WATER RECREATION—PUBLIC USE OF “PRIVATE” WATERS

Water recreation in America is rapidly increasing in popularity. A 1962 report of the United States Outdoor Recreation Resources Review Commission indicated that approximately 44 per cent of the national population preferred water recreation to any other type,¹ and that by the year 2000 swimming will be the most popular recreation in the country.² As might be expected, water recreation is even more popular in California. A 1960 study reported that 60 per cent of all California recreation is centered around water³ and that Californians owned some 356,000 pleasure boats.⁴ This study also anticipated that by 1980 the minimum requirement for swimming and boating facilities within the state will approximately double the facilities available in 1958.⁵ The pressure of this increasing nationwide demand for water recreation coupled with the limited availability of adequate facilities will increasingly create conflicts between the public and riparians when, for example: (1) the state wishes to condemn a public access way to a body of water across privately owned riparian land,⁶ or (2) the public, already having access, wishes to use the body of water and the riparians object.⁷ Or conflicts may arise among riparians if, for example: (1) one of several riparians, all of whom claim a right to use all or part of a body of water, wishes to exclude the others,⁸ or (2) a riparian resort owner admits members of the public to use the entire body of water and other riparians object.⁹

This Comment will explore the problems arising from these conflicts,¹⁰ and evaluate attempted solutions in light of policy considerations and legal doctrine.

There are presently two general views in the United States on the right to use a body of water for on-site recreational purposes.¹¹ A minority of states fol-

¹ U.S. OUTDOOR RECREATION RESOURCES REVIEW COMM'N, OUTDOOR RECREATION FOR AMERICA, A REPORT TO THE PRESIDENT AND TO THE CONGRESS 173 (1962).

² *Ibid.*

³ CAL. PUB. OUTDOOR RECREATION PLANNING COMM., CAL. PUB. OUTDOOR RECREATION PLAN, pt. 2, at 48 (1960).

⁴ *Id.* at 119.

⁵ *Id.* at 86.

⁶ See *Branch v. Oconto County*, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

⁷ See *State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940).

⁸ See *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.2d 689 (1960).

⁹ See *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956). Whether recreational use is limited to owners of the bed or whether nonowners are accorded recreational rights in all or a portion of a body of water, there is still the question of unreasonable use as with the use of any property. For example, an individual might regularly have a very large number of guests whose presence on the body of water would unreasonably interfere with the enjoyment of the other riparians by overcrowding or excessive noise. Solutions to these types of problems have been reached through the issuance of injunctions restraining objectionable uses. See *Florio v. State*, 119 So. 2d 305 (Fla. Dist. Ct. App. 1960) (remand for findings of fact on reasonable use by water ski resort); *McCauley v. Salmon*, 234 Iowa 1020, 14 N.W.2d 715 (1944) (injunction requiring mufflers on motorboats); *Snively v. Jaber*, *supra* (injunction restraining boat rental and picnicking on the shore).

¹⁰ A discussion of problems arising from water recreation at ocean beaches is beyond the scope of this Comment. On this subject see generally Hamilton, *Surf, Sand, Tide & Title*, 35 LOS ANGELES B. BULL. 389 (1960).

¹¹ The problems created by withdrawal of water for recreational use and the problems arising because of conflicts between recreational and irrigational uses are beyond the scope of this Comment. For a suggestion of the considerations involved see *Prather v. Hoberg*, 24 Cal. 2d 549, 150 P.2d 405 (1944); *City of Elsinore v. Temescal Water Co.*, 36 Cal. App. 2d 116, 97 P.2d 274 (1939).

low the traditional common law rule that under all circumstances the owner of the bed has the exclusive right to use a body of water for recreation.¹² The majority of states have, to varying degrees, discarded or rejected title to the bed as controlling and have focused on the suitability of a body of water for recreational use. Some states have only gone so far as to permit common use among riparians and their licensees.¹³ Other states allow recreational use by anyone who may gain access without trespassing on the uplands.¹⁴ One state has gone so far as to allow a fisherman to walk on a privately owned bed.¹⁵ Because this Comment is focused on the extent to which recreational use of waters is an incident of the ownership of the underlying bed, it is necessary to understand how the ownership of beds is determined.¹⁶

As each state was admitted to the Union, it became sovereign of the beds under all navigable waters within the state with the same powers that the Original Thirteen Colonies derived from the English Crown at the time of the Revolution.¹⁷

¹² *City of Birmingham v. Lake*, 243 Ala. 367, 10 So. 2d 24 (1942) (alternate holding); *Great Hill Lake, Inc. v. Caswell*, 126 Conn. 364, 11 A.2d 396 (1940) (by implication); *Leonard v. Pearce*, 348 Ill. 518, 181 N.E. 399 (1932); *Sanders v. De Rose*, 207 Ind. 90, 191 N.E. 331 (1934); *Tyler v. Cedar Island Club, Inc.*, 143 Md. 214, 122 Atl. 38 (1923); *Baker v. Normanoch Ass'n, Inc.*, 25 N.J. 407, 136 A.2d 645 (1957); *Loughran v. Matylewicz*, 367 Pa. 593, 81 A.2d 879 (1951). *Cf. Hartmann v. Tresise*, 36 Colo. 146, 84 Pac. 685 (1905) (fisherman walking on privately owned bed).

¹³ See *Florio v. State*, 119 So. 2d 305 (Fla. Dist. Ct. App. 1960); *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.2d 689 (1960); *Monroe v. State*, 111 Utah 1, 175 P.2d 759 (1946) (by implication); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956). Virginia allows common use when the riparians' title to the bed derives from their ownership of the shore, *Improved Realty Corp. v. Sowers*, 195 Va. 317, 78 S.E.2d 588 (1953), but not when the bed is specifically described in the riparians' deeds on the ground that in the latter case the boundaries are distinguishable. *Wickowski v. Swift*, 203 Va. 467, 124 S.E.2d 892 (1962). This reasoning is difficult to understand. In either case a survey is necessary to establish the boundary lines, and although it would be more difficult when the bed is not described in the deed, the boundary lines could be ascertained. Texas follows a similar rule. *Compare Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Civ. App. 1935), with *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (1935).

¹⁴ See *D'Albora v. Garcia*, 144 So. 2d 911 (La. 1962); *Kerley v. Wolfe*, 349 Mich. 350, 84 N.W.2d 748 (1957) (by implication); *State Game & Fish Comm'n v. Louis Fritz Co.*, 187 Miss. 539, 193 So. 9 (1940) (alternate holding); *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17 (1954); *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904); *State v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945); *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936) (dictum); *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944); *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961). New York and Ohio have held for public use when public access is available. *Fairchild v. Kraemer*, 11 App. Div. 2d 232, 204 N.Y.S.2d 823 (1960); *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 163 N.E.2d 373 (1959). But earlier cases holding for exclusive use among riparians on lakes with no public access were not cited. *E.g.*, *Mix v. Tice*, 164 Misc. 261, 298 N.Y. Supp. 441 (1937); *Akron Canal & Hyd. Co. v. Fontaine*, 72 Ohio App. 93, 50 N.E.2d 897 (1943).

¹⁵ *Elder v. Delcour*, *supra* note 14. *Contra Day v. Armstrong*, *supra* note 14. For a collection of the cases dealing with the right of fishery see Annot. 57 A.L.R. 2d 569 (1958).

¹⁶ For an exhaustive discussion of how beds are allocated between government and private ownership see, *Bade, Title, Points & Lines in Lakes & Streams*, 24 MINN. L. REV. 305, 310-17 (1940).

¹⁷ This result is held to be required by the constitutional principle of equality of states, *United States v. Holt State Bank*, 270 U.S. 49 (1926), but it does not seem that state succession to the ownership of the beds of navigable waters was required by English law. Although the King's sovereignty extended to the removal of purprestures in all navigable waters, the beds of all non-tidal waters were owned by the riparians by a presumption of fact. *Williams v.*

It could, however, allow these beds to pass into private ownership.¹⁸ Although navigability determined title, it is not clear from the early cases whether navigability for this purpose¹⁹ was a question of state or federal law, or who owned the beds of nonnavigable waters.²⁰ In 1926 it was finally settled that navigability is a federal question²¹ and that the test for navigability is whether a body of water was capable of use as a highway for travel, trade, or transportation on the date the state in which it is located was admitted to the Union.²² In later decisions it was made clear that the federal government retained title to the beds of waters which are nonnavigable unless previously granted by federal patent.²³ The determination of whether a federal grant of land riparian to a nonnavigable body of water which described only the uplands passes title is, of course, controlled by federal law; however, state law has been used as a guide to construction of the grant.²⁴

I

THE COMMON LAW VIEW

Once the ownership of land underlying a body of water is established, are the recreational rights in the body of water determined by this ownership? If the land were not covered with water, no court would hold that persons other than the

Wilcox, 8 Adolphus-Ellis 314, 122 Eng. Rep. 857 (Q.B. 1838). Although the language in the first American cases referred to all navigable waters, the facts dealt with tidal waters. Pollard's Lessee v. Hagen, 44 U.S. (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842). It was later specifically held, without discussion, that the states owned the beds of both tidal and non-tidal navigable waters. Barney v. Keokuk, 94 U.S. 324, 338 (1876).

¹⁸ Port of Seattle v. Oregon & W. R.R., 255 U.S. 56, 63-64 (1921). Either state or private ownership of beds is qualified to the extent that obstructions to navigation may not be constructed in waters useful in interstate commerce without the consent of the federal government. United States v. Rio Grande Dam & Irr. Co., 174 U.S. 690, 703 (1899) (state ownership qualified).

¹⁹ Federal standards of navigability are also used to determine which waters are subject to federal control under the commerce clause, United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940), and to determine admiralty jurisdiction, United States v. Flores, 289 U.S. 137 (1933).

²⁰ See, e.g., Hardin v. Jordan, 140 U.S. 371, 380 (1891), discussed in Bade, *supra* note 16, at 312-17.

²¹ United States v. Holt State Bank, 270 U.S. 49 (1926).

²² See United States v. Utah, 283 U.S. 64 (1931), for an extensive discussion and illustration of the application of this standard. There need not have been any use in fact. *Id.* at 82. The body of water need not be navigable in all places and impediments to navigation such as sand bars are not inconsistent with navigability if the body of water can in fact be used. *Id.* at 84-87. So long as the use is in the customary mode of the area it does not matter if it is by steamer, sailing vessel, or flatboat. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 86 (1922). An important factor is the existence of public termini. A small lake, 3 to 6 feet in depth, which connected with navigable streams was held navigable in United States v. Holt State Bank, *supra* note 21, while a lake thousands of acres in size and of the same depth, but with no ingress or egress was held nonnavigable in United States v. Oregon, 295 U.S. 1 (1935). The test for determining if a body of water is subject to regulation under the federal commerce power is different only in that navigability for this purpose may arise at any time and the body of water need not be navigable in fact, but only capable of being made navigable by reasonable improvements. The improvements need not have been made or even contemplated, but there must be a reasonable relation between cost and need at the time. See United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).

²³ United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931).

²⁴ See United States v. Oregon, 295 U.S. 1, 28 (1935).

owner have the right to come upon the land for recreational purposes against the owner's objection.²⁵ At English common law the rule was consistently applied whether or not the land was covered with water.²⁶ The property rights in the bed extended upward to include the area covered by the overlying waters. Thus, all recreational rights (boating, bathing, fishing, and hunting) were in the owner of the bed.²⁷ Even though a public right of navigation might exist on waters overlying privately owned beds, this right was one of way only and did not include recreation.²⁸ With the possible exceptions of Massachusetts and Wisconsin, the early cases in this country followed the English rule.²⁹ In Massachusetts the Great Pond Ordinance, enacted in 1641 and amended in 1647, provided that recreational rights in certain bodies of water could not be privately owned.³⁰ In Wisconsin's view the beds of waters navigable in fact passed into private ownership impressed with a trust that secured recreational rights to the public.³¹ In order to evaluate the present trend³² away from title to the bed as controlling recreational rights it is first necessary to look at the minority rule in more detail.

Although there is merit in not disrupting existing property relations without good cause, the courts applying the common law rule have not seemed to consider the ramifications of that rule in view of the growing demand for water recreation. While many of the decisions seem equitable on their facts,³³ the minority rule is a strict rule of property and there is no language in the cases indicating that it would be relaxed under any circumstances.³⁴ Thus, the owner of the bed can deny recreational use of overlying waters to both the public and fellow riparians.³⁵ This could result in the destruction of the recreational value of a body of water when, for example, a large number of riparians each own a

²⁵ The sole exception to this rule is the right of recreation by custom, recognized at English common law, among the inhabitants of a village. See *Fitch v. Rawling*, 2 H. Bl. 393, 126 Eng. Rep. 614 (C.P. 1795).

²⁶ *Bourke v. Davis*, 44 Ch. D. 110, 124 (1889).

²⁷ *Ibid.*

²⁸ 2 FARNHAM, WATERS & WATER RIGHTS 1364-65 (1904).

²⁹ *Id.* at 1366-68.

³⁰ COLONIAL LAWS OF MASS. at 37, 170 (Whitmore 1889). This ordinance provided for public use of all ponds over 10 acres in size lying within towns. The public had a right of access over uncultivated lands even if privately owned. These provisions were adopted in varying degrees in other New England states. See, e.g., *Percy Summer Club v. Welch*, 66 N.H. 180, 28 Atl. 22 (1889); *New England Trout & Salmon Club v. Mather*, 68 Vt. 338, 35 Atl. 323 (1895). To be distinguished is the situation existing in states formed out of the public domain, since the Great Pond Ordinance antedates the formation of the Union and the ponds were simply never allowed to pass into private ownership by the towns in which they were located. The access provision is no longer applicable in Massachusetts, *Slater v. Gunn*, 170 Mass. 509, 513, 49 N.E. 1017, 1019 (1898), and the Vermont court held it to be unconstitutional in *Mather*. See *Turner v. Hebron*, 61 Conn. 175, 22 Atl. 951 (1891).

³¹ *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1914).

³² The trend has been gradual. See Johnson, *Riparian & Public Rights to Lakes & Streams*, 35 WASH. L. REV. 580 (1960); Note, 5 FLA. L. REV. 166 (1952); Note, 27 HARV. L. REV. 750 (1914); Note, 12 TEXAS L. REV. 72 (1933).

³³ See, e.g., *Sanders v. De Rose*, 207 Ind. 90, 191 N.E. 331 (1934) (resort owner harassed by rival who owned negligible portion of bed); *Smoulter v. Boyd*, 209 Pa. 146, 58 Atl. 144 (1904) (resort owner allowed to exclude owners of small subdivided portion).

³⁴ The only exception arises where the boundaries are not known. Compare *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Civ. App. 1935) and *Improved Realty Corp. v. Sowers*, 195 Va. 317, 78 S.E.2d 588 (1953), with *Diversion Lake Club v. Heath*, 126 Tex. 129, 86 S.W.2d 441 (Civ. App. 1935) and *Wickowski v. Swift*, 203 Va. 317, 124 S.E.2d 892 (1962).

³⁵ *Leonard v. Pearce*, 348 Ill. 518, 181 N.E. 399 (1932).

small portion of the bed. Even if only one riparian excludes the others, most surface recreation may be severely inhibited, unless a very large body of water is involved.³⁶ If more than one of the riparians chooses to follow this course of action, a body of water may become a number of small and relatively useless private ponds. Undoubtedly, as a practical matter, common use exists in most situations of this type by consent among the riparians. Changes in ownership or other conditions, however, can easily create situations in which consent would be revoked by one or more of the parties, and because the use was permissive, no prescriptive right would have been acquired.³⁷

Even in states that view the right to make recreational use of waters as an incident of ownership of the underlying bed, it is uniformly held that there is a public right of navigation for travel or for transportation of goods from one point to another in all suitable waters.³⁸ If the water is nonnavigable no right of navigation exists, of course, even though it is possible to travel the water by boat.³⁹ The public right of navigation results from the economic necessity of persons and goods being able to move freely from place to place.⁴⁰ Thus, the highway provided by water overlying land has modified private ownership because of the importance of the interest advanced by unhindered navigation.

The growing demand for water recreation makes increasingly more important the question of whether the interest of the citizens of a state in having adequate facilities for water recreation should also result in modification of the rights of bed owners. One solution certainly might be to evolve a rule which would permit recreational use of waters by the public. Even a rule which only allows common use among riparians would have a substantial impact on the total demand for recreational facilities. For example, it would facilitate sale of riparian property in smaller parcels giving more persons access to bodies of water. If riparians are permitted exclusive enjoyment, persons might be reluctant to purchase riparian land that carried with it only a small portion of the bed. Whether the general public, licensees of a fellow riparian, or fellow riparians themselves wish to use all or a portion of a body of water over the objection of the owner of the bed, the question is the same—is the interest advanced by allowing that use sufficiently important to outweigh the interest of private ownership and exclusive enjoyment. A majority of states have weighed the scale against the interest of the bed owner.

II

DEPARTURES FROM THE COMMON LAW VIEW

Those states that hold for recreational use by persons other than the bed owner, however, have arrived at no common ground of decision. The major rationales used to avoid control of the use of waters based on title to the bed

³⁶ If the portion of the bed involved lies along the shore, surface recreation would not be affected, but the beds of many bodies of water are divided among the riparians in pie shaped portions extending to the center. This is because the riparian takes to the center in proportion to his ownership of the shore when his grant is silent as to the bed. *Bade, supra* note 16, at 339-42.

³⁷ *E.g.*, *Leonard v. Pearce*, 348 Ill. 518, 181 N.E. 399 (1932); *Tyler v. Cedar Island Club*, 143 Md. 214, 122 Atl. 38 (1923); *Mix v. Tice*, 164 Misc. 261, 298 N.Y. Supp. 441 (1937).

³⁸ 6-A AMERICAN LAW OF PROPERTY § 28.10, at 33-34 (Casner ed., Supp. 1954).

³⁹ 1 FARNHAM, WATER & WATER RIGHTS § 23, at 100-04 (1904).

⁴⁰ See *Ibid.*

are that: (1) "practical considerations" require title to give way to common use among riparians; (2) recreation is an incident of the public easement of navigation; (3) the beds of all waters useful for recreation are impressed with a public trust for that purpose; (4) a public right of recreation arises from state ownership of the overlying waters; and (5) custom or long use gives rise to a right of recreation in persons other than the owner of the bed.

A. Application of "Practical Considerations"

"Practical considerations," although important in deciding rights relative to the recreational use of a body of water, are not usually made the major ground of decision. The Florida, Minnesota, and Washington courts, however, have held for common use among riparians almost solely on practical grounds:⁴¹ if individual bed owners are given exclusive enjoyment of their portions, a diminution in the value of bodies of water for recreation will result because a body of water may not be used as efficiently in parts as in a whole.⁴² Although the courts have not made an analytical distinction, there seem to be two policy considerations involved in this reasoning: (1) some types of water recreation, such as boating or water skiing, require relatively large water areas, and (2) substantially more people will be able to pursue all types of water recreation if all suitable bodies of water are utilized to a maximum extent.

The reasoning that the right of exclusive enjoyment must give way because adequate space is essential to water recreation makes good sense when applied to a body of water where no single riparian owns enough of the bed to make the overlying waters useful to him.⁴³ To allow each owner to exclude others is to destroy the value of the body of water for all. In return for giving up the worthless right to exclusive dominion over his portion of the bed the riparian receives the benefit of using the entire body of water. This reasoning, however, has been applied to fact situations in which it makes little or no sense. In the Minnesota case of *Johnson v. Seifert*,⁴⁴ two riparians owned in fee simple portions of the beds and banks of two small lakes.⁴⁵ The plaintiff's portion was less than five per cent of the area of the beds consisting of a narrow strip along the ends of the lakes.⁴⁶ Unfortunately for the defendant, the court looked far beyond the facts of the case and held that the rule of common use among riparians was necessary to insure the recreational value of all waters within the state.⁴⁷ It seems clear that restricting the parties to their respective portions of the beds would have had no material effect on the amount of space available for recreation—exclusion of the defendant from the plaintiff's small shallow portion at the ends of the lakes would not have inhibited boating on the large portion in any way. It also seems quite possible that, insofar as Minnesota apparently had been pre-

⁴¹ See *Duval v. Thomas*, 114 So. 2d 791 (Fla. 1959); *Johnson v. Seifert*, 257 Minn. 159, 100 N.W.2d 689 (1960); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956).

⁴² See *Ibid.*

⁴³ This would appear to have been the case in *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956), although the court did not determine the respective amounts of the bed owned by the riparians.

⁴⁴ 257 Minn. 159, 100 N.W.2d 689 (1960).

⁴⁵ Title was not discussed, but ownership in fee simple was implicit in the decision.

⁴⁶ See 257 Minn. at 161, 100 N.W.2d at 692 (diagram).

⁴⁷ *Id.* at 169, 100 N.W.2d at 697.

viously committed to the minority view,⁴⁸ the prices paid by the parties for their respective portions were based on the right to use only the water overlying their portions of the bed. It would thus seem that a general rule of common use among riparians cannot be justly applied to all situations.⁴⁹

The rather obvious consideration that more people will be able to pursue all types of water recreation if all suitable waters are utilized to a maximum extent has not been rationally applied by Minnesota and Florida to situations in which it is most meaningful—(1) when the state wishes to admit the public to use of the entire body of water by condemning an access way, (2) when the public already has access, or (3) when one of the riparians as a resort owner wishes to admit the public for a fee. In a pre-*Johnson* Minnesota decision, *State v. Bollenbach*,⁵⁰ the court refused to allow a governmental body to condemn a public access way to a lake with privately owned beds even though the water was useful for recreation. The action was instituted under a statute which authorized condemnation of access ways to “public” waters.⁵¹ The court held that because the bed of the lake was privately owned and entirely surrounded by defendant’s land the waters were not “public”; therefore, condemnation was not authorized under the statute.⁵² When Minnesota later deemphasized the importance of title to beds in *Johnson*, *Bollenbach* was not overruled but distinguished on the ground that it was a case of public versus private rights rather than relative private rights. The court emphasized that in deciding for common use among riparians no public rights were involved. The only reason given for this distinction was the tautological observation that in *Bollenbach* situations the public is not a riparian.⁵³ That the public cannot be made a riparian through the expedient of condemnation is implicit in this observation; however, language in a recent case, *State v. Kuluvar*,⁵⁴ casts some doubt on the current vitality of the *Bollenbach* decision. *Kuluvar* concerned the right of a resort owner who owned a portion of the bed to change the cross section of a lake by erecting a wharf and changing the contour of the bed. A state statute requires a permit for such action if the body of water is “public.”⁵⁵ The court held that the lake was “public” because the public had been admitted to the lake by the resort owner,⁵⁶ citing a 1957 statute⁵⁷ that was not in effect when *Bollenbach* was decided. The statute provides that subject to existing rights the capability of a body of water for substantial beneficial public use determines if it is “public” and that the ownership of the bed or shore shall not be conclusive.⁵⁸ The court went on in dictum to say that when the public has access to a body of water capable of substantial beneficial use, common law riparian rights are subordinate to public recreational

⁴⁸ See *Lamprey v. Danz*, 86 Minn. 317, 90 N.W. 578 (1902).

⁴⁹ The Florida decision, *Duval v. Thomas*, 114 So. 2d 791 (Fla. 1959), is also illustrative of a situation in which the court’s holding for common use seems unjustified because the portions of the bed involved were negligible. *Id.* at 792.

⁵⁰ 241 Minn. 103, 63 N.W.2d 278 (1954).

⁵¹ MINN. STAT. ANN. § 97.48.15 (1947).

⁵² 241 Minn. at 124, 63 N.W.2d at 291.

⁵³ 257 Minn. at 162–63, 100 N.W.2d at 693.

⁵⁴ Minn., 123 N.W.2d 699, 706 (1963).

⁵⁵ MINN. STAT. ANN. § 105.42 (Supp. 1962).

⁵⁶ Minn., 123 N.W.2d at 707.

⁵⁷ MINN. STAT. ANN. § 105.38 (Supp. 1962).

⁵⁸ *Ibid.*

rights.⁵⁹ Although the court did not comment on whether a body of water can be made "public" by condemnation of an access way, it seems clear that the language of the statute will support the conclusion that a condemnation action could be maintained in a *Bollenbach* type situation. The Minnesota rule, however, is not particularly clear. *Bollenbach* and *Johnson* were not discussed in *Kuluvar*, and the statute relied upon in *Kuluvar*, although in effect at the time, was not discussed in *Johnson*. Apparently the most that can be said with certainty is that the Minnesota court seems to be strongly in favor of maximizing public use of waters for recreation; consequently, *Bollenbach* might not be followed today.

If the *Kuluvar* dictum is followed, a Minnesota resort owner could probably admit his patrons to the entire body of water. This would be in accord with specific holdings that permit common use by licensees in Florida and Washington.⁶⁰ From an equitable standpoint, however, there are persuasive arguments for limiting common use to instances where individual riparians are involved. Solitude is valuable to the riparian, particularly in an increasingly urbanized country such as ours. Allowing a large number of persons to use the body of water is quite different from allowing common use by riparians. If one of the riparians desires to profit from the entire body of water by operating a resort, for example, then payment to the other riparians for this right could properly be considered a cost of doing business. If the state wishes the public to be admitted, either by condemning an access way or through one already in existence, perhaps the right to use the body of water for recreation should be condemned.

Florida originally distinguished between use by licensees of a riparian resort owner and use by the general public through access way condemnation. In *Osceola County v. Triple E Development Co.*⁶¹ the county was denied its general power of eminent domain to condemn rights of way from a county road to two lakes entirely surrounded by defendant's land. The beds were privately owned; therefore, the court reasoned that the public had no right to use the waters for recreation and the suit served no public purpose.⁶² When Florida later held for common use among riparians in *Duval v. Thomas*,⁶³ *Osceola* was not overruled but distinguished on the ground that it was not a case of relative riparian rights and explained as holding only that persons not owning a portion of the bed have no right to recreational use of a body of water.⁶⁴ *Duval* did not involve any question of use by the public as licensees but language in the opinion referring to the importance of the tourist industry in the state⁶⁵ foreshadowed the holding in *Florio v. State*⁶⁶ that the public might make reasonable use of an entire lake as licensees of a riparian resort owner. It might be that *Osceola* has been modified to the extent that a condemnation suit condemning an access way *plus* a portion of the

⁵⁹ Minn., 123 N.W.2d at 706.

⁶⁰ See *Florio v. State*, 119 So. 2d 305 (Fla. Dist. Ct. App. 1960); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956).

⁶¹ 90 So. 2d 600 (Fla. 1956).

⁶² *Id.* at 602-03.

⁶³ 114 So. 2d 791 (Fla. 1959).

⁶⁴ *Id.* at 793.

⁶⁵ *Id.* at 795.

⁶⁶ 119 So. 2d 305 (Fla. Dist. Ct. App. 1960).

bed would be allowed.⁶⁷ Under the holding in *Florio*, a riparian may admit the public to the entire body of water. Thus, it is arguable that the establishment of a public shore would not require compensation to be made to the riparians for the right to use the body of water for recreation since a riparian has no right to exclude the licensees of a fellow riparian.

The Minnesota and Florida decisions show the importance of distinguishing between the different kinds of interests involved. Have other rationales provided any more meaningful adjustments of these conflicting interests?

B. Application of Legal Formulas

A number of states hold that the public has a right of recreation incident to the public easement of navigation for commerce.⁶⁸ This reasoning seems to result from a desire to justify recreational uses within the framework of traditional property concepts. Since recreation and navigation were distinct rights at common law,⁶⁹ however, holding recreation to be an incident of the navigation easement is, in itself, a departure from the traditional view. In addition, some of these states have redefined the navigation easement. At common law, the navigation easement was only applicable to waters useful as a public passage for travel or for transportation of goods from point to point.⁷⁰ California,⁷¹ New York,⁷² and Vermont⁷³ follow the travel or transportation reasoning, but North Carolina,⁷⁴ Ohio,⁷⁵ and Oregon⁷⁶ have stated that recreation is "commerce" and thus require only that a body of water be boatable and accessible to the public. None of these courts has specifically answered the criticism that the additional burdens imposed by enlarging the scope of the navigation easement results in an unconstitutional taking.⁷⁷

The most recent of three California decisions dealing with recreational rights is *Bohn v. Albertson*.⁷⁸ The action was between two owners of portions of the bed; one party was developing a resort and wished to exclude others except for

⁶⁷ The concurring opinion in *Osceola* to some extent supports this view. Two justices concurred in the result, but stated that the question of the right to use the waters was not before the court. Their position was that access ways alone would serve no public purpose, but that condemnation of enough shore for a public park would be valid. 90 So. 2d at 603.

⁶⁸ *Bohn v. Albertson*, 107 Cal. App. 2d 738, 238 P.2d 128 (1951); *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904); *Fairchild v. Kraemer*, 11 App. Div. 232, 204 N.Y.S.2d 823 (1960); *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 163 N.E.2d 373 (1959); *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936) (dicta); *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944).

⁶⁹ *Bourke v. Davis*, 44 Ch. D. 110, 124 (1889).

⁷⁰ 1 FARNHAM, WATER & WATER RIGHTS § 23, at 100-04.

⁷¹ *Bohn v. Albertson*, 107 Cal. App. 2d 738, 238 P.2d 128 (1951).

⁷² *Fairchild v. Kraemer*, 11 App. Div. 2d 232, 204 N.Y.S.2d 823 (1960).

⁷³ *State v. Malmquist*, 114 Vt. 96, 40 A.2d 534 (1944).

⁷⁴ *State v. Twiford*, 136 N.C. 603, 48 S.E. 586 (1904).

⁷⁵ *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 170 Ohio St. 193, 163 N.E.2d 373 (1959).

⁷⁶ *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936) (dicta).

⁷⁷ 2 FARNHAM, WATER & WATER RIGHTS § 368, at 1366-68. Additional burdens could result in substantial diminution of riparian property values. When, for example, a riparian had been operating a resort in previously private waters, opening these waters to recreational use would be likely to have a detrimental effect on the resort's business.

⁷⁸ 107 Cal. App. 2d 738, 238 P.2d 128 (1951).

a fee. The body of water was used for commercial purposes and the court followed the easement reasoning in holding for public recreational use.⁷⁹ The court observed in dictum, however, that capacity for use by pleasure boats alone would be enough for the public right of recreation to exist.⁸⁰

In order to evaluate the scope of the California rule, it is necessary to examine two other cases on recreational rights, both decided by the California Supreme Court. In *Bolsa Land Co. v. Burdick*⁸¹ the persons claiming the right to use the body of water for recreation had no means of access except through a very shallow drainage ditch which could be used by boats only with great difficulty due to a heavy growth of vegetation.⁸² The riparian held title under a grant of doubtful validity, but the court held that color of title was good against non-riparians and that in any event there was no access since the ditch was not navigable.⁸³

In a later decision, *Forestier v. Johnson*,⁸⁴ there was access and the court held for a public right of hunting incident to the public right of navigation. Use by small boats was deemed sufficient to show navigability.⁸⁵ The court viewed *Bolsa* as holding that the body of water as well as the access route was non-navigable.⁸⁶ Thus, in addition to being boatable it would seem that a body of water must be useful as a public passage for a public right of recreation to exist since in *Bolsa* the body of water itself was capable of use by small boats.⁸⁷

California's apparent requirement that a public recreation right cannot exist unless the body of water is useful as a public passage is apparently the consequence of the court's desire to maximize recreational use without unduly violating traditional property concepts. This view might be justified on the ground that since the body of water is already burdened with an easement for travel it is generally not much of an additional burden to allow recreational use. On the other hand, many bodies of water of recreational value are of no use as a public passage in the traditional sense. If the common law rights of a bed owner are to be invaded at all, perhaps it is better to face the issue squarely and base recreational rights on the recreational usefulness of a body of water.

Whether the states that view recreation as an incident of the public easement of navigation would allow common use among riparians on a body of water where there is no public access is not clear. Common use among riparians is certainly not logically required since where there is no public access there can be no public easement of navigation. Oregon, however, has stated in dictum that common use would be allowed.⁸⁸ Ohio and New York both failed to discuss earlier cases that held for exclusive enjoyment as between riparians on landlocked lakes with no public access.⁸⁹ None of the other states have expressed their views on this point. A reading of the decisions gives the impression that these courts are strongly in

⁷⁹ *Id.* at 747, 238 P.2d at 134.

⁸⁰ *Id.* at 746, 238 P.2d at 134.

⁸¹ 151 Cal. 254, 90 Pac. 532 (1907).

⁸² *Id.* at 259, 90 Pac. at 534.

⁸³ *Id.* at 262, 90 Pac. at 535.

⁸⁴ 164 Cal. 24, 127 Pac. 156 (1912).

⁸⁵ *Id.* at 28, 127 Pac. at 158.

⁸⁶ *Id.* at 38, 127 Pac. at 162.

⁸⁷ 151 Cal. at 259, 90 Pac. at 535.

⁸⁸ *Luscher v. Reynolds*, 153 Ore. 625, 56 P.2d 1158 (1936).

⁸⁹ *Mix v. Tice*, 164 Misc. 261, 298 N.Y. Supp. 441 (1937); *Akron Canal & Hyd. Co. v. Fontaine*, 72 Ohio App. 93, 50 N.E.2d 897 (1943).

favor of maximizing recreational use of waters and that as a result common use among riparians might be allowed if cases were to arise today.

There are no cases in these states dealing with the questions raised by governmental action to condemn public access ways to recreationally useful bodies of water. It is clear, of course, that such condemnation would be allowed if the public already has another means of access and the right of recreation incident to the public easement of navigation already exists. Compensation would be limited to the value of the land acquired for access. If the public has no present access, the result would seem to depend on whether a state views recreational use alone as sufficient to give rise to the public easement of navigation. In states that consider recreation to be "commerce," it would seem that if a body of water is boatable then once public access is supplied by condemnation, the public easement of navigation would arise. Thus, compensation would only be required for the value of the access way itself. On the other hand, in states that require the navigation easement to be based on travel or transportation of goods from point to point, the navigation easement could not arise from condemnation of an access way. For a condemnation suit to succeed in these states, all riparians would probably have to be compensated for the right to use the body of water for recreation.

Michigan and Wisconsin have gone beyond the easement reasoning and follow the doctrine that the beds of all waters capable of recreational use are impressed with a public trust for this purpose.⁹⁰ The reasoning is not based on commerce; it apparently developed from the lack of clarity in the early federal decisions concerning title to the bed.⁹¹ In these states it is still believed that navigability for title is a matter of state law,⁹² and both states use tests that include considerably more waters than the correct federal one.

In Wisconsin a body of water is navigable if it is capable of use by any recreational boat of the shallowest draft.⁹³ The beds of all lakes navigable by this test are held in trust by the state,⁹⁴ and the beds of navigable rivers, although they may be privately owned, are also impressed with the trust.⁹⁵ Michigan uses the same navigability test for lakes,⁹⁶ but a river is navigable if it will float a saw log.⁹⁷ Although the trust doctrine is an obvious legal fiction, it seems unobjectionable when applied to waters (navigable under the federal test) whose beds passed to the states on admission to the Union,⁹⁸ or in any case when the state appears in the chain of title. In either case the state by virtue of its prior

⁹⁰ *Kerley v. Wolfe*, 349 Mich. 350, 84 N.W.2d 748 (1957); *Branch v. Oconto County*, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

⁹¹ For an extensive discussion of the origin of this doctrine see *Muench v. Public Serv. Comm'n*, 261 Wis. 492, 53 N.W.2d 514 (1952).

⁹² Wisconsin has held that navigability is determined as specified by a state statute. *Id.* at 506, 53 N.W.2d at 519.

⁹³ See *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914) (water 12 inches deep).

⁹⁴ *Branch v. Oconto County*, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

⁹⁵ *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914).

⁹⁶ *Kerley v. Wolfe*, 349 Mich. 350, 84 N.W.2d 115 (1926).

⁹⁷ *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926).

⁹⁸ The saw log test may satisfy the federal standard if it is applied as of admission to the Union. *United States v. Utah*, 283 U.S. 64, 79 (1931). But *Collins* did not specifically apply the test as of admission. In *Kerley* the court viewed *Collins* as stating the pertinent date to be that of the particular case.

ownership could impress the trust on subsequent owners. As to beds which passed into private ownership by force of federal patents, it seems clear there is no basis for the trust doctrine since the state never had an opportunity to impress a trust.

In addition to its misapplication in these instances, this doctrine makes no distinction between the types of interests involved. The general public has the right to make recreational use of any body of water the state regards as navigable if it can gain access without trespassing. Thus, access way condemnation is allowed with compensation only for the value of the land taken without regard for its value as an access way.⁹⁹

Two states have sidestepped the problem of title to the bed by holding that constitutional provisions¹⁰⁰ subjecting all waters of the state not beneficially used to appropriation by the public are applicable to recreational use. Both New Mexico and Wyoming have reasoned from the premise of state ownership of a portion of the water overlying the bed to the conclusion that the public may use this water for boating and other recreational uses.¹⁰¹ The question raised by this view is: to what extent were the appropriation provisions intended to modify the common law rights of a bed owner. From a reading of the provisions it is by no means clear that they were intended to do more than allow the states to appropriate water among conflicting withdrawal uses. For example, the Wyoming provision states that water is essential to industrial prosperity and easy to divert from its normal flow; therefore, its use must be controlled by the state.¹⁰² The interest of a riparian bed owner in exclusive recreational use of water overlying his land is entirely different from his interest in not having that water diverted or appropriated. It thus seems questionable to hold appropriation provisions applicable to public use of water for recreation in the absence of a clear showing that the elimination of the bed owner's common law right of exclusive recreational use was intended.¹⁰³

There are no decisions in these states that deal with common use among riparians on a landlocked lake or with access way condemnation. It would seem to follow logically that a riparian as a member of the public would have the right to use the entire body of water for recreation. Similarly, since the public already has the right to use all bodies of water for recreation, access way condemnation would only require compensation for the value of the land taken as the access way.

In the same way New Mexico and Wyoming have stretched appropriation statutes to avoid the problem of title to the bed, Mississippi has extended the English common law view¹⁰⁴ that a right of common use among riparians could arise from custom of long standing. Mississippi has held that custom, evidenced by long use, justifies recreational use of bodies of water with privately owned beds by all who can gain access without trespass. The court stated in *State Game & Fish Comm'n v. Louis Fritz Co.*¹⁰⁵ that public use had been the custom and

⁹⁹ *Branch v. Oconto County*, 13 Wis. 2d 595, 109 N.W.2d 105 (1961).

¹⁰⁰ N.M. CONST. art. 16; Wyo. CONST. art. 1 § 31, art. 8 § 3.

¹⁰¹ *State v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961).

¹⁰² Wyo. CONST. art. 8 § 3.

¹⁰³ Washington regarded a similar appropriation provision as persuasive, but not controlling in *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956).

¹⁰⁴ See *Bourke v. Davis*, 44 Ch. D. 110, 124 (1889).

¹⁰⁵ 187 Miss. 539, 193 So. 9 (1940) (alternate holding).

rule of conduct among the people of the state since time out of mind.¹⁰⁶ The advisability of a court taking judicial notice of the customs of an entire state seems questionable. The court seems to imply that all riparians are on notice that they have no reasonable expectation of exclusive enjoyment if others customarily use their waters. This reasoning overlooks the equal possibility that such use has been customarily permissive.¹⁰⁷ The proper role of custom would seem to be in specific situations in which it is shown that there was in fact reliance by the persons claiming its benefits, rather than in all situations.

CONCLUSION

Property law has undergone a unique development in defining rights incident to ownership of land underlying bodies of water that are useful for recreation. The majority of states have concluded that the common law principle of vertical extension of land ownership cannot be applied in all instances based, either explicitly or implicitly, on the importance of the greater benefit derived from the efficient recreational utilization of waters. The rules that have been developed are not entirely rational nor is the underlying reasoning always easily justified. Nevertheless, these states have at least attempted to provide meaningful answers to the problems created by the growing demand for water recreation. The minority of states have failed to provide a solution to these problems by their strict adherence to technical rules of property. Although these states are faced with property rights that have vested as the result of prior decisions, modifications can be rationally made without unduly infringing on these rights.

It is entirely consistent with English common law to allow common use among riparians when it has been customary in the past. Custom or long use was originally considered inapplicable in this country because in a newly settled area, of course, there could not have been any prior use.¹⁰⁸ Today, there would seem to be no objection if courts that follow the common law view utilize custom to protect uses that have existed in the past by consent among a group of riparians. Also, it would seem that common use among riparians is proper if the bed of a body of water is divided among the riparians in such a manner that exclusive enjoyment would result in a substantial diminution in the value of the body of water as a recreation area. Each riparian receives the right to use the entire body of water in return for giving up the right of exclusive enjoyment of his portion. Whether to allow common use should be a question of fact in each case since there are situations where common use would benefit only one riparian and the value of the body of water as a recreation area would not be affected.¹⁰⁹

Although it seems that common use among riparians may be justified under the circumstances outlined above, the question remains whether vested property rights should be further modified by including the licensees of a riparian resort owner in the common use. If licensees have customarily used the entire body of water in the past, then that use should be allowed to continue. If a

¹⁰⁶ *Id.* at 564, 193 So. at 11.

¹⁰⁷ Other states have dealt with long use in terms of whether a prescriptive right has been acquired by the users. These states have uniformly deemed the use to be permissive and thus have not recognized any prescriptive right of use. Cases cited note 37 *supra*.

¹⁰⁸ GOULD, WATERS 113 n.4, 114 (1st ed. 1883).

¹⁰⁹ See text accompanying notes 44-49 *supra*.

riparian wishes to open a resort on a body of water previously used only by individual riparians, a different question is presented. It is arguable that use of the entire body of water should be allowed since more persons would then be able to participate in water recreation. On the other hand, the resort owner is conducting a business, and it is questionable if he should be allowed to profit at the expense of other riparians. It would seem that maximizing the utilization of waters is properly a function of the state through condemnation; therefore, the resort owner should be required to negotiate a purchase of the right to use portions of a body of water overlying bed areas owned by other riparians or to stay within his portion. This is no different from any commercial enterprise paying for its business needs.

Further modifications of the rights of bed owners in states that are committed to the common law view would seem to require compensation. There should be serious legislative consideration of to what extent the public need for water recreation should be satisfied through access way condemnation, improvement of existing bodies of water, inclusion of recreation facilities in flood control projects, and by similar methods.¹¹⁰

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¹¹⁰ For a complete catalog of the ways in which public facilities may be increased see U.S. OUTDOOR RECREATION RESOURCES REVIEW COMM'N, OUTDOOR RECREATION FOR AMERICA, A REPORT TO THE PRESIDENT AND TO THE CONGRESS (1962).