big game hunting provision unconstitutional because the provision was also not necessary for the public's enjoyment of the state waters.⁴¹ Additionally, the court held the provision requiring landowners to pay the cost of building portages around their barriers unconstitutional because the landowner receives no benefit from the portage.⁴²

IV. ANALYSIS

In both *Curran* and *Hildreth*, the Montana Supreme Court recognized a public right to use recreationally the state's waters. In these decisions, the court held that capability determined availability. If the waters were capable of recreational use, they were available for recreational use.⁴³ The state legislature subsequently interpreted these cases very broadly in House Bill 265, providing for a very liberal recreational use of state waters, beds and banks.

The court in *Galt* narrowed the broad language found in *Curran* and *Hildreth* by stressing that the land adjoining public waters must be used

36. *Id.* at 15 (emphasis original).

37. *Curran*, ___ Mont. at ___, 682 P.2d at 171.

38. *Galt*, ___ Mont. at ___, 731 P.2d at 916.

39. *Id.* at ___, 731 P.2d at 915.

40. *Id.* at ___, 731 P.2d at 915.

41. *Id.* at ___, 731 P.2d at 916.

42. *Id.* at ___, 731 P.2d at 916.

43. *Id.* at ___, 731 P.2d at 915; *Curran*, ___ Mont. at ___, 682 P.2d at 172.

minimally and only when use of the land is essential to the public's enjoyment of the waters. However, the court in *Galt* failed to differentiate between navigable and nonnavigable streams. This differentiation between navigable and nonnavigable streams is pivotal in accurately determining the extent of the public's right to use the beds and banks. The importance of this differentiation lies in the ownership of the beds. The beds of navigable streams are owned by the state in trust for the people, not by the private adjacent landowner.⁴⁴ In contrast, the beds of nonnavigable streams are owned by the adjacent private landowner to the middle of the streambed.⁴⁵

Nonetheless, the court in *Galt* failed to differentiate between navigable and nonnavigable waters and consequently treated public and private lands alike. One of the dissenting judges in *Galt* deemed this a glaring shortcoming of the majority's opinion and commented on the perplexing shift from the court's previous holding found in *Curran*.⁴⁶ In *Curran*, the court found that the adjacent private landowner had no proprietary rights to the beds of navigable waters because the beds belonged to the state in trust for the people of the state.⁴⁷ The court based its holding on the common law public trust doctrine.⁴⁸ In contrast, the majority in *Galt* implied that landowners adjacent to navigable streams owned the beds subject to an easement.⁴⁹ However, no support is provided for the majority's inconsistency with the *Curran* decision and the apparent abandonment of the common law public trust doctrine set forth in *Curran*.

More specifically, the court in *Galt* found the big game hunting provision on the Class I navigable streams unconstitutional. The court held this provision unnecessary to the public's right to use recreationally the state's waters.⁵⁰ While the court may narrow the public's right to use recreationally the beds of Class II nonnavigable streams, the beds which are arguably privately owned, the situation with the beds between the low water marks of Class I navigable streams is different.⁵¹ Since the state owns the beds of navigable waters in trust for the people, the state legislature or the Department of Fish, Wildlife and Parks is seemingly better suited than the courts are to regulate public lands.

The court again failed to distinguish between public and private lands in its discussion of the new statutory requirement that landowners pay for the construction of portage routes around barriers the landowners in-

44. See *supra* notes 6 and 7.

45. MONT. CODE ANN. § 70-16-201 (1985).

46. *Galt*, ___ Mont. at ___, 731 P.2d at 920 (Sheehy, J., dissenting).

47. *Curran*, ___ Mont. at ___, 682 P.2d at 168.

48. See *supra* note 6.

49. *Galt*, ___ Mont. at ___, 731 P.2d at 915.

50. *Id.* at ___, 731 P.2d at 916.

51. See *supra* notes 6 and 7.

stalled. The majority in *Galt* found this provision unconstitutional since the landowners received no benefit from the construction of the portage routes.⁵² This argument may have some merit in the context of privately owned beds and banks. The argument fails however when examined in light of publicly owned beds and banks. A landowner who runs instream fences across public land is deriving a benefit from the use of that public land for private purposes. These fences are a detriment to the public, interfering with commerce on navigable rivers. Removal of the obstructions or requiring the landowner to pay for portage routes around the barriers seems not only appropriate but necessary.

V. CONCLUSION

The court in *Galt* narrowed the broad language found in *Curran* and *Hildreth* regarding the public's recreational right to use the state's waters, beds and banks. But the court also obscured the distinction between public and private lands as it relates to the scope of the public's recreational rights. By doing so, the court effectively permits landowners to escape public accountability when they construct fences across public lands. Both landowners and recreationists are left floundering on the issue of when and where overnight camping and temporary duckblinds are acceptable. Consequently, the continuing tension between public and private rights to state waters and corresponding lands continues.

52. *Galt*, ___ Mont. at ___, 731 P.2d at 916.