Recreational Rights and Titles to Beds on Western Lakes and Streams

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RECREATIONAL RIGHTS AND TITLES TO BEDS ON WESTERN LAKES AND STREAMS

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What rights do riparians, their licensees, and the public have to use the small lakes and streams of the West when the beds are privately owned? This is the question which this Article attempts to answer. However, to do this, an analysis had to be made of which lake and stream beds were privately owned. Thus, the Article covers both the questions of title to beds and rights of surface use.

The selection of the states West of the Mississippi was partly arbitrary, to limit the size of the project. Although there are certain elements of similarity among these Western States (all except Texas were carved out of the federal domain; they are the most recently created states; they are for the most part less densely populated than those farther East; nearly all of them have placed more emphasis on recreation as a state asset; and, with few exceptions, all contain arid regions within their borders), little reason was found to conclude that these similarities caused the courts to apply different rules than the Eastern States. Cases are cited from states East of the Mississippi from time to time where they seemed specially relevant to the material at hand.

The objective has been to determine the relative rights of the public, riparians, and subjacent owners to the use of the nonnavigable natural lakes and streams of the West. The uses in question include boating, swimming, fishing, viewing, and homesite location. The relations of these riparians and subjacent owners vis-à-vis each other have been examined to determine how lake rights are developing and changing in light of the rapidly increasing pressure of modern use.

This Article is concerned only incidentally with appropriative

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rights, and with the relationship of the appropriation and riparian systems in those states where both systems exist. It has been found that the differences among the states concerning lake and stream surface law have not particularly correlated with the differences concerning consumptive use law. It cannot be said, for example, that because a state has the appropriation system, or the riparian system, or a combination of both, that a certain rule will apply to lake or stream surface use. The two fields of consumptive use and surface use, although related, are sufficiently distinct from each other so that case law has developed independently. Thus, there has been little need to integrate the two fields.

Artificial lakes and streams have not been discussed. They open a different and difficult field of law that could well be the subject of a separate writing, and one which would be too much of a diversion from the principal burden of this Article.

The concern here is primarily with those bodies of water where the beds are privately owned. These include waters that are non-navigable by the federal test of navigability, as well as those that are nonnavigable under various state tests where those tests cover more water than the federal test.

It is assumed that there are rapidly growing pressures and conflicts concerning the use of the surface of these lakes and streams. Numerous other writings have dealt with the problem of increasing use of the waters of the Nation for recreation. The fact of this increasing use is accepted as a basic premise. The cases are analyzed in light of that premise to see how the courts are meeting and solving the new conflicts.

The initial concern in this Article was with the use of the surface of these lakes and streams, rather than with the title to their beds. It was found, however, that the title question persisted in intruding into the analysis. Many early cases and some later cases held, for example, that the public had a right of surface use only where title

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1. This is not to say that no such conflicts have been reported. In Washington and California, for example, consider: In re Clinton Water Dist., 36 Wash. 2d 284, 218 P.2d 309 (1950); City of Elsinore v. Temescal Water Co., 36 Cal. App. 2d 116, 97 P.2d 274 (Dist. Ct. App. 1939); City of Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P.2d 585 (Dist. Ct. App. 1935); Litka v. City of Anacortes, 167 Wash. 239, 9 P.2d 88 (1932); In re Martha Lake Water Co., 152 Wash. 53, 277 Pac. 382 (1929).

to the bed was held by the state or federal government. Some of these cases have now been overruled, and the rules changed. Nevertheless, to explain the development of the law of surface use it has been necessary first to explain the development of the law concerning title to beds. Subsequently, this Article deals with the problems of surface use among riparians, bed owners, the state, and the public.

No writers in the past have tried to survey or analyze either the title or surface use cases for lakes and streams of the Western States. Between 1899 and 1940, water law scholars of the West reflected the economic and social problems of their era and wrote extensively about stream law and consumptive rights. The great treatises by Angell in 1877, Farnham in 1904, Wiel in 1911, and Kinney in 1912 dealt only briefly with surface use law. Professor Bade, writing in 1940, was the first to raise some of the issues in the field of surface use law that are now considered important. However, even Bade was concerned more with the law of Minnesota than the law of the Western States, and with title questions rather than with surface rights. Since the Second World War, several other writers have written about surface use law, but for the most part they too have been concerned with title issues, or with the law of a particular state. Professor Waite is one of a very small group who has written directly on the question of surface use law. In a 1958 article he urged public management of the use of lake surfaces through imposition of use fees, the adoption of lake zoning laws, and of boat traffic regulations. Again in a 1961 article he argued the need for public management and briefly reviewed the federal, state, and local constitutional and common law bases that might support such management. Professor Munro also has written on lake surface law. In 1961 he reviewed Minnesota lake law, pointing out some of its inconsistencies and arguing in support of the trend which he noted.

5. Wiel, Water Rights in the Western States (1911).
7. Bade, Title, Points and Lines in Lakes and Streams, 24 Minn. L. Rev. 305 (1940).
toward greater public use of the state's lakes. Lastly, one of the authors of this Article in 1960 surveyed the lake law of Washington, analyzing a number of the lake cases in other states to show the trend of these cases toward greater public use.

This Article, however, represents the first time that an effort has been made to systematically and comprehensively survey the lake and stream surface use cases of the Western part of the Nation, or of any large section of the Nation, and to critically compare and evaluate these cases.

Before turning to a discussion of the law of title to lake and stream beds, it would be helpful to comment on a few terms, in particular the terms "navigable," "navigability," and "riparian rights." These terms are thoroughly woven into the fabric of water law, yet are more than usually chameleon in character, changing from time to time, from place to place, and from writer to writer. The terms "navigable" and "navigability," as applied in water law, are used as concepts to decide a host of legal relationships covering titles, rights of use, powers to legislate, and the like. Some of the relevant uses of the terms are:

1. The English test of navigability to determine title to beds.
2. The federal test of navigability for determining title to beds.
3. The various federal tests of navigability in statutes passed under the commerce clause of the federal constitution.
4. The various state tests of navigability for determining title to beds.
5. The various state tests to determine the extent of the public right of use of the surface for recreation where the bed is privately owned.

14. E.g., The Montello, 87 U.S. 430 (1874).
15. E.g., United States v. Utah, 283 U.S. 64 (1931).
18. E.g., Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); Bohn v. Albertson,
(6) The various state tests to determine the extent of the right of other riparians to use the surface for recreation where the bed is privately owned.19

(7) The various state tests to determine the extent of the public right to float logs on waters where the bed is privately owned.20

(8) The various state tests set forth in statutes for different purposes.21

In many of the above examples the terms “navigable” and “navigability” are defined differently. To say the least, caution is required in the use of these concepts to avoid confusion.

The term “riparian rights” also poses problems of definition.22 In a physical sense the word riparian describes the relationship of land to water, that is, riparian land is land that is adjacent to water. The significance of the term “riparian,” however, is in its impact on “riparian rights.” Here is where the greater difficulty lies. It has been found that the differences between states in the rules applied and even in the same state where different litigants are involved, that is, riparian versus riparian, riparian versus public, riparian versus state, riparian versus appropriator, and when different issues are raised, that is, the right to fish, to swim, to wade, to appropriate water, to build structures in a lake or stream, to have access to the water, to stop or cause accretions, and to view the water, are so great that generalizations can only be made with great care. The meaning of the term depends on the economic, social, and legal history of the state, on the nature of the litigants, and on the nature of the issues.

Two aspects of the term may be generalized. The first concerns the kind of interest in land that a person must have in order to enjoy such rights. By definition “riparian land” means land that is adjacent to water. The term describes a physical relationship, and it is this physical relationship that gives rise to the special bundle of


20. E.g., Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499 (1908); Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813 (1904).


22. It should be noted that while the term “littoral rights” was formerly used frequently to distinguish lake rights from river (riparian) rights, it is only of slight historic significance and will not be used again in this Article.
rights called riparian rights. As the physical relationship of the land and water is the nexus of the matter, it follows that one who controls the physical use of the land, that is, the possessor, is the one who normally holds its riparian rights. Thus, riparian rights would accrue to lessees and life tenants, and to adverse possessors; whether they would accrue to holders of easements would seem to depend on the scope and purpose of the easement, that is, was it intended to be broad enough to carry riparian status with it.

Further, riparian rights are a result of the possession of riparian land; that is land adjacent to water, not land underlying water. In most cases the possessor of the riparian land also owns the bed under the water adjacent to his upland. However, if these parcels are in separate ownership, it would seem doubtful that the bed owner would acquire any "riparian" rights, such as the right to use the surface, or to allow his licensees to use the surface, in common


24. The authors have been intrigued by the question whether an easement holder, either private individual or government body, can be a riparian in the traditional sense. If so, and if the holder is a governmental body, what benefits might accrue to the public by virtue of the easement? In essence, the courts that have considered these questions have quite uniformly found that the easement owner's rights are to be determined from the intent of the grantor, which will in turn be inferred from the purpose of the easement. Two types of easements most clearly constitute the holder a riparian, no doubt to the exclusion of his grantor. The first is the broad easement giving to the grantee such exclusive control of the property that the courts feel riparian rights must accrue to them, E.g., Hanford v. St. Paul & D.R.R., 43 Minn. 104, 42 N.W. 596 (1889); In re Otter Tail Power Co., 128 Minn. 415, 151 N.W. 198 (1915). The second is where the easement is granted for the purpose of allowing the grantee access to the water. E.g., State v. Yates, 104 Me. 360, 71 Atl. 1018 (1908); Hathaway v. City of Milwaukee, 132 Wis. 249, 111 N.W. 570 (1907).

The more difficult question, however, concerns not so much the rights of the individual easement riparian, but the rights that might accrue to the general public by virtue of an easement held by a governmental body as, for example, one arising out of a street dedication condemnation. The number of people that might be given access to a lake via such an easement is potentially very large. See particularly the recent case of Flynn v. Beisel, 257 Minn. 531, 102 N.W.2d. 284 (1960), which explicitly stated that other than fee owners may possess riparian lake rights (without reference to the licensee rationale) through common law dedication of an easement to the lake and public acceptance thereof by use.

An interesting aside is found in the 1961 New York case of Thornhill v. Skidmore, 32 Misc. 2d 320, 227 N.Y.S.2d 793 (Sup. Ct. 1961), where the court found an implied easement over the defendant's property to allow other community residents a right of use in a nonnavigable canal.

25. E.g., Indianapolis Water Co. v. American Strawboard Co., 53 Fed. 970, 974 (C.C.D. Ind. 1893), where the court said: "The ownership of the bed of the river is not the foundation of 'riparian rights' properly so called, because the word 'riparian' is relative to the bank, and not to the bed of the stream . . . ."
with other riparians. Nor would it seem that he would have any remedies as a riparian to bar others from the use of the surface over his property.

For ease of presentation, this Article has been divided into two principal parts; (1) title to beds, and (2) right of surface use. There is also an appendix which attempts to collect all the leading lake and stream surface cases in the subject states, the design and categories of which are explained therein.

While summaries are usually reserved for the conclusion of a writing, it is believed that certain propositions advanced in this Article warrant some brief initial mention to prepare the reader for the discussions that will follow. Thus, several propositions are set forth to indicate the subject matter and scope of the Article.

I
SUMMARY OF PROPOSITIONS

A. On Title to Beds

All the state courts that spoke on the subject prior to 1926 assumed that the test of navigability for deciding title to the beds of lakes and streams was their own state test. Some of these tests of navigability were significantly different than the federal test.

The United States Supreme Court decided three cases between 1922 and 1931 that made clear that the federal test of navigability must be applied to determine which lake and stream beds passed to the several states upon statehood. From this trilogy, 1926 has been adopted as the dividing line in time among the Western cases. Most later state court cases have either explicitly recognized the controlling effect of the federal test, or have coincidently adopted or affirmed state tests consistent therewith.

B. On Right of Use

On navigable lakes and streams where the bed is state-owned, the courts are agreed that the public has a right of use.

Prior to 1926 the courts tended to lump together the question of title to beds and the right of public use. If the bed were state-owned, the public had such a right of use; if the bed were privately owned, the public had no such right.

The Brewer-Holt-Utah series of cases held that the federal test controlled navigability for title. The federal test turned on com-

mercial usefulness, not on pleasure boat use. This required considerable re-thinking in a number of state courts on the question of the public's right of use.

Nine states West of the Mississippi now recognize a right of the public, or at least others than the owner of the bed, to use the surface of lakes and streams where the beds are privately owned. Two of these states, Washington and Minnesota, recognize a right in the other riparians and their licensees to use these waters. Texas can only be included in this list on the basis of particularly weak dicta, but in its place, or as a tenth state, Iowa might be added. This state is unique in that its supreme court has held that the beds of non-navigable lakes and streams are still owned by the federal government, and that the waters overlying these beds are available to the public for general use.

Six other states West of the Mississippi have spoken against a public right of use of waters where the beds are privately owned. For the most part, however, these cases were decided earlier than those noted in the last paragraph. Further, one of the six applied an erroneous "pleasure boat" test for determining title which renders virtually all its river and lake beds state-owned.

Of all the aforementioned sixteen states, only the State of Washington has squarely met the problem of non-owner abuse of this right of common surface use, although Minnesota and Wyoming have also spoken on the issue. All three of these states have applied a test of "reasonableness" to determine the legal limits of the common right of use.

II
TITLE TO BEDS

A. Federal Cases on Navigability for Title

In order to understand the impact of the federal navigability cases on the law of lake and stream surface use it is necessary to answer two questions: (1) which test, state or federal, determines whether a given lake or stream is navigable for title, and (2) if the federal test controls, what is that test?

Prior to the 1920's the state courts adhered to the view that the

28. Arkansas, Colorado, Montana, South Dakota, Utah, and (again) Texas.
test to be applied in determining navigability for title was the state test as announced by each state supreme court. No United States Supreme Court case had squarely faced the issue until *Brewer-Elliott Oil & Gas Co. v. United States*, *United States v. Holt State Bank*, and *United States v. Utah* and it was only with these cases that the United States Supreme Court finally settled that the question of navigability for title was a federal question, to be decided by the federal test as pronounced by the federal courts.

These three cases form an important line of demarcation among the state cases. To facilitate discussion, these three cases will be


31. The Supreme Court came close to answering the question in *Wear v. Kansas*, 245 U.S. 154 (1917), where it considered a Kansas Supreme Court decision in which that state court had taken judicial notice of the navigability (for title) of the Kansas River. The petitioner claimed that if navigability in fact were the issue as the state court had held, then petitioner was entitled to a trial by jury on that question, and the state court was in error in taking judicial notice of such navigability. Answering this contention, the United States Supreme Court said that this raised "a question of state law." It should be noted, however, that the United States Supreme Court did not say that the test of navigability to be applied was a question of state law, but only that the state court's taking judicial notice (as opposed to a jury determination) of navigability was a state law question.

The federal Circuit Court of Appeals for the Eighth Circuit considered the question of title navigability in the widely cited case of *Harrison v. Fite*, 148 Fed. 781 (8th Cir. 1906), but took an ambiguous position, referring merely to the "test of navigability as understood in the American law . . ." Id. at 783. Apparently the court assumed that there was only one test. No mention was made of the possible need to distinguish between a federal test and the various state tests.

32. 260 U.S. 77 (1922).
33. 270 U.S. 49 (1926).
34. 283 U.S. 64 (1931).
35. This is not to say that such questions, now that they are labeled "federal questions," can automatically be taken to the federal courts for determination, either by removal or otherwise. The manner in which federal questions can be gotten into the federal courts is complex, has been covered by a substantial body of legal literature, and is outside the scope of this Article.

Illustrative of some of the problems is the case of *Economy Light*, 256 U.S. 113, where the Supreme Court noted that the Illinois Supreme Court had earlier held the river in question to be nonnavigable and a writ of error had been dismissed by the United States Supreme Court on the ground that "no federal question was involved." The Court (in *Economy Light*) went on to say that this dismissal did not bind the United States to that ruling of nonnavigability and held the river navigable.

It is said that "there is a federal question lurking in the background of almost every controversy." London, *Federal Question Jurisdiction—A Snare and a Delusion*, 57 Mich. L. Rev. 835, 839 (1959). It is also true that a great many cases that involve federal matters will be litigated in the state courts.
referred to as the “Brewer-Holt-Utah” series, or to the date 1926, when the important Holt case was decided.

1. What is the Federal Test?

What is the federal test for title? This is not an easy question to answer. Only a handful of cases have been decided by the Supreme Court on the issue, and these have left many questions unanswered. Part of the problem is the lack of any clearly charted verbal definition of navigability. Needless to say, even with such a precisely drawn verbal formula there would be difficulty in predicting the results of its application to the unique geographical features of real-life lakes and streams. However, there is no such precisely drawn word formula. This lack is attributable, in part, to the failure of the United States Supreme Court to separate the cases dealing with title navigability from those dealing with navigability for other purposes. Of the 14 cases that make up the principal Supreme Court jurisprudence on the question of navigability, 6 are concerned with title questions. However, none of these has attempted to describe how title navigability differs from navigability for other purposes. The only case that has made such an attempt was the well known commerce clause case of United States v. Appalachian Elec. Power Co.

The first 2 of these 14 cases, both decided in the 1870’s, were concerned with the imposition of penalties against vessels for operating on “navigable waters of the United States” without licenses or contrary to regulations as set forth in the federal statutes passed under the authority of the commerce clause. In both cases the Supreme Court held the waters navigable, and developed the test that has been cited and relied on for deciding virtually all navigability issues since that date. In these two cases the court rejected the

36. Upon careful examination of the cases dealing with navigability one finds that the Supreme Court relies on only a relatively small number of cases for the definition of navigability. These are: United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1941); United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922); Oklahoma v. Texas, 258 U.S. 661 (1891); Economy Light Co. v. United States, 256 U.S. 113 (1921); United States v. Cress, 243 U.S. 316 (1917); Leovy v. United States, 177 U.S. 621 (1900); United States v. Rio Grande Dam & Irr. Ditch Co., 174 U.S. 690 (1899); St. Anthony Falls Water Power Co. v. Board of Water Comm’rs, 168 U.S. 349 (1897); Packer v. Bird, 137 U.S. 661 (1891); United States v. The Montello, 87 U.S. 430 (1874); The Daniel Ball v. United States, 77 U.S. 557 (1870).


38. 311 U.S. 377 (1941).

39. The Montello, 87 U.S. 430 (1874); The Daniel Ball, 77 U.S. 557 (1870).
English test of navigability, which was based on the ebb and flow of the tides, and said:

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.  

The other 12 cases have been concerned with (1) riparian rights under the state law of Minnesota, (2) title to beds of lakes and streams, (3) compensability of property rights allegedly taken under the navigation servitude, (4) applicability of an act of 1890 making it unlawful to create or maintain any wharf, pier, dam, or other obstruction “in any navigable waters of the United States” unless approved and authorized by the Secretary of War, (5) applicability of the Rivers and Harbors Act of 1899 prohibiting the creation of any obstruction “to the navigable capacity of any of the waters of the United States” unless authorized by the Secretary of War, and (6) applicability of the Federal Power Act of 1920 prohibiting construction of dams on “those parts of streams or other bodies of water over which Congress has jurisdiction under . . .” the commerce clause.

The indiscriminate citing of this group of cases can be illustrated as follows: in Packer v. Bird, the earliest title navigability case in

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40. The Daniel Ball, 77 U.S. 557, 563 (1870).
47. Economy Light Co. v. United States, 256 U.S. 113 (1921).
49. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1941). The Court in this case considered navigability under the Rivers and Harbors Act, and the Federal Power Act to be the same. This has been explicitly so stated in Rochester Gas & Elec. Corp. v. Federal Power Comm'r, 344 F.2d 594 (2d Cir. 1965).
50. 137 U.S. 661, 666 (1891): “those rivers are regarded as public navigable rivers in law which are navigable in fact, as said in the case of The Daniel Ball . . . ‘they are navigable in fact where they are usable, 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.’”
which the navigability issue was discussed, the Court relied without comment on *The Daniel Ball*; in *United States v. Cress* (navigation servitude case) the Court relied on *The Daniel Ball, The Montello, Rio Grande* (Act of 1890, under the commerce clause), and *Leovy* (Act of 1890, under the commerce clause); in *Brewer-Elliott, Holt, Utah, and Oregon*, the Court at different places relied on all the above cited cases in addition to *Economy Light* (Rivers and Harbors Act of 1899) and *St. Anthony Falls* (riparian rights in Minnesota).

It was not until the 1940 decision of *United States v. Appalachian Elec. Power Co.* that the Court finally attempted to sort out the prior decisions and indicate that navigability for title might be defined differently than navigability for other purposes. In *Appalachian* the Court held that the Federal Power Act gave the Federal

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51. 243 U.S. 316, 324 (1916): "That the test of navigability in fact should be applied to streams in their natural condition was in effect held in *The Daniel Ball*. . . ." *Id.* at 323. The Court then cited and quoted *The Montello* holding that, "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway." (Emphasis the Court's.) The Court also cited without comment *Packer v. Bird, Leovy v. United States, and United States v. Rio Grande Dam & Irr. Ditch Co.* for judicial recognition of "the limitation of the public right to the natural state of the stream . . ." *Id.* at 325.

52. 260 U.S. 77, 86 (1922):
A navigable river in this country is one which is used in its ordinary condition, as a highway for commerce over which trade and travel is or may be conducted in the customary modes of trade, and travel on water. It does not depend upon the mode by which commerce is conducted upon it . . . but upon the fact whether the river in its natural state is such that it affords a channel for useful commerce.

The Court cited *Economy Light, The Montello, and The Daniel Ball* as authority.

53. 270 U.S. 49, 56 (1926): Navigability in fact depends "on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce." The Court cites *The Montello, Cress, Economy Light, Oklahoma, and Brewer-Elliott*.

54. 283 U.S. 64, 83 (1931): Quoting the definition from *United States v. Holt State Bank*, the Court cited *The Daniel Ball, The Montello*, and *Holt*. The Court also quoted from *The Montello* for the rule that "the capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use." The Court cites *Packer* and *Economy Light* as additional authority.

55. 295 U.S., 14 (1935): The Court held that navigability is "to be determined according to the law and usages recognized and applied in the federal courts, even though . . . the waters are not capable of use for navigation in interstate or foreign commerce." The Court cites *Holt, United States v. Utah, and Brewer-Elliott*. The Court further cites, without comment, the following cases as authority for the rule to be applied to determine navigability (for title in this case): *Oklahoma v. Texas, Economy Light, Rio Grande, and The Daniel Ball*.

56. 311 U.S. 377 (1940).

Power Commission jurisdiction over New River in Virginia and West Virginia despite the fact that the river was not navigable in its natural state and could only be made so with artificial improvement. On this artificial improvement issue the title cases were expressly distinguished, the Court noting that:

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. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable.\textsuperscript{58}

\textit{Appalachian} is thus a clear warning that the cases need sorting according to the purpose for which navigation is being determined.

2. Commerce Clause Navigability

The power of Congress to legislate concerning interstate and foreign commerce is very broad and is not dependent upon the navigability or nonnavigability of waters over which the commerce might pass but rather is contingent only upon the requirement that such waters, or travel on them, have an “effect” upon interstate commerce.\textsuperscript{59} The transport of goods over the intrastate Lake Chelan, in Washington, separated by a 600 foot drop to the interstate Columbia River, could be subjected to federal control because the goods are then transferred to other carriers that travel in interstate commerce via land or air.\textsuperscript{60} Also, the trickle of water in the tiny step-across “Jack” creek in central Washington could be sub-

\textsuperscript{58} 311 U.S. 377, 408 (1940).
\textsuperscript{59} In United States v. Rio Grande Dam & Irr. Ditch Co., 174 U.S. 690 (1899), the Court said: “We may . . . properly limit our inquiry to the effect of the proposed dam and appropriation of waters upon the navigability of the Rio Grande . . . .” in deciding whether a dam on a nonnavigable upstream portion of the river would interfere with the federally protected commerce on the downstream navigable portion of the river. \textit{Id.} at 701. More recently in Oklahoma v. Guy F. Atkinson, 313 U.S. 508 (1941), in approving federal authority to dam an Oklahoma river not navigable in Oklahoma but navigable outside that state, the Court held that the dam would have a “tangible” effect on the navigable portion of the river and was therefore subject to commerce clause federal power. Note, 29 Calif. L. Rev. 761 (1941); Note, 90 U. Pa. L. Rev. 102 (1941).
\textsuperscript{60} Missouri-Kansas-Texas Ry. Co. v. Northern Okla. Rys., 25 F.2d 689 (8th Cir. 1928), \textit{cert. denied}, 278 U.S. 610 (1928) (a ten-mile railroad line entirely within one county in Oklahoma was subject to ICC control even though locally owned and operated because coal will pass over the line on its way to other states); Katzenbach v. McClung, 379 U.S. 294 (1964) (a restaurant serving primarily local people is subject to federal regulation because it buys meat from a local dealer who buys it interstate and the cumulative effect at many such operations has an impact on commerce sufficient to require regulation of the unit in order to direct the effect of the mass).
jected to federal control because these waters then flow into the Teanaway River, then the Yakima, and finally into the navigable Columbia River. If enough such trickles were interfered with, the navigability of the Columbia might be affected; thus, Congress has power to control the development and use of such waters.

It is still possible, of course, for the courts to be faced with "navigability" questions under particular statutes enacted under the commerce clause, but these questions are essentially ones of statutory construction—that is, whether Congress intended to legislate only concerning navigable water (as defined in the statute) and not whether Congress could, under the Constitution, legislate with regard to anything wet. It would, of course, be possible for such statutes to define the terms "navigable" and "navigability" in the same way they are defined in the title cases, but this would be strictly coincidental. One would need to look carefully at the wording and purpose of the statute as well as at its legislative history to make certain that such a meaning was intended.

There is, of course, one type of commerce clause navigability that is not a creature of statute—navigation servitude navigability—and it would appear at first that the cases on this subject might provide useful insights on the navigability test. This is not so, however, for several reasons: (1) the test of navigability for the application of the navigation servitude is probably that set out in Appalachian, (2) none of the navigation servitude cases has given any considered attention to the navigability test, and (3) only one navigation servitude case has ever been cited in the title navigability cases, and that citation was largely perfunctory. For certain of the navigation servitude issues, navigability of the waters is immaterial.

One might rationalize the early mixture of commerce clause and title navigability cases on the ground that the court had not then developed its commerce clause jurisprudence as it now has. Neither the need for, nor the reality of, federal control over everything

63. See the discussion of this question in Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 Natural Resources J. 1, 4-6 (1963).
65. As Morealle points out, when Congress “expressly exercises its power over a nonnavigable tributary in order to ‘protect’ the navigable capacity of the mainstream” such exercise “eliminates, in effect, all distinction between ‘navigable’ and ‘non-navigable’ . . . .” Morealle, supra note 63, at 74-75.
affecting interstate commerce was then realized. Now, however, this jurisprudence has grown to full bloom; it has its own rationale and its own unique characteristics. It is time, therefore, to separate these cases from those concerned with title. Appalachian recognizes this, but only in one brief paragraph. No other Supreme Court case has been decided on title navigability since Appalachian, and no commerce clause case has again discussed the issue. The lower federal courts offer little help; decisions on both title and commerce clause questions are disconcerting in their continued indiscriminate citation of the several lines of navigability cases. There are no clear lines of demarcation to serve as guides in future litigation.

3. Navigability for Title

Seven United States Supreme Court decisions have explicitly discussed the question of navigability for title. Six of these were title navigability cases, the seventh was Appalachian. In several other cases the Court has taken judicial notice of the navigability (for title) of certain waters, but did not discuss the test applied in that determination. Except for the first title navigability case, Packer v. Bird (1891), all of these cases were decided in the fourteen-year period from 1921 to 1935; Appalachian then followed in 1940.


67. United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 44 (1911); United States v. Holt State Bank, 240 U.S. 49 (1925); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 51 (1922); Oklahoma v. Texas, 258 U.S. 574 (1921); Packer v. Bird, 137 U.S. 661 (1891). In Shively v. Bowlby, 152 U.S. 1 (1894), the Court was concerned with title to the bed of a navigable river, but assumed without discussion that the river in question was navigable for title.


69. For example, see the title navigability case of Shively v. Bowlby, 152 U.S. 1 (1894), and the commerce clause navigability cases of United States v. Rio Grande Dam & Irr. Ditch Co., 174 U.S. 690 (1899), and Arizona v. California, 283 U.S. 423 (1931).
4. Navigability Determined as of the Date State Joins Union

In accordance with the constitutional principle of equality of states, the title to the beds of rivers within each state passes to that state when it is admitted to the Union, if the rivers were then navigable. As this date is different for virtually each state, the test must necessarily be applied on such different dates. This aspect of navigability for title would appear to be differentiated from navigability under the commerce clause cases. In Appalachian the Court expressly noted this difference, pointing out that "for the purpose of the regulation of commerce, [navigability] may later arise."

It is immaterial that the river is not now used for commerce, or that it has not been used for many years. Navigability is determined by whether it was commercially usable at the time the state came into the Union.

Needless to say, one of the more bothersome aspects of this rule is the increasing difficulty, with the passage of time, of establishing either the physical characteristics, or the transportation uses of a given river or lake at the time the state joined the Union. California, for example, joined the Union in 1850. No one is alive today who can tell us from personal observation what the river was used for in 1850, or what it was physically like at that time. Other methods of proof can be used, it is true, but the overall persuasive-

70. United States v. Utah, 283 U.S. 64, 75 (1931); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 408 (1941). But note that a different position was taken in the early Circuit Court of Appeals case of Harrison v. Fite, 148 Fed. 781 (8th Cir. 1906), where the court mistakenly said:

It does not follow that, because a stream or body of water was once navigable, it has since continued and remains so. Changes may occur, especially in small and unimportant waters, from natural causes, such as the gradual attrition of the banks and the filling up of the bed with deposits of soil, the abandonment of use followed by the encroachment of vegetation, and the selection by the water of other and more natural and convenient channels of escape, that work a destruction of capacity and utility as a means of transportation; and, then this result may fairly be said to be permanent, a stream or lake in such condition should cease to be classed among those waters that are charged with a public use.

Harrison was a title case, and the court was deciding that title to the bed of the water in question was in the riparian because it was nonnavigable. Therefore, the public had no right of use of the waters.


72. This follows from the rule that navigability at the time of statehood is the criterion. Furthermore, it is not actual use that is in question, but only susceptibility for use. Thus, it is immaterial that the water is not now being used, and has not been used for many years for commercial purposes. Contra, the early case of Harrison v. Fite, 148 Fed. 781 (8th Cir. 1906), in which the court, prior to and without the aid of the Brewer-Holt-Utah series, said that navigability for title could be lost through disuse.
ness of the evidence will continue to diminish with the passage of time.

5. Natural and Ordinary Condition

One is tempted to say, on the basis of Holt, Utah, and Appalachian that navigability for title depends upon the usability of waterways for commerce in their "natural and ordinary condition," not on their potential usefulness after artificial improvements have been made. A careful reading of the title navigability cases tends to support this rationale; for example, in Holt and Utah the Court reiterated the earlier test of The Montello that waters are navigable "when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce . . . ."73 The difficulty comes from Appalachian,74 the case that purported to start the sorting-out process between cases concerned with navigability for title and those concerned with navigation for other purposes. The following quotation contains the critical language:

To appraise the evidence of navigability on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural or ordinary conditions' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in section 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use . . . . Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.

Of course there are difficulties in applying these views. Improvements that may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement. Although navigability to fix ownership of the river bed or riparian rights is determined


74. A number of case notes commented on the uncertainties inherent in the navigability discussion in Appalachian: 50 Yale L.J. 134 (1941); 54 Harv. L. Rev. 876 (1941); 35 Ill. L. Rev. 346 (1941); 25 Minn. L. Rev. 636 (1941).
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. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable. There has never been doubt that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries, or shifting currents.76

Far from providing one with a clearly charted path, this language appears to be subject to three possible interpretations:

1. For title navigability the waters must be usable in their natural state, without the need of improvements or artificial aids, whereas for commerce clause navigability the waters will be held navigable if they can be made navigable with reasonable improvements. This would seem to follow from the fact that title navigability is determined as of the date the state entered the Union, whereas "navigability, for the purpose of the regulation of commerce, may later arise."

2. For either title navigability or commerce clause navigability the waters will be considered navigable when they can be made so with reasonable improvements. This could be argued from the Court's discussion of "natural and ordinary." One would think that if title navigability depended upon usability of waters in their natural and ordinary condition rather than in an "improved" condition, the Court would have said so, and would have used this means of distinguishing the title and commerce clause cases. But it confused the issue by saying that "'natural or ordinary conditions'" [Here the court cited a title case]76 refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." And again, later, the Court says that navigability is not lost merely because of the obstruction of "falls, rapids, and sand bars, carries or shifting currents" and again cites a title case,77 this time mixed together with commerce clause cases.78

77. United States v. Utah, 283 U.S. 64 (1931).
78. Economy Light Co. v. United States, 256 U.S. 113 (1921); United States v. The Montello, 87 U.S. 430 (1874).
(3) For title navigability the waters must be navigable in their natural state at the time the state joined the Union, except as to those improvements that would have been "reasonable" at that time, considering the then existing (or to be expected?) population density, transportation patterns, and engineering knowledge. This might follow from the Court's statement that "Improvements that may be entirely reasonable in a thickly populated, highly developed, industrial region may have been entirely too costly for the same region in the days of the pioneers. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement."

The first of these three possible interpretations seems preferable because the tenor of the whole quotation tends to support it slightly more than interpretation (2) or (3) and it has the quality of providing greater predictability and certainty for this important area of title law. Unfortunately, however, the language of *Appalachian* is too ambiguous to resolve the question and further word from the Court must be awaited to know which interpretation is "the law."

The preference for number (1) is given some further support, albeit slight, from the fact that there is no case where the court has found title navigability where the waters in question were non-navigable in the natural state but could be made navigable by artificial improvements. The nearest case to this was *Utah* where the Court held navigable certain sections of the San Juan, Green, and Grand Rivers despite the presence of numerous obstacles such as rapids, riffles, and rocks which made navigation difficult at times and even impossible on occasion. However, the Court emphasized that the waters could be navigated part of the time and were thus usable in their natural state. Neither here, nor in any other title case, has the Court purported to apply the rule of *Appalachian* that all those waters will be deemed navigable that have sufficient "volume, gradients, and regularity of flow" so that they can be made usable by artificial improvements. Whether the upper reaches of the Green, Grand, and San Juan Rivers, would have been held navigable under this test is not known because the United States did not attempt to quiet title to them and the Court did not therefore report on or consider the physical characteristics of these portions of the rivers. From evidence available from other sources one

could argue that these waters are navigable under the Appalachian test.  

6. Interstate Navigability Not Required

One aspect of the title navigability test is clear—the waters need not be navigable in interstate commerce; intrastate navigability is sufficient. In United States v. Utah the Court said that it was “un-disputed” that certain of the waters in question were navigable only within the State of Utah, yet held them navigable for title.  

Certain of the commerce clause cases must be distinguished here. In The Daniel Ball, for example, the Court was construing a statute covering “navigable waters of the United States” and said this phrase included only water which “form[ed] . . . by itself, or by its connection with other waters, a continued highway over which commerce . . . may be carried on with other States or foreign countries . . . .”

7. Highways for Commerce Via the Customary Modes of Trade or Travel on Water

Another element of the test of navigability not yet clearly defined is the one that requires the waters to be usable as highways for commerce by the “customary modes of trade and travel on water.” The extreme position would be to say that if the waters are sufficient to float logs, fur traders’ canoes, or fishermen’s boats, they are navigable. This would not leave many lakes or streams in the nonnavigable category. Again, however, Supreme Court decisions leave much to speculation.

Log floating is one of the uses of a river or lake that can be accomplished with less water, and in more turbulent water, than many other commercial activities; however, none of the title navigability cases has yet faced or even discussed the log floating question. Three commerce clause cases, The Montello, Rio Grande, and Appalachian, all touch on the question, although their comments are too
brief to be much help. In *The Montello*, the Court seemed to suggest that if there were enough water to float log rafts, then the waters were "navigable." A few years later in *Rio Grande* the Court qualified this earlier statement by saying that "the mere fact that logs, poles and rafts floated down stream occasionally and in times of high water does not make a navigable river." In *Appalachian* the Court again touched on the question, saying, "[T]he uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs . . . . The tests of navigability must take these variations into consideration." Needless to say, these brief statements do not provide definitive answers.

Rowboating and canoeing are two other activities that can occur on very small lakes and streams and are sometimes today considered "commercial" because of the presence of resorts and fishing guides. More importantly, in the early days these methods of transportation formed important means of communication and carriage throughout much of the West. Recognizing this fact the Supreme Court in *Holt* held Mud Lake and Mud River in Minnesota navigable for title, describing them as follows:

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In its natural and ordinary condition the lake was from three to six feet deep. When meandered in 1892 and when first known by some of the witnesses it was an open body of clear water. Mud river traversed it in such a way that it might well be characterized as an enlarged section of that stream. Early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose. The country about had been part of the bed of the glacial Lake Agassiz and was still swampy, so that waterways were the only dependable routes for trade and travel. Mud river after passing through the lake connected at Thief river with a navigable route extending westward to the Red river of the North and thence northward into the British possessions. Merchants in the settlements at Liner and Grygla, which were several miles up Mud river from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited, but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake; but this was exceptional, the usual conditions being as just stated . . . . Some years after the lake was meandered, vegetation such as grows in water got a

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footing in the lake, and gradually came to impede the movement of boats at the end of each growing season, but offered little interference at other times.88

This probably describes about the minimal physical condition for water that can be called navigable.89 It will be noted, however, that these waters were used for transportation and travel during early times, and in fact at one period constituted the principal means of conveyance from certain settlements. This does not, therefore, suggest that merely because waters are of sufficient depth, breadth, and length to float canoes or small boats they will be deemed navigable for title.

United States v. Oregon89 demonstrates this last point. There the Court in an action to quiet title brought by the United States against the State of Oregon held Malheur, Harney, and Mud Lakes in southeastern Oregon nonnavigable for title. Of the three lakes, Malheur came closest to being navigable. The lake might aptly be described as a low spot with a bit of water in it in the middle of a huge mud flat. In 1931, when the special master inspected the lake, he found about 400 acres covered by water of "negligible depth," surrounded by about 1,000 acres of mud. During an average year some 39,678 acres would be under water, 11,715 under one foot or less, 10,126 under one to two feet, 6,988 under two to three feet, 10,821 under three to four feet, and 26 acres under four to five feet. During an occasional, exceptionally wet year, the water would be somewhat deeper. In the average year extensive mud flats around the lake made difficult the launching of boats which had to be dragged many yards through these areas to reach water. Evidence of past boating did not show any commercial use. Local witnesses had rarely if ever seen boats on the lake. Although the evidence showed that a few rowboats and canoes had been used by trappers or duck hunters, they usually had a draft of only one to six inches, and had to be dragged over the mud to the water. The lake contained tules and other water vegetation, impenetrable at many

89. A brief attempt was made in the early commerce clause case, The Montello, to describe the minimal limits of navigability, where the Court said:
   It is not, however, as Chief Justice Shaw said (Rowe v. Bridge Co., 21 Pick. 344), 'Every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'
90. 295 U.S. 1 (1935).
points, through which was a labyrinth of channels leading to no definite destination. Only four motorboats had ever been seen on the lake, and these had been used only to a limited extent. The Court concluded, “These conditions preclude the use for navigation of the area in question, in its natural and ordinary condition, according to the customary modes of trade and travel over water, and establish an absence of that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability.”

Comparing nonnavigable Malheur Lake with navigable Mud Lake of Holt we can see that Malheur Lake was deep enough, wide and long enough to be navigable, but was distinguished in that (1) it was geographically isolated from habitation and from transportation routes, (2) was surrounded by extensive mud flats making access difficult, and (3) and had never been used for commercial travel.

Presumably from these two cases one can conclude that mere depth, length, and breadth of water are not sufficient for title navigability. They must also be so geographically located and so physically accessible as to be actually usable in going from place to place.

This raises the question of the navigability of the thousands of small lakes in the West that range from five to 400 or more acres in area and are as much as eighty feet or more in depth. Many of them are used extensively by recreationists for boating, swimming, fishing, and hunting, although not for commercial travel. Certainly they are deep enough and large enough for floating commercial vessels; and they are not surrounded by extensive mud flats such as Malheur Lake. Many of them are touched by highways, or have access roads to them. The two factors that distinguish them from navigable Mud Lake in Holt are (1) they are not geographically located so that they can be conveniently used to go anywhere, and (2) no commercial travel has ever taken place on them. Needless to say, the second of these two elements seems to be the least important, (except to the extent that it tends to prove the first) because the Court has said many times it is concerned with “susceptibility” of use for commerce, not actual use.

The problem is illustrated by Silver Lake in the State of Washington, which along with numerous other similar small lakes in that
The Washington Supreme Court has held nonnavigable. This lake has about 485 acres of surface area, is three and one-half miles long by one-third mile wide, and up to eighty feet deep. A roadway crosses one end of it. The lake has never been used for commercial travel and because of its geographical location shows no likelihood of being so used in the future. Would it be navigable for title under the federal test? The United States Supreme Court decisions do not provide any clear and certain answers. These lakes are probably not navigable—under the authority of Oregon. It is true that they do not have the mud flat inaccessibility problem that existed in Oregon; nonetheless they are similarly isolated from large centers of population and from transportation routes, that is, they do not go anywhere, and no commercial travel has ever occurred on them. The Supreme Court, in Oregon as well as in other title navigability cases, has emphasized the need for commercial usability. Certainly in the extreme case of an alpine lake of fifty acres, located at 10,000 feet on a mountainside, accessible only through a tortuous mountain road, and leading nowhere but to the other side of the lake, it would seem that the Court would consider it non-navigable for title. If this is correct, the question becomes one of deciding how much geographical isolation is required before a floatable body of water will be considered nonnavigable. As with so many other aspects of the title navigability question, a further pronouncement by the Supreme Court is needed.

8. Summary of Title Navigability Test

The above Supreme Court decisions on title navigability can be summarized: navigability for title should be considered separately from navigability for commerce clause or other purposes. There are four criteria for navigability for title:

(1) Navigability for title is determined as of the date each state came into the Union.

(2) Such navigability is determined by the natural and ordinary condition of the water at that time, not whether it could be made navigable by artificial improvements. However, the fact that rapids,
rocks, or other obstructions make navigation difficult will not destroy title navigability so long as the waters were usable for a significant portion of the time.

(3) Navigability in intrastate commerce is all that is required, not usability in interstate commerce.

(4) The waters must be usable by the “customary modes of trade or travel on water.” This may include waters usable for commercial log floating. This includes waters as little as three or four feet deep that are geographically located so they have been, or can be used by canoes and rowboats for commercial trade and travel (fur traders’ canoes). This does not include waters which are difficult to access because of surrounding mud flats or the like, and which are geographically isolated from habitation and transportation routes, and which have never been and are not likely to be used for commercial trade or travel. This probably does not include waters that are geographically isolated from habitation and transportation routes and which have never been and are not likely to be used for commercial trade or travel, even though these waters are deep enough and large enough to float commercial type vessels, and are not physically inaccessible because of mud flats or the like.

B. The State Cases on Title to Beds

After the above examination of the federal cases on title navigability, an examination of the state cases now follows to determine whether they agree that the federal test is controlling, and if not, whether their pronounced tests are significantly different than the federal test.

1. Pre-1926 State Cases

   a. Local Law Deemed Controlling

   It is not surprising that the state cases prior to the Brewer-Holt-Utah series reflected the view that the test of navigability was for the states to decide as a local matter. No United States Supreme Court case had squarely raised the issue of the controlling effect of the federal test, and the state courts could hardly be expected to raise the issue on their own initiative. Their natural tendency was to keep jurisdiction over all such matters until the federal courts made it clear that the question was controlled by federal, not state, law.
State supreme courts in Arkansas, Idaho, Minnesota, North Dakota, Oregon, Texas, and Washington announced that "local law" governed the question of navigability for title. They universally rejected the "ebb and flow" test of the English common law, examined the various common law decisions on navigability in the United States, and then selected their own "state" tests. No state cases have been found which recognized the controlling effect of the federal test prior to 1926.

b. Significantly Out of Phase With Federal Law

Of the decisions noted above which announced, or assumed, that local law controlled the test of navigability, those in Iowa, Minnesota, North Dakota, Oregon, and Washington were especially sig-

   It is common knowledge that most of the streams of this state rise in the mountains, and are used more generally for floating timber than for carrying passengers or freight. This being so, we deem it advisable to recognize as navigable streams used either for . . . floating lumber, logs, wood, or any other product to the market. . . . We believe, therefore, the conditions prevailing in this state fully justify this court in holding many streams to be navigable which under the decisions of other states would be nonnavigable, and that this court is fully warranted in applying the principle of riparian ownership, as applied in many states to nonnavigable rivers to what we term 'navigable' rivers.
97. Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139, 1143 (1893): "In this state, we have adopted the common law on the subject of waters, with certain modifications . . . the principal of which are that navigability in fact, and not the ebb and flow of the tide, is the test of navigability . . . ."
98. Roberts v. Taylor, 74 N.D. 146, 181 N.W. 622, 625 (1921):
   It is essential to first determine whether the waters of the lake involved are to be deemed public or private waters. This is for determination by this state in accordance with its policy and law. . . .
   It may not be doubted that in this state such test is a test of navigability in fact borrowed from both civil law and common-law principles in contradistinction to the so termed 'tidal test of the common law.'
99. Guilliams v. Beaver Lake Club, 90 Ore. 13, 175 Pac. 437 (1918). This case does not expressly reject the ebb and flow of the tide test, but adds to it other categories.
100. Welder v. State, 196 S.W. 868, 873 (Tex. Civ. App. 1917): "But, as the entire internal commerce in this country, prior to the building of railroads, was carried on our large rivers and great lakes, the tide water test was found not applicable to our conditions, and another test was applied, viz. navigability in fact."
101. Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 240-41 (1900):
   [A]lthough at the common law the test of the navigability is the ebb and flow of the tide, yet, especially in this country, it is held that the rivers and streams above the ebb and flow of the tide, which have sufficient capacity for useful navigation, are public rivers, and subject to the same general rights which the public possesses in navigable waters.
significant because they adopted tests substantially different from the federal test, and thus were most clearly in error. These cases fall into two categories:

(1) Those which held that the beds of navigable waters belonged to the state, but which applied the "pleasure boat" test or some other test of navigability substantially out of phase with the federal test (Minnesota, North Dakota, Washington, and, once again, Oregon);

(2) The cases of Iowa which held that the beds of nonnavigable lakes belonged to the federal government, but were subject to state control.

Still a third group of cases might be singled out as having been decided, if not in error, at least under a misapprehension as to the implications of the federal test of navigability. In Colorado, Idaho, and Oregon the courts held that the beds of some, if not all navigable rivers belonged to the riparians. Although such decisions were admittedly within the power of the state courts to make under the rule that state courts can determine the construction of federal grants to riparian lands, they were, in fact, made under a misapprehension as to where title was at the time. Apparently these courts thought title still remained in the federal government, not realizing that it had passed to the states upon their statehood. Two of these courts, Idaho and Oregon, have since modified their holdings and now say that title to beds of navigable waters (under tests consistent with the federal test) are in the state. No subsequent Colorado decisions on the subject have been found.

The Oregon decisions require further comment. In the Guilliams case the Oregon court adopted a unique, four-part classification

102. Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1905).
103. Johnson v. Hurst, 10 Idaho 308, 77 Pac. 784 (1904).
105. In Montana (Gibson v. Kelley, 15 Mont. 417, 39 Pac. 519 (1895)), and South Dakota (Flisrand v. Madson, 35 S.D. 457, 152 N.W. 796 (1915)), the courts hold that a riparian on navigable waters owns to low water mark. But since the bed of all navigable waters up to high water mark went to the states upon their joining the Union, one may well wonder why the courts have decided to construe away this strip of land between low and high water mark. As in the case of Colorado, Idaho, and Oregon, the answer would appear to lie in a lack of understanding by these courts of the true state of the title at the time of their decision. It should be observed, however, that a court might knowingly so hold if it wanted to give a high priority to the riparian's right of access.
of state waters which, among other things, held that the beds of fresh water streams "which are navigable in fact for boats, vessels or lighters," were privately owned. Under the federal test these waters were clearly navigable for title, and title thus passed to the state upon its admission to the Union. It is true that the state supreme court has the power to transfer such lands to the riparians by its final decision, but there is nothing in the opinion to indicate that it knowingly intended this result, and subsequent decisions suggest that such was not its intention.

In Minnesota and North Dakota the courts took a different approach, holding that the state owned the beds of all navigable waters, but then defining navigability, under their assumed local option to do so, to include waters too shallow to be useful for anything other than pleasure craft, such as hunting and fishing skiffs. This test included waters nonnavigable under the federal test, and is hereafter referred to in this Article as the "pleasure boat" test.

Washington similarly adopted an early test of navigability which was apparently inconsistent with the federal test. The court started correctly in 1905 by adopting a test not unlike the federal test and holding navigable a lake which had for a number of years carried commercial sight-seeing vessels. Again in 1917 the court seemed to apply a rule consistent with the federal cases in rejecting the "pleasure boat" test of Minnesota. But in 1922 the court decided two lake cases where it appeared to take an approach contrary to the federal cases. (It should be remembered that the impact of the Brewer-Holt-Utah series was not felt until some time after 1922). In these two cases the Washington court held navigable two

110. Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139, 1143 (1893): "Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit." A subsequent federal case construed the Minnesota law as holding that the title (jus privatum) to the beds of navigable waters was in the riparians. Hobart v. Hall, 174 Fed. 433 (C.C.D. Minn. 1909), aff'd, 186 Fed. 426 (8th Cir. 1911). A few years later the Minnesota Supreme Court seemed to hold that title to these beds was owned by no one. State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914). For a discussion of these cases, see Bade, Title, Points and Lines in Lakes and Streams, 24 Minn. L. Rev. 305 (1940).
111. Roberts v. Taylor, 74 N.D. 146, 181 N.W. 622, 626 (1921): "A use public in its character may exist when the waters may be used for the convenience and enjoyment of the public, whether traveling upon trade purposes or pleasure purposes."
small lakes, of 40 and 200 acres, ranging from 15 to 50 feet in depth. They were large enough and deep enough to float commercial vessels, but were geographically so located that commercial use was and would continue to be impractical. Nonetheless, the court deemed them "susceptible" of commercial navigation and thus navigable for title purposes.

The Iowa court in an 1899 decision initially assumed that "the title to all lake beds in the state" belonged to the state without regard to navigability. Then, ten years later, the court changed its position about the beds of nonnavigable lakes, holding that if the lake were meandered, the title remained in the federal government.

c. Applying Federal Test or One Consistent Therewith

The Idaho Supreme Court saw the error of its ways by 1916 and changed its rule, holding in the Callahan and Hirzel cases that the beds of navigable waters belonged to the state. The Idaho court also, in the Hirzel case, adopted a broad test of navigability consistent with the federal test.

The Nebraska court adopted a rule of navigability in 1895 that was consistent with the federal test, although without indicating whether it realized the binding effect of that test. In the same

118. The test stated in Hirzel is broad enough (rivers are navigable in law which are navigable in fact) to be consistent with the federal test. However, some question about the meaning of the phrase is left open in Idaho because it was also used in the 1908 case of Johnson v. Johnson, 14 Idaho 561, 95 Pac. 499 (1908), where the general statement was simplified in such a way as to make clear that a "pleasure boat" test was intended. What the present Idaho court would do with this issue is therefore open to some question.
But the doctrine of the common law has not, as a rule, been accepted in this country, and has been entirely repudiated by the courts of the United States, in determining the jurisdiction of Congress over lakes and streams, whether situated in two or more states, or within the boundaries of a single state. In those courts, navigability in law is synonymous with navigability in fact, without regard to the influence of the ocean tide, and includes those waters only which afford a channel for useful commerce. The courts of this state will take notice of this fact, which is also established by abundant proof,—that the Republican is not a navigable river, within the foregoing definition.
year Montana adopted a broad test of navigability consistent with the federal case, saying it approved the rule that "is now established by the overwhelming weight of American authority that a stream navigable in fact is navigable in law."¹²⁰

In 1925 the Washington court changed its test of navigability to conform to the federal test, though again without explicit recognition of its controlling effect.¹²¹

The courts in Arizona, Missouri, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, Utah, and Wyoming did not speak on the issue of navigability for title, or on the controlling effect of the federal test, prior to 1926.

2. Post-1926 State Cases

The Brewer-Holt-Utah line of cases¹²² had a substantial impact on the later state decisions although surprisingly few of those state cases explicitly recognized the need for a choice between the state and federal tests of navigability. In view of the virtually unanimous opinion of the state courts prior to 1926 that the state test controlled, one might think that following 1926 many decisions would be found noting the error of these earlier cases, but this is not true.

The Minnesota and North Dakota courts are the only courts that expressly recognized the need to choose between the federal and state tests of navigability for title. Both courts accepted the federal test. The Minnesota court first addressed itself to the question in the decision of State v. Adams¹²³ where it said:

> Based upon decisions cited, the conclusion is inescapable that what Minnesota owned in its sovereign capacity as a state upon admission to the Union and what was retained by the United States as a part of the public domain clearly involves a Federal question. Whatever we

¹²⁰ Gibson v. Kelly, 15 Mont. 417, 39 Pac. 517, 519 (1895).
¹²¹ Proctor v. Sim, 134 Wash. 606, 236 Pac. 114, 116 (1925): Navigability is always a question of fact. Whether a body of water is navigable in the true sense of the word depends, among other things, upon its size, depth, location, and connection with, or proximity to, other navigable waters. It is not navigable simply because it is floatable for logs or other timber products or because there is sufficient depth of water to float a boat of commercial size. A lake which is chiefly valuable for fishing or for pleasure boats of small size is ordinarily not navigable. In order to be navigable, it must be capable of being used to a reasonable extent in the carrying on of commerce in the usual manner by water.

¹²² See text accompanying notes 33-35 supra.
¹²³ 251 Minn. 521, 89 N.W.2d 661 (1957), cert. denied, 358 U.S. 826 (1958).
may have assumed the law to be prior to United States v. Holt State Bank, . . . it is clear that since that decision the waters over which Minnesota may assert ownership as an incident of statehood due to their navigability must be determined under Federal law.\textsuperscript{124}

The North Dakota court similarly adopted the federal test of navigability after discussing the federal cases which declared its supremacy.\textsuperscript{125} Interestingly, this court failed to call attention to its own earlier decision applying an erroneous pleasure boat test.\textsuperscript{128}

The courts in four other states, Louisiana,\textsuperscript{127} Oklahoma,\textsuperscript{128} Oregon,\textsuperscript{129} and Washington\textsuperscript{130} all indicated that they were "conforming" to the federal rule, without explicitly noting that they were required to do so, or that their previous decisions were incorrect by that rule.

Other post-1926 courts in Missouri, Texas, Utah, and Wyoming appear even less aware of the controlling effect of the federal test, although they apply tests apparently consistent with it.\textsuperscript{131}

In the arid Southwest the courts of Arizona, Nevada, and New Mexico have not, as yet, discussed a test of navigability for title.

Only one state since 1926 has expressly applied a test different than the federal test. In 1937 the South Dakota court stated:

\begin{quote}
In the early history of the common law the rights of the public in navigable waters were confined to navigation. But the term navigable
\end{quote}

\textsuperscript{124} 89 N.W.2d at 686.\textsuperscript{125} Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488, 491 (1949): "On these facts, measured by the federal rule as to navigability it is certain that the lake was not navigable in fact at the time of the admission of the state into the union . . . ."
\textsuperscript{126} Roberts v. Taylor, 74 N.D. 146, 181 N.W. 622 (1921).\textsuperscript{127} State v. Sweet Lake Land & Oil Co., 164 La. 240, 113 So. 833, 836 (1927): The rule laid down by the Supreme Court of the United States is that streams and lakes which are navigable in fact are deemed navigable in law . . . . The same rule with regard to navigable waters of the state, as contradistinguished from the navigable waters of the United States, has been observed in the decisions of this court.
\textsuperscript{128} Aladdin Petroleum Corp. v. State, 200 Okla. 134, 191 P.2d 224 (1948).\textsuperscript{129} Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158, 1161 (1936): Clearly, under the federal test for the determination of the navigability of streams, this small inland lake, which is only one mile long and one-eighth mile wide, cannot be regarded as a navigable body of water in the sense that the title to the bed of the lake would pass to the state by virtue of its admission to the Union.
\textsuperscript{130} Smith v. State, 184 Wash. 58, 50 P.2d 32, 33 (1935): "We are satisfied in this respect with the holding in Snively v. State, . . . which approves, and is bottomed on, the en banc decision in Proctor v. Sim, . . . and which may be spoken of as the federal rule. We are not disposed to change or discredit that rule."
\textsuperscript{131} Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 22 (1954): "The rule adopted in this state to determine whether or not title to the bed of a river is vested in the riparian owners is the rule adopted in the Federal Courts."
has been extended and includes waters that are not navigable in the
ordinary sense. The court then applied what was essentially a "pleasure boat" test,
giving as its reason the "natural availability of waters for public
purposes taking into consideration the natural character and sur-
roundings of a lake or stream." The court relied on the policy
rationale that the beds should be kept public so that the public
would have a right of use for recreational purposes. There is no
mention of the United States Supreme Court decisions which hold
that the test for title is determined by federal law.

In summary, prior to 1926 the state courts, without exception,
believed that they were to determine the test of navigability for
title under their own state laws. Some of them adopted tests of
navigability consistent with the federal test, but only by coincidence.
Others adopted tests substantially different, not all of which have
been changed by subsequent state court decisions.

A number of discrepancies exist between the post-1926 cases and
the federal test set out in this Article.

South Dakota stands out as most conspicuously in error, as a
result of the 1937 decision in *Hillebrand v. Knapp.* There the
plaintiff riparian sought to enjoin the defendant from growing and
cutting hay on part of a dry lake bed in front of the plaintiff's prop-
erty, on the ground that the lake was nonnavigable and the plaintiff
therefore owned both the bed and the hay. The court held for the
defendant, ruling that the lake bed was owned by the state rather
than the plaintiff. The lake was normally dry about one-half of each
year; during the other one-half of each year it contained only two
or three feet of water, although for several years preceding the
lawsuit, because of a long dry spell, it had contained no water at
all. At no time had it ever been used for commerce, nor was it so
situated as to be susceptible of such use. Nonetheless, the South
Dakota court held the lake navigable for title, basing its decision
on the *Lamprey v. Metcalf* principle that the bed had to be state
owned for the public to have the right of use of the surface. The
court assumed it had jurisdiction to design its own test of navig-
ability for title and thus applied what was essentially a "pleasure
boat" test to find the lake navigable.

135. 52 Minn. 181, 53 N.W. 1139 (1893).
A Wyoming decision as late as 1961 also perpetuates an error of some of the earlier state cases in ruling that navigability for title is determined by state law. The court did not discuss the possibility that a federal test might control, and may simply have overlooked this issue. Furthermore, the test adopted appears broad enough to be consistent with the federal test and thus, unless the court applies it in some way inconsistent with the federal cases, the question is probably academic.

In Idaho and Texas the cases leave some doubt whether the courts in those states recognize the controlling effect of the federal test. Similarly in the 1936 Oregon case of Luscher v. Reynolds, although the court indicated at one point that navigability for title was to be determined “within the meaning of the federal cases,” the opinion reiterated a series of rules regarding ownership of stream beds from an earlier decision which were clearly at odds with the federal rule.

Lastly, Iowa poses a unique situation. The court there said in an early case that the title to all beds, whether the waters were navigable or not, was in the state. Clearly, as to the beds of non-navigable waters, this statement was in error because no grants of them to the state had ever been made. By 1909 the court saw the error of its earlier ruling and changed its position, recognizing that the state did not own the beds, and held that the federal government had never disposed of these submerged lands and thus still owned them.

If the state court applies a test of navigability inconsistent with the federal test, can it later change its mind? To put the question another way, who is bound by the decision? Res judicata would clearly bind the parties to the original suit. It would seem, however, that no positive rule of law would bind anyone else, although one could anticipate that a court might be reluctant to change such a rule (especially for the same body of water) if the change would upset numerous titles.

III
RIGHT OF USE

The cases on the public right of use of waters where the beds

are privately owned show a remarkable diversity of rule as well as theory. There are probably few areas of law in which similar problems have arisen in the several states where the courts have split so widely, or based their decisions on such diverse theories. Furthermore, there is often little, if any reference by the courts of one state to the decisions on similar issues in other states.

There appears to be almost complete uniformity regarding the right of public use on waters where the state owns the beds. In all the states surveyed, except Colorado, the courts have held that the public has a right to use these waters for fishing, commercial travel, recreation, and otherwise. The concern here will be only with the public right of use where the beds are privately owned. Thus, the smaller lakes and streams of the West are of primary concern.

This leads to the preliminary question of when a body of water is too small to be considered a lake, that is, when it is so small that it is no longer subject to the special body of rules called lake law, riparian rights, and the like. No cases have been found which directly hold that a particular body of water is so small that it is not a "lake." The question will, however, become increasingly important as more people seek bodies of water, both large and small, for recreation and homesites. The Minnesota court has given what seems to be a reasonable definition of the problem and a suggested criterion. In a 1960 case the court said:

It does not follow that the foregoing riparian-rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game, but which as a practical matter does not lend itself in any substantial degree to the customary propulsion of boats by outboard motors or cars. A minor body of water which by its nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the rule. No hard-and-fast line can be drawn and each case must be determined according to its own peculiar facts.

Probably the more difficult questions lie in a slightly different direction. If a body of water is large enough to be a lake, are all parts of it subject to the same set of rules about riparian rights, public rights, and the like? What about a very shallow portion of

141. Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1905).
142. Of course the qualification should be added that the public must be able to reach the water without trespass.
a lake, perhaps only a few inches deep, which has been developed by riparians and those who own the bed as a duck hunting preserve? Can the riparians and the public use such an area with impunity? Can a riparian build a fence across such a shallow portion? Can a riparian fill in part of the lake where the bed is owned by him? Must he obtain the consent of all other riparians prior to doing so? Can he do so even with that consent where the public is held to share the right of use? Only a few of these issues have been raised by the courts. More definitive answers must await new decisions.

Another perplexing area concerns artificially created lakes or streams. If the lake or stream is entirely artificial, it is probably owned or controlled by the owner of the subjacent land and is not subject to the common law rules discussed here. This may not be true, however, where the body of water is gradually accepted as part of the landscape, where lots are sold to riparians for homes, and where the public becomes accustomed to its use. The problem is complicated even more where a lake is created by damming a stream, or by artificially raising the water table. Few cases have been decided on such questions. There does not seem to be an easy answer in principle. Cases will have to be considered one at a time, giving regard to the multitude of factors that bear on the issue of a common right of use.

Lastly, it should be noted that some courts say riparian rights accrue to those who own the upland that borders on the water, and not to the owner of the bed. Only a few cases have raised this issue, one reason being that in most instances the upland and the bed are owned by the same person. Therefore, although some problems may arise in the future because of such split ownership, this Article will treat the ownerships in one person as the normal situation.

144. He can in Texas under the circumstances of Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935), where the court allowed the plaintiff riparian to literally fence the defendant riparian off the major portion of the lake surface, saying that the riparian bed owner “has right to control that part of the surface of the lake above his land, including the right to fish in or boat upon the water . . . .” This result is clearly contrary to the cases following Snively v. Jaber.


146. Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935).

147. For a good introduction to this subject, see Evans, Riparian Rights in Artificial Lakes and Streams, 16 Mo. L. Rev. 93 (1951).

148. See text accompanying note 25 supra.
A. Pre-1926 State Cases

The cases prior to 1926 tended to lump together both the issues of title to bed and right of public use. The courts were prone to say that if the state owned the bed of the water, that is, if it were navigable for title, then the public had a right of use; and conversely, if the beds were privately owned, the public had no such right of use. The notion of treating separately these two issues of title and right of use had not occurred, evidently, to either courts or counsel.

Probably the most widely cited case in this area of the law is the 1893 Minnesota decision in Lamprey v. Metcalf.\textsuperscript{149} There the Court adopted the "pleasure boat" test of navigability for title, giving as its reason:

The importance of the question, both to the public and to riparian owners, is apparent, when we consider that there are many thousand of such lakes in this state, which, although most of them may not be adapted for navigation, in its ordinary, commercial sense, have been, from earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc., and the further fact that observation teaches that the waters of many of these lakes are, from natural causes, slowly and imperceptibly receding, so that a part of what was then bed, when surveyed, has, or in time will, become dry land. The right of the public to use these lakes for the purposes referred to, as well as the right of the riparian owner to these relicted lands and . . . their right of access to the water, . . . is the question here.\textsuperscript{150}

Thus, the Minnesota court took the position that in order to give the public the right of use of lakes or streams, the title to the bed had to be in the state. The Arkansas court took the same position in 1890,\textsuperscript{151} as did Texas in 1917,\textsuperscript{152} and North Dakota in 1921.\textsuperscript{153}

The Supreme Court of Washington initially started in the same direction, holding in Griffith v. Holman,\textsuperscript{154} that the riparian bed-owner on a small stream had a right to fence off and keep a fisherman out of the portion of a stream flowing across his land. This

\textsuperscript{149} 52 Minn. 181, 53 N.W. 1139 (1893).
\textsuperscript{150} 53 N.W. at 1140.
\textsuperscript{151} St. Louis I.M. & S. Ry. v. Ramsey, 53 Ark. 314, 13 S.W. 931 (1890).
\textsuperscript{152} Welder v. State, 196 S.W. 868, 873 (Tex. Civ. App. 1917): "Behind all definitions of navigable waters lies the idea of public utility. Waters, which in their natural state are useful to the public for a considerable portion of the year are navigable."
\textsuperscript{153} Roberts v. Taylor, 47 N.D. 146, 181 N.W. 622 (1921).
\textsuperscript{154} 23 Wash. 347, 63 Pac. 239 (1900).
position was modified, however, a short time later when the court held that the public had an easement to float logs on such nonnavigable streams. The rule was further limited in a 1956 case recognizing a common right of use among riparians and their licensees on the surface of nonnavigable lakes. Still, however, the court did not overrule the Griffith rule concerning recreational use of streams.

Idaho early recognized the need to split the two issues of title and right of use, holding in a 1908 case that the public had an easement to use any and all streams of the state for log floating, even though the beds were privately owned. It should be noted, however, that this decision was based on the erroneous assumption that the beds of all lakes and streams, whether navigable or not, were privately owned. In later cases the Idaho court recognized that the beds of navigable waters belonged to the state, in which case there is no question of the public right of use.

B. Post-1926 State Cases

Even some decisions after the 1926 series still tied the two issues of title and right of use together, for example, the decisions in North Dakota, South Dakota, and Utah. In South Dakota the court in 1937 adopted the “pleasure boat” test for title, holding the same criteria applicable to the public right of use. In Utah the court in 1946 adopted a “federal” type of test for title while holding the same criteria applied to public right of use. In 1921 the North Dakota court adopted the “pleasure boat” test for title, at the same time tying the public right of use to the test, but later, in 1949, changed its title test to conform to the federal rule without mentioning that this might affect the criteria for determining the public right of use.

159. In the early history of the common law the rights of the public in navigable waters were confined to navigation. But the term 'navigable' has been extended and includes waters that are not navigable in the ordinary sense. Whether or not waters are navigable depends upon the natural availability of waters for public purposes taking into consideration the natural character and surroundings of a lake or stream.
In spite of the decisions in these three jurisdictions applying the same criteria to title and public right of use, the clear trend of cases since 1926 has been toward treating the issues separately. The trend has also been toward recognizing a public right of use even where the title to the bed is privately owned.

Nine states West of the Mississippi now recognize the right of public or non-owner use of waters where the bed is privately owned: California, Idaho, Minnesota, Missouri, New Mexico, Oregon, Washington, Wyoming, and Texas, although the last state can only be included on especially weak dicta. The decisions in all of these jurisdictions came after the Brewer-Holt-Utah series, although not necessarily as a direct result thereof. In each case, however, the decision which first separated the two issues was either one of first impression, or was one where, because of the announced paramountcy of the federal test of navigability for title, the court had to reevaluate its position. The decisions, therefore, represent much direct thought on the question.

The Minnesota and Oregon courts had to revise their positions as a result of the Brewer-Holt-Utah series. As noted earlier, Minnesota was the jurisdiction that originated the "pleasure boat" test for determining title to the beds of waters. It applied this test for many years without apparently having any occasion to examine its position. With the Brewer-Holt-Utah decisions, and especially because Holt State Bank involved a Minnesota lake, the court in 1932 changed its title test to conform to the federal rule. It did not, however, explicitly point out the error of its prior cases until 1958 in the case of State v. Adams.

State v. Adams left Minnesota in a rather awkward position. In earlier cases the court had announced a strong policy in favor of the public right of use of the state's lakes and streams. This policy

172. "[S]o long as these lakes are capable of use for boating, even for pleasure, they are navigable within the reason and spirit of the common-law rule." Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139, 1144 (1893).
174. 251 Minn. 521, 89 N.W.2d 661 (1957).
now appeared to be thwarted because if the right of public use followed title, and the beds of a considerable part of the state's waters were now, under the federal test, in private ownership, the public would have to be denied the use of these waters. Two years later the dilemma was resolved in favor of the public policy. In Johnson v. Seifert the Minnesota Supreme Court reversed itself and held that the right of public use was no longer based on public title but rather was founded on the common law of riparian rights:

It is not to be overlooked that the Federal test of navigability is designed for the narrow purpose of determining the ownership of lake beds, and for the additional purpose of identifying waters over which the Federal government is the paramount authority in the regulation of navigation. Whether waters are navigable has no material bearing on riparian rights since such rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore.

Because of the policy favoring public use of lakes and streams, the rights of riparians on these lakes and streams were subject to an easement in favor of the public for recreational and other purposes.

To a lesser extent the Oregon court also had to reexamine its position following the Brewer-Holt-Utah series. In the early case of Guilliams v. Beaver Lake Club, the court had originated a four-part test of navigability which no other court has ever followed:

[Streams and bodies of water are divided into several distinct classes: (1) Those in which the tide ebbs and flows, which are technically denominated navigable, in which class the sovereign is the owner of the soil constituting the bed of the stream, and all right to it belongs exclusively to the public. (2) Those which are navigable in fact for boats, vessels or lighters. In these the public has an easement for purposes of navigation and commerce, they being deemed public highways for such purpose, although the title to the soil constituting their bed remains in the adjacent owner, subject to the superior right of the public to use the water for purposes of transportation and trade. (3) The streams which are so small and shallow that they are not navigable for any purpose, the public has no right to whatever. (4) To this list may be added our larger rivers susceptible of a great volume of commerce where the title to the bed of the stream remains in the state for the benefit of the public.]

175. 257 Minn. 159, 100 N.W.2d 689 (1960).
176. 100 N.W.2d at 694.
177. 90 Ore. 13, 175 Pac. 437 (1918).
178. 175 Pac. at 439. (Emphasis added.)
Part two of the test appears to be a fair statement of the federal test for title; yet the Oregon court indicated that the beds of the waters in this category were privately owned. Later in the 1936 case of *Luscher v. Reynolds* the court had to, and did, recognize the controlling effect of the federal test and changed part (2) to mean that the beds of waters in this category were state owned. (Interestingly the court did not indicate in the opinion that it was making the change.) The court then went on to define the waters that were subject to the public right of use and adopted what is essentially the "pleasure boat" test for this purpose.

The cases in the other seven jurisdictions which recognize a public right of use were cases of first impression where the courts were not required to reverse or redefine prior holdings. Two other jurisdictions deserve special attention: Iowa and South Dakota. If all of the Western States are to be listed which, on one theory or another, allow public use of small lakes and streams (nonnavigable by the federal test), these two states must be included. As indicated earlier, South Dakota still adheres to the erroneous "pleasure boat" test for determining title to beds, holding that the state owns the beds of virtually all streams and lakes in the state. It further holds that the public has the right of use on all streams and lakes where the beds are state owned, which again is all usable water of the state. Conceivably the court may one day correct its rule concerning title to conform to the federal test. If it does so, it will undoubtedly have to reexamine its rule about public use.

Iowa similarly must be included among the states that permit the public to use its small lakes and streams. Its approach, however, is to declare that the title to the beds of these nonnavigable waters never passed out of federal ownership, and that as long as the beds are federally owned the public has a right to use the water, at least until the federal government complains. Thus, the public in this state, too, is assured of a right to use virtually all lakes and streams.

179. 153 Ore. 625, 56 P.2d 1158 (1936).
180. While we have held that Blue Lake is not a navigable body of water in the sense that title to the bed thereof would pass to the state upon admission to the Union, it is navigable in a qualified or limited sense . . . . There are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptance of such terms . . . . Regardless of the ownership of the bed, the public has the paramount right to the use of the waters of the lake for the purpose of transportation and commerce.
56 P.2d at 1162.
181. See text accompanying note 159 supra.
C. **Bases for Common or Public Right of Use**

There are three theoretical bases for decisions giving the public a right of use on waters over privately owned beds.\(^{182}\)

The most widely used theory is simply the common law as applied to the law of riparian rights. It is to repeat the obvious to state that riparian rights vary from time to time and from place to place, depending on social, economic, and political needs of society as viewed by its judiciary. The courts in this first group of states believe that society’s needs require the recognition of a public right of use, essentially for recreation, although some of the early cases also took in log floating, even where the beds of the waters were privately owned. These courts define riparian rights so as to deny riparians the right to exclude others from the use of the water. One of the courts in this group neatly parried an argument to the contrary by inquiring: “What practical value would the vested rights to boat, swim, fish and bathe, have to any riparian owner if such rights were restricted to his fenced-in pie-shaped portion of the lake”?\(^{183}\)

California,\(^{184}\) Idaho,\(^{185}\) Minnesota,\(^{186}\) Oregon,\(^{187}\) Texas,\(^{188}\) and Washington\(^{189}\) fall into this first category. The statements of the courts in Washington\(^{190}\) and Minnesota are articulate expressions of this policy. The Minnesota court has said:

> Illogical as the rule may be, it must be conceded that a few states have taken the position that ownership of the bed of a nonnavigable or private lake carries with it complete and exclusive control and ownership of the overlying waters, but for the most part these states have few lakes or rivers of any value either to the public or to the riparian owners. Significantly, however, states which like Minnesota have extensive waters of recreational or commercial value hold that an abutting or riparian owner has a right of reasonable use of the entire overlying water, and no distinction is made between navigable and

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182. The term "public" is here used generically to denominate all users other than the riparian owner of the immediately underlying bed. So used, the term encompasses, in varying degrees, non-owners, adjacent riparians, and their licensees.


190. 296 P.2d at 1019.
In both of these states the courts have adopted a slightly more restricted rule concerning public right of use than in the other four jurisdictions. In each the courts limit the right of use to the riparians on the same body of water and their licensees, rather than holding that it is available to any member of the public.

In the Washington case the precise issue was whether licensees (in fact, business invitees of a resort) could use a small lake in common with other riparian owners. The court held that they could, subject to the limitation that this use must not unreasonably interfere with the exercise of similar rights by the others; the court imposed injunctive restraints on the defendant resort operator. In the principal Minnesota case the question arose between two riparians, and the court was not called upon to comment on possible rights of licensees of riparians or the public in general. In a later Minnesota case, however, the court indicated that the right of use was available to licensees of riparians as well.

An early Idaho case predicated a public easement for streams on the need for floating logs downstream to markets and mills. Nothing was said, either then or in any later Idaho case, about extending such a right to lakes, nor of taking in recreational activities. An early Washington case similarly used log floating as a basis of public easement on nonnavigable streams, although stressing the fact that the activity was expressly authorized by statute.

It should be recognized that more frequently than not there are no clear boundary lines on a submerged lake bed, and as a rule the location of the boundaries is of no concern to the riparian owners. At least one court, however, has faced the novel argument that a common right of surface use should apply only when the bed

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194. It is clear from Johnson v. Seifert supra that any privileges enjoyed incidental to riparian rights are almost universally held to be in common with other abutting owners and that includes the public where the public is involved through a town or village as a riparian owner representing the public.
is unsurveyed. The court held that the precise ownership of the bed had no bearing on the right of use of the surface.

The other two theories that serve as a basis for public or non-owner right of use where the title to the bed is privately owned are both historically oriented. Although they are similar they will be treated individually here.

In a 1954 Missouri decision the court said that the public right of use of nonnavigable waters was based on pre-statehood statutes providing for the government of the Missouri Territory, on the enabling act by which authority was granted for the Territory to become a state, and on the state constitution. All of these have similar provisions. For example, the act of Congress providing for government of the Missouri Territory is typical and it provides:

The Mississippi and Missouri Rivers, and the navigable waters flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of the said territory and to the citizens of the United States, without any tax, duty, or impost therefor.

Based on these laws the court held that,

Any title which appellant may have acquired to the bed of the river was necessarily subject to the applicable law in force at the time, and such applicable law may not be disregarded in determining whether the Meramec River is in fact a public highway and open for public travel by boat and wading.

Following this line of thought, the court held that the public right of use extended not only to the surface, but also extended to the use of the bed for wading, and the shores for necessary portages. This reasoning might logically be extended to any lake inter-connecting with the Mississippi or Missouri systems, but any wider application could be questioned.

While Missouri appears to be the only jurisdiction to have used this theory for its decisions on public right of use, several other states have taken a similar historically oriented approach. These are classed in the third category presented below.

New Mexico and Wyoming take the position that the

199. 2 Stat. 743 (1912).
declaration in their constitutions that all waters are the property of the state requires the court to hold that the public has a right to use these waters for recreation, as well as for commercial navigation. (Colorado specifically rejected this same argument, holding that the constitutional provision applied only to consumptive water uses.) The language of the court in the Wyoming case of *Day v. Armstrong* is illustrative:

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

These uses include pleasure boating and permit the incidental touching or scraping of the bottom, or even wading on the bottom to free a snagged boat, and apply whether or not the bed is privately owned. They do not include wading generally, such as for fishing or portages, and thus these courts refuse to go as far as did the Missouri court in *Elder v. Delcour.*

### D. Denial of Public Use Where Beds Are Privately Owned

Of the Western jurisdictions that have spoken on the question of the public right of use of waters where the beds are privately owned, Arkansas, Colorado, Montana, and Utah have not been considered. Texas must also be mentioned again. In these states the most recent cases tend to favor denying a public right of use. The weight of the group is weakened, however, by the facts that (1) two of them, Arkansas and Colorado, were decided prior to 1910, and (2) the Texas decision denying a public right of use applies only in a very limited situation, that is, to lakes where the beds have been explicitly granted to the riparians by the state, and is not applicable where the riparians received title to the beds by implication along with the grant of uplands.

The other two jurisdictions, Montana and Utah, are placed in

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205. *364 Mo. 835*, 269 S.W.2d 17 (1954).
this group on the basis of decisions in 1925 and 1946 respectively. The Montana case is a firm holding against a public right of use. The Utah case of *Monroe v. State* was concerned only with title to the bed of a nonnavigable lake and can be included in this group only on the basis of weak dicta. No issue of a public right of use was involved; the only mention of it was by way of an extensive quotation from *Harrison v. Fite*, the 1906 federal case arising in Arkansas.

### E. The Common Right of Use

The nature and extent of the common right of use in those states which recognize it will be examined by dividing the topic into two sections in which the rights and limitations of the lake users will be considered, be they riparians, licensees, or members of the general public.

1. What Can the Users Do in Exercise of the Common Right?

Only a few cases have specifically discussed the precise nature of the rights of the users who share with the riparian owner the common right of surface use. These cases can be conveniently classified according to the theoretical bases on which they rest.

As indicated earlier, California, Idaho, Minnesota, Oregon, Texas, and Washington base their common use concept on the common law of riparian rights. The Minnesota court has defined what these users can do:

\[
\text{[A]n abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other domestic or recreational uses, to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface . . .}^{212}
\]

The California court spelled out these rights somewhat more specifically in quoting with approval from another case, noting that the right of use for navigation included “incidental use of the bottom,” such as walking on the bottom while bathing, casting an anchor from a boat in fishing, propelling a duck boat by poling against the bottom, and walking on the ice if the river is frozen.\(^{213}\)

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211. 148 Fed. 781 (8th Cir. 1906).
Statements by the courts in Oregon, Texas, and Washington, while not so detailed as those above, are consistent with them. There appears to be no reason to believe these courts would define the rights differently.

Missouri bases its common use concept on certain federal statutes and the state constitutional provision noted previously. The Missouri court held that fishermen and others cannot only boat and wade in the waters flowing over private land, but can also portage along the shore around log jams and other obstacles. The right of portage has not been recognized in any other state and has been expressly denied in at least one.

New Mexico and Wyoming base their common use concepts on constitutional declarations that all waters belong to the state, that the state has an easement over private land for the flow of these waters, and that therefore the Wyoming court has said that these waters may be used to float craft, and

as a necessary incident to that use, the bed or channel of the waters may be unavoidably scraped or touched by the grounding of the craft. Even a right to disembark and pull, push or carry over shoals, riffles and rapids accompanies this right of flotation as a necessary incident to the full enjoyment of the public's easement. . . . On the other hand, where the use of the bed or channel is more than incidental to the right of floating use of the waters, and the primary use is of the bed or channel rather than the floating use of the waters, such wading or walking is a trespass . . . . Such trespass cannot be made lawful either by legislative or judicial action.

The Wyoming court expressly refused to go as far as the Missouri court, saying: “We are not inclined to go as far as the Missouri court when it permitted wading or walking upon the bed or channel of the river or use of its banks for recreation.” Thus, in Wyoming the public cannot wade in a stream for fishing. They are privileged to touch bottom only incidentally in connection with their right of floating on the surface.

The New Mexico court has only made general statements about the right of “fishing” and “navigation” of the public in waters

215. 269 S.W.2d at 23.
218. 362 P.2d at 146.
flowing over private land. No analysis of the extent of these rights has been found.

In all three groups of states above, the non-owners have the right to fish, swim, and boat in waters where the beds and shores are privately owned, assuming they can reach the water without trespassing. Beyond this generalization there appear to be three positions: (1) those states which allow only navigation and incidental touching of the bottoms in connection therewith, (2) those states which also permit wading when done in connection with fishing and swimming, and (3) the single state which also permits portaging on the shore around obstacles.

2. Limitations on the Common Right of Use

First, it should be pointed out that with the ever increasing pressure of fishermen and recreationists on the small lakes in the Western States, it is apparent that for their own protection and the protection of the riparians, some restraints must be placed on the common right of use of these waters. Two general approaches to this problem offer practical solutions: (1) governmental restraints through zoning, traffic laws, and similar regulations; and (2) common law restraints judicially imposed through the law of trespass, riparian rights, and nuisance. A third possibility, voluntary agreements between the users of the lakes, seems impracticable in view of the large and constantly changing number of people who use the lakes.

The writings of Professor Waite, analyzing the theoretical bases for governmental restraints on lake use, were presented earlier. Some of these restraints are now being applied, especially to those lakes that lie within or very near to metropolitan areas. Speed zones, restrictions on waterskiing, and other limitations can now be found on a number of these lakes. However, few lakes lie inside or near enough to municipalities that they have received such regulation. Historically neither county nor state governments have accepted responsibility for regulating their use. Whether and how fast they might do so in the future remains to be seen. In the meantime the common law provides the principal alternative.

a. Limitations as to Persons

The right of common use is limited as to persons. In those jurisdictions, such as Washington and Minnesota, which say that

220. See text accompanying notes 10-11 supra.
the common right of use extends only to riparians and their licensees, any person who gains access by trespass presumably could be enjoined because by definition they would not be riparians or licensees. However, in those states where the public in general shares this common right of use the answers are not so easy. It is clear that a member of the public is not entitled to trespass to gain access to a body of water.\textsuperscript{221} Nor is it any excuse that there is no other means of access to the water. However, no case is known where a riparian other than the owner of the land to which the trespass occurs has tried to enjoin the use of a lake on the grounds that access was gained by trespass. A pragmatic analysis of the Washington-Minnesota rule that limits lake use to riparians and their licensees suggests that this rule may not be so different from the “public right of use” rule. For the most part, the public who gain access to any lake will be licensee of some riparian. There are, of course, some persons who might gain access to a lake who would not necessarily be licensees; these would include (1) those who trespass over riparian land to gain access; (2) those who fly into the lake;\textsuperscript{222} and (3) those who gain access via riparian land on a connecting river or stream. Obviously groups (1) and (3) will be larger or smaller depending on how strictly one defines the terms “riparian” and “licensee.”

In Washington and Minnesota it is nonetheless important to know who are licensees and who are riparians. It is the physical relationship of the land to the water that gives rise to the riparian right, and it would seem that only those who hold possession or the right to possession of land should be able to exercise riparian rights. Under this reasoning riparian rights would accrue to lessees, life tenants, and adverse possessors, but possibly not to easement holders who have no possessory rights in the land. Thus, if the state held a public access road by easement, the public might be denied its use because the state would not be a riparian. Obviously the nature of the property interest held by the state would be vital,


\textsuperscript{222} See State Game & Fish Comm’n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9, 11 (1940), where after holding that there was no private ownership in the water, the court said:

Where . . . there are several riparian owners of an inland lake, each owner, their licensees, and every other inhabitant who can gain access thereto without trespass, may use the surface of the whole lake for boating and fishing so far and so long as they do not interfere with the reasonable use by others similarly entitled to that right.
and this question might well turn on the construction of the instrument, either court decree or grant, creating the interest. If the acknowledged purpose of the interest were to create a right of way through which the public could gain access to the water, the court might find the interest to be a fee on a limitation or some similar possessory interest, rather than an easement; some courts have also held that riparian rights go with easements where the easement was intended to convey such rights, or where it really included the exclusive control over the riparian area in question.223

Pursuing further the question of who is a licensee, in the Washington case of Snively v. Jäber both business invitees and social guests were included.224 Under the standard definition of licensee, anyone who comes on a lake by permission of a riparian owner would also be included. Such a broad definition easily includes members of the public who gain access to the lake through a state park or public access road. On the other hand, if a member of the public, acting without the consent of the state, gained access to a lake from the edge of a public highway which happened to touch on a lake, he might not hold the status of licensee. Presumably he would become a licensee only if the state extended permission through appropriate regulations, installation of signs, or the like.

b. Limitations on Conduct

The common law provides three principal causes of action for controlling the conduct of persons who use lake or stream surfaces: trespass, nuisance, and the concept designated simply as "riparian rights." Needless to say, the three overlap to some extent.

Trespass can be used to prohibit the use of a lake or stream by those who have no legal right to its use, that is, who do not share the common right of surface use. It can also be used to keep within legal bounds the conduct of those who, although legally entitled to use the lake or stream surface, exceed their rights. For example, in Wyoming225 (although not in other states) trespass is used to prohibit wading in a nonnavigable river or lake for fishing. It could be used in all states except Missouri to prohibit portaging, which re-

223. See note 24 supra. Cf. In re Judicial Ditch Proceeding No. 15, 140 Minn. 233, 167 N.W. 1042 (1918), where the court held a city was riparian where it had platted streets down to the meander line, even though it did not own the fee. The court concluded that it made a difference as to the type of easement in question. An easement owned by a city, county, or state for road purposes, or by a railroad for track bed purposes, is closely akin to a fee on a special limitation.
224. 48 Wash. 2d 815, 296 P.2d 1015, 1019 (1956).
quires walking over or along the banks. And it could be used in any Western State to prohibit construction of docks, dikes, or other permanent installations on the beds.

A more difficult question concerns the temporary use of lake or stream beds. Apparently the placing of an anchor to hold a boat for a short time is not a trespass, although permanently anchoring a boat, dock, or buoy is actionable in all states. Just when the placing of an anchor, foot, or other object on the bed is a trespass depends upon the intention of the actor; that is, is he acting in aid of navigation or is he acting with some other intent not within the scope of the shared right.

Obviously many of these questions will be difficult to decide, and the answers will depend upon the evidence adduced in each case. The difficulties, however, will probably be no greater than those raised by privilege, consent, and the like in the field of trespass, which the courts are accustomed to handling.

Nuisance and “riparian rights” are two other theories that may also be used to control the conduct of persons entitled to use the surface of lakes and streams. To date the few decisions that speak on this issue have not (with one exception) clearly identified whether they are talking the language of nuisance or of “riparian rights.” The general statements found are appropriate to both theories.

The only case actually applying one of these theories is the Washington decision of Snively v. Jaber, and it was based on nuisance. Certainly nuisance is an appropriate theory for use here. Over the years it has shown a remarkable adaptability to changing circumstances. Nonetheless, for this purpose it would seem to have some definite limitations. For example, it is quite possible that the courts would be reluctant to apply it unless the harm complained of was quite serious, possibly more serious than would be the case in most lake use conflicts. Also, the harm involved in such conflicts often affects only, or primarily, recreational interests, and

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228. 48 Wash. 2d 815, 296 P.2d 1015 (1956).
229. "Both public and private nuisances require some substantial interference with the interest involved." Prosser, Torts § 87, at 598 (3d ed. 1964). (Emphasis added.) As to the meaning of the term "nuisance," Dean Prosser comments that, "Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem . . . ." Id. § 87, at 592.
the nuisance theory has not often been used to protect these interests. It is suggested that the nuisance theory may not be as sensitive an instrument as might be desired for handling many lake and stream use problems. A more refined instrument might be found in the "riparian rights" theory.

The riparian rights theory has not been used to limit the recreational use of any lakes in the West. It has, of course, been used many times to restrain the use of waters for irrigation, waste disposal, and the like, where the activity has caused injury to another riparian. A considerable body of jurisprudence has been built up around the rights of riparians to enjoin the activities of other riparians or members of the public where the other's use of the water was "unreasonable." Thus, although each riparian has a right to use the water, his right is relative only, and must be reasonable in relation to the rights of others.

This body of riparian rights law, embodying the principle of reasonable use, could easily be applied to lake and stream surface cases. Although riparians, licensees, or members of the public might have a right to use a lake or stream surface, that right would only be relative to the rights of others sharing the same body of water. The reasonableness of the use would depend upon the size of the body of water, the depth, the use of the shores, other uses of the waters, and the like.

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

On smaller lakes and streams where the number of riparian owners is high in proportion to the size of the body of water, "reasonableness" may require that only the riparians and their personal guests use the surface; no commercial resorts would be allowed and no public access roads permitted.

On other bodies of water the public might be allowed entry through resorts, or public access roads, but the number might be sub-
ject to limitation, depending on size, number of riparians, and the like.

Where the public is permitted access, either through resorts or public access roads, such use might be limited or even terminated where the conduct of the public becomes unreasonable. Conceivably the riparians might be thought of as having a "right" of use, whereas the public might be thought of as having only a "privilege," available so long as conduct was reasonable. One of the conditions imposed on the operator of a resort, or a public access road, might be control over the members of the public entering the lake through such points of access.

CONCLUSION

In conclusion it should be observed that despite the substantial number of lake and stream cases decided to date, most of which have been touched on or reviewed here, the field is sufficiently new that most of its development lies in the future. The demands on the smaller lakes and streams of the West are increasing with continued expansion of population and recreation, and the number of conflicts over the use of these lakes and streams will undoubtedly increase proportionately. Much thought needs to be given to the questions posed by these conflicts.

It is suggested that although this Article has attempted to survey and analyze the key cases of this large field, there are several important questions on which this writing can only serve as an entree to further research. For example, more research is needed on the individual problems of different states concerning the use of lakes and streams, and particularly on how best to control excessive or abusive use of these bodies of water. Further research is also needed on the complex maze of federal-state relations, looking at such questions as "which rule controls when" and in general on how the two systems might most efficiently work together.
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* The criteria used to exclude a decision from the table is based on the opinion of the editorial board of the *Federal Register*.