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PUBLIC USE OF THE BANKS AND BEDS OF MONTANA STREAMS*

62 MONT. L. REV 107 (1991)

Albert W. Stone**

I. INTRODUCTION

There is nothing startling in the concept of a public trust as applied to property owned by the state for the benefit of its people. It has long been recognized in the navigable waters of the seas and the lands underlying them,¹ as it has in the navigable waters of our inland streams and their banks and beds belonging to the state.² Our Montana Constitution provides expressly for a public trust in waters by declaring:

All 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 law³

Typically, when one entity owns and manages property "for the use" or benefit of another, the relationship is one of trustee and beneficiary⁴ If

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1. United States v. Oregon, 295 U.S. 1, 6 (1935); Shively v. Bowlby, 152 U.S. 1, 11, 13-18 (1894); People *ex rel.* Webb v. California Fish Co., 166 Cal. 576, 596-97, 138 P. 79, 87-88 (1913); 1 H. FARNHAM, LAW OF WATERS AND WATER RIGHTS, §§ 36, 36a, at 169-75 (1904); S. MOORE, HISTORY AND LAW OF THE FORESHORE AND SEA SHORE, 651 n.1, 655-56 (3d ed. 1888); Stone, *Public Rights in Water Uses and Private Rights in Land Adjacent to Water*, in 1 WATERS AND WATER RIGHTS 177, at 190-91 (R. Clark ed. 1967).

2. Montana v. United States, 450 U.S. 544, 551 (1981); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435, 452 (1892).

3. MONT. CONST. art. IX, § 3(3)(emphasis added).

4. 1 G. BOGERT, LAW OF TRUSTS AND TRUSTEES, § 1 at 1-2 (rev. 2d ed. 1984); 1 SCOTT ON TRUSTS, § 1, at 1-2 (W. Fratcher 4th ed. 1987)[hereinafter SCOTT]. In the immediate context, the quoted section of the Montana Constitution expresses a trust relationship, and, as with the beds and banks of navigable waters, if the need for a "settlor" is felt, the United States may fill that need. See Shively v. Bowlby, 152 U.S. 1, 49, 57:

[T]he title and the dominion of the tide waters and the soil under them, in each colony,

the beneficiary is the public, then the relationship is called a "public trust."⁵

The history and development of the public trust doctrine from Justinian through the Magna Charta to modern applications has been set forth so many times in recent articles that it would be superfluous to do it again here.⁶ It should be sufficient merely to note that the doctrine does exist, and it *is* being applied.⁷ Also, as with other legal doctrines, it is being molded and adapted to serve modern contexts and developing needs.⁸

passed by the royal charter to the grantees as "a trust for the common use of the new community about to be established"; and, upon the American Revolution, vested absolutely in the people of each State "for their own common use "

Upon the American Revolution, these rights, charged with a like trust, were vested in the original States

Upon the acquisition of a Territory by the United States . . . the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.

The new States admitted into the Union since the adoption of the Constitution have the same right as the original States

One prominent author emphasizes the need for a third party (settlor) over the continuing two-party relationship. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989). There is certainly merit in Huffman's technical argument that the law of easements is more appropriate than the law of trusts. That conclusion, however, may not be so important, desirable or necessary as he asserts. It is true that the conventional trust initially involves three parties, but commonly when the trust is created there are only two parties because of the death of the settlor. The on-going relationship, which is all that remains, requires and consists of only two parties: the trustee and the beneficiary. See 76 AM. JUR. 2D *Trusts* § 248 (1975).

5. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 460 (N.D. 1976); Orion Corp. v. State, 109 Wash. 2d 621, 640, 747 P.2d 1062, 1072-73 (1987), cert. denied, 486 U.S. 1022 (1988); Menzer v. Village of Elkhart Lake, 51 Wis. 2d 70, 81-82, 186 N.W.2d 290, 296 (1971).

6. See, e.g., *Symposium on the Public Trust Doctrine and the American West: Yesterday, Today and Tomorrow*, 19 ENVTL. L., No. 3 (1980) [hereinafter *American West*]; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); *The Public Trust Doctrine in Natural Resource Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181 (1980) [hereinafter *A Symposium*]; UNIVERSITY OF COLORADO NATURAL RESOURCES LAW CENTER, *INSTREAM FLOW PROTECTION IN THE WESTERN UNITED STATES: A PRACTICAL SYMPOSIUM* (Mar. 31-Apr. 1, 1988) (conference proceedings available from the Law Center) [hereinafter UNIVERSITY OF COLORADO] as just a few of many representative sources.

7. See, e.g., National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346, cert. denied, 464 U.S. 977 (1983); Shokal v. Dunn, 109 Idaho 330, 707 P.2d 441 (1985); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 671 P.2d 1085 (1983); Cinque Bambini Partnership v. State, 491 So.2d 508 (Miss. 1986), aff'd sub nom. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976); Morse v. Oregon Div. of State Lands, 285 Or. 197, 590 P.2d 709 (1979); Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), cert. denied, 486 U.S. 1022 (1988).

8. Judge Cardozo wrote:

As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but

The above quoted passage from the Montana Constitution is merely a restatement of the common law, statutory law or constitutional law of every western state.⁹ It is not new and it is not startling here nor elsewhere. Private persons do not own the water in the streams, but they, along with other members of the public, have the right to its use. The water is also subject to appropriation for beneficial uses.¹⁰ Therefore, the people may appropriate waters for beneficial uses and they may also float and fish in the flowing waters of nearly all of the states in the West.¹¹

Additionally, where inland waters are navigable for title purposes (*i.e.*, under the federal test)¹² the state acquired title to the beds and banks

creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 166-67 (1921). Furthermore,

The law regarding the public use of property held in part for the benefit of the public must change as the public need changes. The words of Justice Cardozo, expressed in a different context nearly a half-century ago, are relevant today in our application of this law: "We may not suffer it to petrify at the cost of its animating principle."

Stone, *supra* note 1, at 202 (quoting *Epstein v. Gluckin*, 233 N.Y. 490, 494, 135 N.E. 861, 862 (1922)(Cardozo, J.)).

9. The relevant constitutional and statutory provisions of the eighteen Western states (Hawaii is omitted) are set forth in Stone, *supra* note 1, at 242-45.

10. *Id.*

11. See *People v. Sweetser*, 72 Cal. App. 3d 278, 140 Cal. Rptr. 82 (1977); *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1976); *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974); *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17 (1954); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945); *Roberts v. Taylor*, 47 N.D. 146, 181 N.W. 622 (1921); *Curry v. Hill*, 460 P.2d 933 (Okla. 1969); *Luscher v. Reynolds*, 153 Or. 625, 56 P.2d 1158 (1936); *J.J.N.P. Co. v. State ex rel. Div. of Wildlife Resources*, 655 P.2d 1133 (Utah 1982); *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969), *cert. denied*, 400 U.S. 878 (1970); *Bach v. Sarich*, 74 Wash. 2d 575, 445 P.2d 648 (1968); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961). *Contra* *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979).

12. The words "navigable" and "navigability" have been used in different contexts, and their meanings are different when the context is different. For purposes of determining title to the beds of waters, *i.e.*, whether the state acquired title when it acquired statehood (or independence from the Crown, in the case of the thirteen original states), the federal test laid down in *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), governs:

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.

This test is applied as of the date of acquiring statehood. If a stream met these conditions *at that time*, then title to the beds and banks passed to the new state. Otherwise title remained in the federal government and would pass to a private owner who obtained a federal patent to the land.

For purposes of the *commerce clause* of the U.S. Constitution, the *Daniel Ball* test, involving usability for commerce, applies. Indeed the *Daniel Ball* case involved a commerce clause issue. But, according to *The Montello*, 87 U.S. (20 Wall.) 430 (1874), and as stated in *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940):

on the date that the state acquired statehood.¹³ As in the case of lands underlying the oceans and bordering the oceans to high tide (at least),¹⁴ so in the case of the beds and banks of such navigable rivers and streams, the state's title is held in trust for the use and benefit of the public.¹⁵ Unless there is a clear and imperative reason, and unless the loss to the public is minimal and outweighed by other public policy considerations neither the courts nor the legislature can divest the beneficiaries of this trust from their interest in and use of the trust property¹⁶

But courts and legislatures do have a role, as does any manager of trust property, to oversee and regulate the uses of the trust property so that it may best serve the beneficiaries.¹⁷ The public may be restricted so that the property does not become over used or abused; and the property may be dedicated to a public use that necessarily excludes some other public uses.¹⁸

Although navigability to fix ownership of the river bed or riparian rights is determined . . . 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. *Id.* at 408 (citations omitted).

Similarly, for *admiralty* jurisdiction, the commerce test is used, but jurisdiction may be extended over places formerly nonnavigable. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 268, 271-72 (1932); *The Robert W. Parsons*, 191 U.S. 17, 28 (1903); *Ex parte Boyer*, 109 U.S. 629, 632 (1884).

Then there are the various state tests of navigability to determine the usability of a stream or lake for public recreational purposes. These vary from state to state.

So, there are different meanings of navigability, and the phrase in the text above: "navigable for title purposes (*i.e.*, under the federal test)" is for the purpose of making clear that it is the first meaning referred to herein, involving *The Daniel Ball*, that is intended, as well as to alert the reader that there is more than one meaning.

13. *Montana v. United States*, 450 U.S. 544, 551 (1981); *Packer v. Bird*, 137 U.S. 661, 666 (1891); *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477-78 (1850); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845); *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410-11 (1842).

14. The public's rights in some states have included the dry sand beaches. *See Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984); *Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978). In Oregon, the public's right extends to dry sand areas adjacent to the ocean up to the upland vegetation line by virtue of the common-law doctrine of "custom." *McDonald v. Halvorson*, 308 Or. 340, 359, 780 P.2d 714, 724 (1989) (including "gravel beaches, beaches strewn with or even made up of boulders, and other areas adjacent to the foreshore . . . " But in this case, the beach did not abut the ocean; so although the doctrine was approved, it did not apply.); *State ex rel. Thornton v. Hay*, 254 Or. 584, 587, 462 P.2d 671, 673 (1969).

15. *See supra* notes 2 and 13.

16. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892); *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 441, 658 P.2d 709, 724, 189 Cal. Rptr. 346, 361, *cert. denied*, 464 U.S. 977 (1983); *United Plainsmen Ass'n v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457, 463 (N.D. 1976). *See also supra* note 6.

17. G. BOGERT, *supra* note 4, at §§ 541-50; 2 SCOTT, *supra* note 4, at §§ 89-111; 1 RESTATEMENT (SECOND) OF TRUSTS, §§ 169-83 (1959).

18. *See Colberg, Inc. v. State ex rel. Dept. of Pub. Works*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968); *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928), *cert. denied*, 280 U.S. 517 (1929); *City of Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674 (1957); *State v. Public Serv. Commission*, 275 Wis. 112, 81 N.W.2d 71 (1957); *City of Milwaukee v. State*, 193 Wis. 423, 214 N.W. 820 (1927).

As a matter of legislative power, the title to trust property may be conveyed into private ownership,¹⁹ but the state cannot convey more than it owned. The state that held the land subject to a trust can only convey that land for purposes consistent with that trust.²⁰

II. THE *CURRAN* AND *HILDRETH* CASES

A. *The Waters*

The foregoing general description of the trust relationship is neither new nor difficult to deal with regarding property owned by the state for the use of its people.²¹ So the Montana Supreme Court's decisions in the *Curran*²² and *Hildreth*²³ cases, to the extent that they dealt with the water of the State of Montana, were not innovative, nor were they intrusive upon private rights. It is inconceivable that landowners have not always been aware that the streams flowing by or through their property were public waters. Even before the admission to the Union of any of the Western states,²⁴ the miners developed local rules to control the use of water. Institutional control was confirmed in the Lode Mining Act of 1866,²⁵ the Desert Land Act of 1877,²⁶ and explained in the *Beaver Portland Cement* case.²⁷ As to the waters, *Curran* and *Hildreth* merely followed the state constitution, which in turn merely stated what the law would be without the above-quoted constitutional provision.²⁸

B. *The Lands*

In the *Curran* case, the trial court held that the public has a right to use the *streambed* of the Dearborn River up to the high water mark as it

19. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876). See *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *Cook v. Dabney*, 70 Or. 529, 139 P. 721 (1914); *Rhode Island Motor Co. v. City of Providence*, 55 A. 696 (R.I. 1903); *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028 (1940).

20. See *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 630, 671 P.2d 1085, 1093 (1983); *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 79-81, 360 N.E.2d 773, 780-81 (1976); *Caminiti v. Boyle*, 107 Wash. 2d 662, 732 P.2d 989 (1987), *cert. demed.*, 484 U.S. 1008 (1988); *supra* notes 18 and 19.

21. See *supra* notes 1-3.

22. *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984).

23. *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984).

24. Except for Texas, which was admitted in 1845.

25. Ch. 262, § 9, 14 Stat. 253 (1866)(codified at 30 U.S.C. § 51 (1988))(explicitly recognizing local rights to the "use of water for mining, agriculture, manufacturing, or other purposes").

26. Ch. 107, 19 Stat. 377 (1877)(codified at 43 U.S.C. § 321 (1982)).

27. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935).

28. See *supra* note 11.

flows through Curran's property²⁹ The trial court was affirmed by the Montana Supreme Court, but in its ensuing discussion, the Supreme Court spoke only of the public's use of the *waters* up to the high water mark. The *Curran* decision found that the Dearborn River was navigable for title purposes (the federal test)³⁰ and thus the state acquired ownership of the bed and banks up to high water mark when it acquired statehood.³¹ In 1895, however, by case law³² and statute,³³ title to the land between high and low water was said to be vested in the adjacent landowner, but that had no effect upon the public's use of the water

Because the state owns the bed between low water marks of navigable (for title) streams, there is no room for an argument that the public may be excluded from the use of the bed of the Dearborn River, by wading or other reasonable means.³⁴ But, what about the nature of the title to the land between high and low water? The title to that land had belonged to the state for the use of the public,³⁵ but the state, by case and statute, gratuitously conferred title to the upland riparian owners.³⁶ It was a title subject to a public trust. As will be discussed later, the conferring of that title to the riparian landowner (if *Gibson* and the legislation are honored)³⁷ is only that: passage of the title that the state had. That title was subject to public uses. It still is.³⁸

The *Hildreth* case differs from the *Curran* case in that there was no determination of navigability for title (the federal test) and thus no determination of title to the bed or banks of the Beaverhead River. The

29. *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 55, 682 P.2d 163, 172 (1984).

30. *Id.* at 43-44, 682 P.2d at 166. *See also supra* note 12 and accompanying text.

31. *Curran*, 210 Mont. at 45, 682 P.2d at 166.

32. *Gibson v. Kelly*, 15 Mont. 417, 422, 39 P. 517, 519 (1895).

33. MONT. CODE ANN. § 70-16-201 (1989).

34. But see discussion of *Galt v. State ex rel. Department of Fish, Wildlife & Parks*, 225 Mont. 142, 731 P.2d 912 (1987), commencing in text at *infra* note 80.

Montana's "angling statute" (MONT. CODE ANN. § 87-2-305 (1989)) permits public use of the adjacent banks of navigable waters for purposes of fishing. If that is constitutionally permissible, then other members of the public should have equal use of the banks if they are not being a nuisance to fishermen. Conversely, if other members of the public cannot use the banks because of private ownership, then neither should the anglers.

35. *See supra* notes 2, 12, and 13.

36. *See supra* notes 32 and 33.

37. In *Galt*, 225 Mont. 142, 731 P.2d 912 and discussed in the text beginning at *infra* note 30, Justice Sheehy's dissent included this statement:

The definition by the legislature in 1933 of the right to use the streambeds up to the high water mark for the purpose of fishing is an indirect recognition of the legislature that Section 70-16-301, MCA, is not worth the paper it is written on insofar as it applies to the streambeds between high water marks on navigable streams.

Galt, 225 Mont. at 158, 731 P.2d at 922. *See also infra* text accompanying note 52.

38. *See infra* note 53 and accompanying text. *See also supra* note 20.

Montana Supreme Court said: "Public use of the waters and the bed and banks of the Beaverhead up to the ordinary high water mark was determined, not title."³⁹ The court added: "Under Montana law, the public has the right to use the Beaverhead and its bed and banks up to the ordinary high water mark, with additional, narrowly limited rights to portage around barriers."⁴⁰

Because the *Hildreth* case did not find that the state had title to the bed and banks of the Beaverhead, these statements of the court must be applicable where the bed and banks are in private ownership. So by these declarations the Montana Supreme Court quite clearly found a public interest not only in the publicly owned waters of the state, but also in the private titles to the lands—the beds and banks—up to the high water mark.

C. *The Decision in Perspective: Historically and Contemporaneously*

Several articles and cases discuss the public trust as it applies to the beds and coastlines of the sea,⁴¹ and as it applies to inland *waters* of the states.⁴² However, there is very little discussion of public rights in the *beds and banks* of streams where those beds and banks are held by private titles because the streams are non-navigable for title (the federal test).⁴³

Commencing with the most fundamental and ancient concept, we may start with the proposition that the seas are common to all.⁴⁴ There is also a presumption that the ocean beds belong to the public up to high

39. *Montana Coalition for Stream Access, Inc. v. Curran*, 211 Mont. 29, 39, 684 P.2d 1088, 1093 (1984)(emphasis added).

40. *Id.* at 40, 684 P.2d at 1094.

41. See *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 374 (1971); *Morse v. Oregon Div. of State Lands*, 285 Or. 197, 590 P.2d 709 (1979); *Bowlby v. Shively*, 22 Or. 410, 30 P. 154 (1892), *aff'd*, 152 U.S. 1 (1894); Porro, *Invisible Boundary—Private and Sovereign Marshland Interests*, 3 NAT. RESOURCES LAW. 513 (1970); Taylor, *Patented Tidelands: A Naked Fee?*, 47 CAL. ST. B.J. 420 (1972); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762 (1970); Comment, *Private Fills in Navigable Waters: A Common Law Approach*, 60 CALIF. L. REV. 225 (1972).

42. See *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983), *cert. demed*, 464 U.S. 977 (1983); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457 (N.D. 1976); *American West*, *supra* note 6; *A Symposium*, *supra* note 6; UNIVERSITY OF COLORADO, *supra* note 6.

43. There is some discussion of this in Carvell, *North Dakota Waterways: The Public's Right of Recreation and Questions of Title*, 64 N.D.L. REV. 7, 68-70 (1988). See also *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 570-71, 127 Cal. Rptr. 830, 836-37 (1976); *Elder v. Delcour*, 364 Mo. 835, 848, 269 S.W.2d 17, 26 (1954).

44. "By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea." J. INST. 2.1.1; Hale, *de Jure Maris*, (1667, first publ., 1787) in MOORE, A HISTORY AND LAW OF THE FORESHORE AND SEA SHORE 370 (3d ed. 1888).

water⁴⁵ But there have been numerous conveyances of the shorelines and the beds of bays into private ownership.⁴⁶

Conveyances of tidelands, shorelines, and beds of the ocean and its bays must be pursuant to legislative authorization.⁴⁷ Courts look with disfavor, however, upon private acquisition of public property and will scrutinize the statutory authority to ascertain the legislative intent.⁴⁸ Unless the statute is unmistakably clear that the grantee is intended to hold the property free of all public interest (the *jus publicum* as well as the *jus privatum*), the grantee will hold the land subject to the public rights of use, which the grantee cannot obstruct.⁴⁹

It is not surprising, then, that case law supports public use of these beds and tidelands regardless of whether the title is in the public (the state) or in private ownership.⁵⁰ With regard to navigable (for title) inland lakes and rivers, title to the beds and banks became vested in each state upon its acquisition of statehood.⁵¹ Again, the title was held by the state for the use of the public—a public trust. Again, there were conveyances by the states of some beds and banks.⁵² The courts' treatment of these conveyances paralleled their treatment of conveyances of the seabeds and tidelands.⁵³ In Montana and California, by essentially identical statutes, the title to all of the banks between high and low water marks of the navigable inland lakes and streams were gratuitously conceded to the adjacent private owners.⁵⁴ These gratuitous concessions of public lands were considered at an early date in Montana, and quite recently in California. In *Gibson v Kelly*,⁵⁵ in 1895, Montana recognized the private title, saying: "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*

45. See *supra* note 1.

46. I H. FARNHAM, *supra* note 1, at § 41 at 194-95, §§ 44, 45, at 214-23. See also cases cited *supra* note 19.

47. *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 524, 606 P.2d 362, 366, 162 Cal. Rptr. 327, 331, *cert. denied*, 449 U.S. 840 (1980); *People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 587-88, 596-97, 138 P. 79, 83-84, 87-88 (1913).

48. See *City of Berkeley*, 26 Cal. 3d at 524, 606 P.2d at 366, 162 Cal. Rptr. at 331; *People ex rel. Webb*, 166 Cal. at 587-88, 596-97, 138 P. at 83-84, 87-88. See generally Sax, *supra* note 6; *supra* notes 16-20 and accompanying text.

49. See authorities cited *supra* note 48.

50. *Id.*

51. See *supra* notes 12-13.

52. See *supra* notes 19-20.

53. See *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 105 Idaho 622, 671 P.2d 1085 (1983); *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 360 N.E.2d 773 (1976).

54. CAL. CIV. CODE § 830 (West 1982); REV. CODES MONT. § 67-712 (1947) (now codified at MONT. CODE ANN. § 70-16-301 (1989)).

55. 15 Mont. 417, 39 P. 517 (1895).

*the strip in question.*⁵⁶ The public's interest in, and ability to use the banks of navigable streams is, of course, much greater and broader today than it was in 1895.

The California statute⁵⁷ came under review in separate actions decided on the same day by the California Supreme Court. The two cases involved the title to the land between high and low water surrounding Clear Lake⁵⁸ and Lake Tahoe.⁵⁹ The cases are so similar, that a quote from only one of them is sufficient:

We come, then, to the question whether the grant of lands between high and low water made by section 830 to riparian landholders is free of the trust described in *City of Berkeley*. It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust. Instead, unless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public.

In *Marks v Whitney*, we held that, although early cases had expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.

Nothing in the language of section 830 requires a conclusion that riparian landholders take free of the public's rights in the lands between low and high water in navigable lakes and streams. We conclude, therefore, that Lyon's title to such lands is impressed with the public trust.⁶⁰

From these precedents in California and Montana regarding private titles to the banks of navigable lakes and streams, the holding in the *Hildreth* case,⁶¹ applying the same rule to the private titles in the banks and beds of non-navigable waters can be viewed in perspective. The waters

56. *Id.* at 423, 39 P at 519 (emphasis added).

57. CAL. CIV. CODE § 830 (West 1982).

58. *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696, cert. denied, 454 U.S. 865 (1981).

59. *State v. Superior Court (Fogarty)*, 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713, cert. denied, 454 U.S. 865 (1981).

60. *Lyon*, 29 Cal. 3d at 226, 229, 231, 625 P.2d at 248, 250, 251, 172 Cal. Rptr. at 705, 707, 708 (citation omitted).

61. *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1088 (1984).

themselves clearly belong to the public, and are not in trespass although they flow over private lands.⁶² The state holds the waters in trust for the public, and has an easement over the lands, in favor of the public, up to high water mark for public uses, stemming from the flow of the water over privately owned beds and banks.⁶³ There is an easement over private lands to the high water mark, in favor of the state for the flow of its water and the use by the public.⁶⁴

The extent of the public's right to use this easement depends upon the susceptibility of each stream to particular public uses. The thought was expressed in *Hildreth* this way:

Under the 1972 Constitution, the only possible limitation of use can be the characteristics of the waters themselves. Therefore, no owner of property adjacent to State-owned waters has the right to control the use of those waters as they flow through his property. The public has the right to use the waters *and the bed and banks* up to the ordinary high water mark.

Hildreth's claim for inverse condemnation is based upon the theory that there has been a taking of his land without compensation. Such is not the case. Public *use* of the waters and the bed and banks of the Beaverhead up to the ordinary high water mark was determined, not title.

As discussed previously in this opinion and extensively in *Curran*, ownership of the streambed is irrelevant to determination of public use of the waters for recreational purposes. Navigability for recreational use is limited, under the Montana Constitution, only by the capabilities of the waters themselves for such use. Hildreth has never owned and does not now own the waters of the Beaverhead River. Under Montana law, the public has the right to use the Beaverhead and its bed and banks up to the ordinary high water mark, with additional, narrowly limited rights to portage around barriers.

The Beaverhead River is navigable for recreational purposes and the public has a right to use its bed and banks up to the ordinary high water mark with limited right to portage across private property in order to bypass barriers in the waters.⁶⁵

62. *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961); *see also* cases cited *supra* note 11.

63. *See People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971); *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974).

64. *Mack*, 19 Cal. App. 3d at 1050, 97 Cal. Rptr. at 454; *Southern Idaho Fish & Game Ass'n*, 96 Idaho at 362, 528 P.2d at 1297.

65. *Hildreth*, 211 Mont. at 35-41, 684 P.2d at 1091-94 (emphasis added)(citation omitted). The

III. THE STREAM ACCESS LAW

In the aftermath of the *Curran* and *Hildreth* cases the Montana legislature in 1985 passed the "Stream Access Law"⁶⁶ in order to further define the boundaries of the public easement and the permissible activities therein. Briefly, it established two classes of streams: Class I waters, which are those that would be classed as navigable for title under the federal test;⁶⁷ and Class II waters, which are "all surface waters that are not class I waters, except lakes."⁶⁸ (Lakes are not dealt with in the statute.)⁶⁹

As to the boundaries, the act states:

"Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it[,] [e.g.,] deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value.⁷⁰

"Recreational use" was defined quite broadly, and included hunting, boating in flotation devices or motorized craft, and other activities.⁷¹ In a subsequent section, big game hunting was limited to use of a long bow or shotgun;⁷² overnight camping was permitted except within sight of or within 500 yards of any occupied dwelling, whichever is less;⁷³ and similarly the placement of any permanent duck blind, boat moorage, or other object was permitted except within sight of or within 500 yards of an occupied dwelling, whichever is less.⁷⁴

right of portage was referred to several times in both the *Curran* and *Hildreth* cases. In the case of easements, the holder of the dominant tenement (easement holder) not only has the right of use of the easement itself, but also the right to make incidental use of land and materials outside the boundaries of the easement itself if that is necessary in order to use the easement. This additional right is called a "secondary easement," needed to make use of the primary right. *Laden v. Atkeson*, 112 Mont. 302, 116 P.2d 881 (1941). The "right of portage" would come under this doctrine. Where the public owns not merely an easement but the title to the beds and banks, there should be no less a right of portage by necessity.

If it were needed, the doctrine of secondary easements could be used for the benefit of bathers, fishermen, and others to support their use of the banks and beds of streams as necessary to their enjoyment of the waters themselves. But because the easement itself, in favor of the public, or the trust itself, includes the banks and beds, resort to a secondary easement is unnecessary except where portages are required.

66. MONT. CODE ANN. §§ 23-2-301 to -322 (1989).

67. MONT. CODE ANN. § 23-2-301(2) (1989).

68. MONT. CODE ANN. § 23-2-301(3) (1989).

69. MONT. CODE ANN. § 23-2-310 (1989).

70. MONT. CODE ANN. § 23-2-301(9) (1989).

71. MONT. CODE ANN. § 23-2-301(10) (1989).

72. MONT. CODE ANN. § 23-2-302(2)(d) (1989).

73. MONT. CODE ANN. § 23-2-302(2)(e) (1989).

74. MONT. CODE ANN. § 23-2-302(2)(f) (1989).

Although recreational uses were described without regard to the characteristics of the streams in which they were permitted,⁷⁵ the statute went on to restrict public uses in Class II waters.⁷⁶ With respect to these, the public was prohibited (without the permission of the landowner) from big game hunting, overnight camping, the placement of seasonal objects, or other activities that are not primarily water-related pleasure activities as described (very broadly and inclusively) under "recreational use."⁷⁷ By negative pregnant, as well as the preceding description of "recreational use," all of these activities would be permissible in Class I waters.⁷⁸

The statute also provided procedures for limiting or prohibiting public use and for identifying streams within Class II waters that are not capable of recreational use, or are capable of only a limited use to which the public may be restricted.⁷⁹

IV *GALT V STATE EX REL. DEPARTMENT OF FISH, WILDLIFE AND PARKS*⁸⁰

In the aftermath of *Curran, Hildreth*, and the Stream Access Law, some landowners led by Montana state Senator Jack E. Galt brought a declaratory judgment action against the State Department of Fish, Wildlife and Parks to have the statute declared unconstitutional as a taking of private property without just compensation.⁸¹ Although the trial court granted summary judgment for the Department, the Montana Supreme Court reversed.

Justice Morrison, writing for the court, upheld most of the statute, but found several important public interest provisions unconstitutional: (1) the permission to hunt big game, regardless of the means used, because that is "not a necessary part of the easement granted the public for its enjoyment of the water;"⁸² (2) overnight camping and (3) the placement of permanent objects must be restricted to situations where necessary for the public's use of the water itself;⁸³ and (4) the responsibility to provide for portage routes around artificial barriers cannot be placed on the landowner⁸⁴ (A barrier is, generally, a "manmade obstacle to the natural flow of water"⁸⁵)

75. MONT. CODE ANN. § 23-2-301(10) (1989); *see also supra* note 71.

76. MONT. CODE ANN. § 23-2-302(3) (1989).

77. *Id.*

78. MONT. CODE ANN. §§ 23-2-301(10) and -302(1) (1989).

79. MONT. CODE ANN. § 23-2-302(5) (1989).

80. 225 Mont. 142, 731 P.2d 912 (1987).

81. *Id.* at 144, 731 P.2d at 913.

82. *Id.* at 148, 731 P.2d at 916.

83. *Id.*

84. *Id.*

85. MONT. CODE ANN. § 23-2-301(1) (1989).

Chief Justice Turnage concurred with Morrison's reasoning and result, but did not think that the Public Trust Doctrine was necessary in the *Curran*, *Hildreth*, or this *Galt* case.⁸⁶

Justice Gulbrandson concurred principally on the basis that the beds and banks of Class II waters are in private ownership and so the legislature had no authority to legislate their use.⁸⁷

Justice Hunt dissented because he agreed with the District Court that *Curran* and *Hildreth* had already disposed of the issues of this case, and the Stream Access Law was a proper constitutional legislative response to those cases.⁸⁸

Justice Sheehy recognized that the challenged law divided the state's waters into Class I and Class II waters, and as to the former, the state has title to the bed and banks of those navigable (for title) streams.⁸⁹ As to them, then, talk of an "easement" is irrelevant: "When the state legislature acts within its sphere to regulate the use of property which the state owns, we should respect the legislative discretion."⁹⁰ He would uphold the entire statute.

V COMMENTARY

Although the majority opinion in the *Galt* case purported to follow the *Curran* and *Hildreth* cases, there can be no mistaking that there was a clear departure, in the direction of limiting and restricting the prior two cases. The general tenor of Morrison's opinion is epitomized by this quote:

The public trust doctrine in Montana's Constitution grants public ownership in water not in beds and banks of streams. While the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water, there is no attendant right that such use be as convenient, productive and comfortable as possible.

The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself. We hold that any use of the bed and banks must be of minimal impact.⁹¹

So in the majority's view, the public's interest, or right, extends *only* to the water; the use of the bed and banks is in the nature of a secondary

86. *Galt*, 225 Mont. at 149, 731 P.2d at 916 (Turnage, C.J., concurring).

87. *Id.* at 151, 731 P.2d at 917 (Gulbrandson, J., concurring).

88. *Id.* at 151-55, 731 P.2d at 917-20 (Hunt, J., dissenting).

89. *Id.* at 155-61, 731 P.2d at 920-24 (Sheehy, J., dissenting).

90. *Id.* at 159, 731 P.2d at 923.

91. *Id.* at 147, 731 P.2d at 915.

easement—only as absolutely necessary.⁹² This is a very restrictive and questionable view of public rights and, with respect to Class I waters, it seems indefensible.⁹³

The only use that the majority opinion made of any recognition that there are two classes of water in the statute was in connection with duck blinds, which may be necessary for the public enjoyment of “certain large bodies of water [but] the right to construct permanent improvements on any commercially navigable stream does not follow.”⁹⁴ That single recognition of what the legislature called “Class I Waters” is inadequate. Moreover, there was no explanation of why the legislature cannot legislate what public uses can be made of property owned by the state in trust for the public. Without some good explanation, the statement is both inadequate and unsound. There is simply insufficient recognition of both the public’s rights in the banks and beds of navigable (for title) waters and, needless to say, the effect those rights have had on the banks and beds of non-navigable (for title) waters.

The legislature dealt separately with two different types of streams: the Class I streams, which are navigable for title purposes, and of which the beds and use of the banks are for the public;⁹⁵ and Class II streams, of which the beds and banks are privately owned.⁹⁶ In the majority opinion, except for minimal and incidental uses that are necessary for the public to use the water, any such use of beds or banks over privately owned property is a trespass.⁹⁷ That is a restrictive view indeed. Beyond that, according to the majority, any substantial public use of *publicly* owned beds or banks is a trespass!⁹⁸

92. *Id.* See also *supra* note 65.

93. Because the state *owns* the water and the bed, and either owns or absolutely controls the use of the banks. See *supra* notes 56-60. See also *supra* note 37 for a quotation from Justice Sheehy’s dissent in the *Galt* case regarding the ineffectiveness of Montana Code Annotated section 70-16-301 (1989).

94. *Galt*, 225 Mont. at 148, 731 P.2d at 916.

95. MONT. CODE ANN. § 23-2-301(2) (1989).

96. MONT. CODE ANN. § 23-2-301(3) (1989).

97. *Galt*, 225 Mont. at 142, 731 P.2d at 912.

98. Trespass to whom? Some undefined offense to the upland landowner who holds no title to the bed or bank (or possibly a bare title to the bank, held for the public)? The court only said:

The public trust doctrine in Montana’s Constitution grants public ownership in water not in beds and banks of streams. While the public has the right to use the water for recreational purposes and minimal use of underlying and adjoining real estate essential to enjoyment of its ownership in water, there is no attendant right that such use be as convenient, productive, and comfortable as possible.

The public has a right of use up to the high water mark, but only such use as is necessary to utilization of the water itself. We hold that any use of the bed and banks must be of minimal impact.

Galt, 225 Mont. at 147, 731 P.2d at 915

There is nothing to indicate that this quote is restricted to Class II streams, and the context does

The Stream Access Law defines "surface water" to include "a natural water body, *its bed, and its banks up to the ordinary high-water mark.*"⁹⁹ With respect to Class II waters, where the beds and banks are privately owned, it permitted general water-related public recreational uses, specifically excluding only big game hunting, overnight camping and the placement or creation of any seasonal object.¹⁰⁰ To the extent of these exclusions it deferred to the peace, quiet, and privacy of the riparian owner. But members of the public could use the water, beds and banks for fishing, fowling, swimming, floating, picnicking, and other temporary water related activities.

Because any "trust" under which the riparian owners hold title along non-navigable streams is a dry, passive one wherein the title holder has neither management duties nor private rights, the older, traditional and conventional law of trusts and real property would classify it as an easement.¹⁰¹ The riparian owner would then hold the servient tenement for the dominant tenement that is in the public. But it is more consistent or parallel with the language of cases from the seacoasts and navigable streams to classify the interest of riparian owners along non-navigable streams as a trust.¹⁰² These owners hold their title as trustees of the public trust with respect to their ownership of subaqueous land. They hold these lands in trust for the public uses discussed above.

The landowner never did have the right to interfere with the flow of the waters to high water mark.¹⁰³ The waters themselves were never in trespass within their banks, and the owner never could use the banks in ways that would interfere with the flow of the water.¹⁰⁴ He never had an unburdened ownership of that land,¹⁰⁵ and the soles of people's feet on that land take

indeed include Class I as well as Class II streams.

99. MONT. CODE ANN. § 23-2-301(12) (1989)(emphasis added).

100. MONT. CODE ANN. § 23-2-302(3) (1989).

101. Discussed generally under the Statute of Uses in G. BOGERT, *supra* note 4, at § 4; 1 SCOTT, *supra* note 4, at §§ 67-68; 1 RESTATEMENT (SECOND) OF TRUSTS, §§ 67-69 (1959).

102. See *Shively v. Bowlby*, 152 U.S. 1 (1894); *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980); *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *People ex rel. Webb v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 815 (1914). The difference is more one of theory and terminology rather than of practical result.

103. This is in the field of tort law. See *Formicove, Inc. v. Burlington Northern, Inc.*, 207 Mont. 189, 673 P.2d 469 (1983); *LeMunyon v. Gallatin Valley Ry.*, 60 Mont. 517, 199 P. 915 (1921), *rev'd on other grounds sub nom.* *Formicove, Inc. v. Burlington Northern, Inc.*, 207 Mont. 189, 673 P.2d 469 (1983); *Fordham v. Northern Pac. Ry.*, 30 Mont. 421, 76 P. 1040 (1904).

104. See cases cited *supra* note 103.

105. "The foreshore is truly sui generis and the location of land capacity concerning it has to be settled by considerations different from those applicable to any area of our dry land." 1 R. POWELL, *THE LAW OF REAL PROPERTY*, ¶ 163 at 704 (1989).

It is the settled rule in Michigan that "the title of the riparian owner extends to the middle line of the lake or stream of the inland waters." Whatever the nature of the interest of a

nothing from him.

The Stream Access Law recognizes that on some streams some or all public uses may be inappropriate because of the characteristics of the stream, and impliedly recognizes that there may be an abuse, overuse, or nuisance caused by members of the public.¹⁰⁶ For those situations, it empowers the Fish and Game Commission to regulate, limit, restrict or prohibit public use.¹⁰⁷ Otherwise, the landowner must look to the enhanced quality of life on riparian property for his reward.

VI. CONCLUSION

The *Galt*¹⁰⁸ case is currently the law in Montana. Notwithstanding the Stream Access Law,¹⁰⁹ even on navigable waters where the state owns the beds and the public has the right of navigation and fishery between the high and low water mark, the public must make only minimal and incidental use of the beds and banks.¹¹⁰ Moreover, the legislature no longer has plenary authority to set policy or legislate as to the uses of such state owned land. Such a new restriction of legislative freedom and responsibility suggests a need for the Montana Supreme Court, in a subsequent case, to reconsider and refine what it has done.

Under the *Galt* case, there seems to be little distinction between Class I and Class II waters and their beds and banks. If there is to be such a restrictive view of public uses of Class II waters, beds and banks, then a distinction should be made in favor of the public on Class I streams.

The *Hildreth* case¹¹¹ should be read again. If the Constitution is to be given full effect with respect to public use of the waters of the state, and if

riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Scranton v. Wheeler, 179 U.S. 141, 163 (1900)(citation omitted).

It appears that the law is well past reliance on *cujus est salum ejus est ad coelum*. The better course would be to restore the Roman concept of public right and include within navigational rights walking, wading and pushing or pulling craft across shallows, riffles, rapids and other obstructions.

Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 231 (1980)(citations omitted).

106. MONT. CODE ANN. § 23-2-302(5) (1989).

107. *Id.*

108. *Galt v. State ex rel. Dep't of Fish, Wildlife & Parks*, 225 Mont. 142, 731 P.2d 912 (1987).

109. MONT. CODE ANN. §§ 23-2-301 to -310 (1989).

110. *Galt*, 225 Mont. at 148, 731 P.2d at 915.

111. *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1083 (1984).

the public interest is to be protected as it is in the public trust doctrine, then the legislature's view, as expressed in the Stream Access Law, should be respected and given more weight than it was accorded by the temporal majority of the 1987 Montana Supreme Court.

