Access and Wharfage Rights and the Territorial Extent of Indian Reservation Bordering on Navigable Water - Who Owns the Bed of Flathead Lake?

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ACCESS AND WHARFAGE RIGHTS AND THE TERRITORIAL EXTENT OF INDIAN RESERVATION BORDERING ON NAVIGABLE WATER—WHO OWNS THE BED OF FLATHEAD LAKE?

The area around beautiful Flathead Lake in northwestern Montana is rapidly becoming one of the favorite summer resort and recreation areas of the entire Rocky Mountain West. Real property values in the vicinity of the lake have risen rapidly in recent years with lake shore property being particularly valuable. Because the southern half of the lake lies within the external boundaries of the Flathead Indian Reservation and because of a 1942 decision from the Court of Appeals for the Ninth Circuit, Rochester v. Montana Power Co., a unique question exists as to a possible conflict between the rights of riparian owners on the lake and the tribal rights of the confederated Indian tribes who occupy the reservation.

ORIGINS OF THE PROBLEM

Opening of Flathead Reservation to Settlement

The Flathead Indian Reservation was created by the Hell Gate Treaty with the confederated tribes of the Flathead, Kootenay and Upper Pend d'Oreilles Indians on July 16, 1855. By this treaty the

1 Flathead Lake is the second largest natural fresh water lake west of the Mississippi River. MONTANA STATE UNIVERSITY, THE MONTANA ALMANAC 355 (1958).

2 Shoreline properties on Flathead Lake are currently selling at an average of $50 to $100 per frontage foot, with some well developed sites being considerably more expensive. Interview with realtor W. D. (Bill) Lee, in Missoula, Mont., May 11, 1965.

3 The area of the Flathead Reservation is described in the Hell Gate Treaty, July 16, 1855, 12 Stat. 976 (Proclaimed April 18, 1859) as follows:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

The description of the reservation does not specifically refer to the lake, but a plotting of the boundaries clearly shows the lake to be bisected by the reservation's northern boundary. Montana Power Co. v. Rochester, 127 F.2d 189, 190 n.3 (9th Cir. 1942).

4 Ibid.

5 By the traditional meaning, "riparian" ownership refers to ownership of lands bordering on streams or rivers, whereas ownership of lands bounding on lakes or ponds is "littoral" ownership. Mettler v. Ames Realty Co., 61 Mont. 152, 159, 201 Pac. 702, (1921). However, this distinction seems to have fallen into some disuse and "riparian" is presently utilized by many courts and writers to describe land bordering on both lakes and streams. See Gould, Waters § 148 (3d ed. 1900); 1 Farnham, Waters and Water Rights § 62 (1904); and 1 Weil, Water Rights in the Western States, §§ 726, 728 (3d ed. 1911).

6 12 Stat. 975 (1859). The treaty did not actually become effective until almost four years after it was signed. It was ratified by the Senate on March 8, 1859, and proclaimed by the President on April 18, 1859.
confederated tribes ceded all "their right, title, and interest in and to the country occupied or claimed by them" in a large part of the Washington Territory. In return for this cession the government reserved "for the use and occupation of said confederated tribes" the general reservation.

From the time of removal of the tribes to the reservation until the early part of the twentieth century the reservation lands were occupied exclusively by the confederated tribes. Then, in 1909, following congressional action, portions of the reservation were for the first time opened to non-Indian settlers. The legislation under which the reservation was opened provided for the survey of all the lands within the reservation boundaries and for individual allotments to all eligible persons having tribal rights in the confederated tribes. The remaining lands were to be classified and appraised and opened to settlement by non-Indians. Subsequent special legislation authorized the Secretary of the Interior to subdivide into lots of not less than two or more than five acres and sell all the unallotted lands fronting on the lake. As a result of this division and opening of the reservation, substantially all the land of the reservation has come into the hands of individual owners.

7This area includes substantially all of the state of Montana west of the continental divide. 12 Stat. 975 (1859).
812 Stat. 975 (1859).
9See note 3 supra for the treaty description of the reservation boundaries. The original reservation was approximately sixty miles long and forty miles wide and contained about 1,425,000 acres. MONT. PRESS BUREAU, supra note 1, at 4.
10Except for employees of the Indian department, white men were forbidden to reside on the reservation. 12 Stat. 975, 976 (1859).
11Act of April 23, 1904, 33 Stat. 302. The land was opened by Presidential Proclamation on May 22, 1909.
12This opening of the reservation lands to individual settlement was a part of the government's policy, culminating in the General Allotment Act, 24 Stat. 398 (1887), to persuade the Indian to give up his nomadic way of life and adopt the habits of civilized life. The General Allotment Act, supra gave the President authority to order allotment of all reservations in severalty to individual Indians "whenever in his opinion any reservation or any part thereof is advantageous for agricultural and grazing purposes . . . ." In essence the allotment system provided for: (1) allotment of tribal lands to individual Indians, normally under trust patents which restricted the allottees' ability to alienate the property; (2) termination of the restrictions on alienability after a fixed term of years; (3) termination of the alienability restrictions by administrative action prior to the expiration of the specified period; and (4) alienation of allotted lands prior to the expiration of the specified period. DEP'T. OF THE SOLICITOR, U.S. DEP'T. OF INTERIOR, FEDERAL INDIAN LAW 777 (1958). [Hereinafter cited as FEDERAL INDIAN LAW]. See FEDERAL INDIAN LAW 773-818 for a general survey of the allotment system and its operation. The allotment system is no longer a viable part of American Indian law, having been substantially abolished by the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 461 (1958).
13See text infra at 27 for discussion of the significance of all reservation lands being surveyed.
14The Presidential Proclamation of May 22, 1909, 36 Stat. 294, provided that "all the non-mineral unreserved lands classified as agricultural lands of the first class, agricultural lands of the second class and grazing lands within the Flathead Indian Reservation" were to be made available to non-Indian settlers. By the terms of the Act of April 23, 1904, 33 Stat. 302 timber lands had been specifically excepted from the disposal provisions.
15Act of April 12, 1910, 36 Stat. 296. Under this act timber lands bordering on the lake were not excepted but were to be sold along with lands of other classifications.
The Rochester Decision

Montana Power Co. v. Rochester involved the titles to two tracts of land located within the reservation. One title had been derived from an individual allotment to an Indian grantee; the other stemmed from a federal patent issued on a tract of the unallotted lands. Plaintiff, owner of an island in the lake which had been part of the unallotted lands, brought an action against the power company for damages resulting from the flooding of an easement. Plaintiff's island, prior to the construction of Kerr Dam, had been joined to the shore by a narrow isthmus, which was above the low water mark of the lake for several months each year. Plaintiff purchased an easement across this isthmus from the owner of the shoreline lot upon which it terminated. The grantor's chain of title commenced with a patent to an Indian allottee. With the construction of Kerr Dam the normal low water level of the lake was raised and the isthmus at all times remained under water. Plaintiff sued because of this flooding. The Ninth Circuit determined that no easement could have been conveyed to plaintiff since the original patent of the shoreline lot had granted title only to high water mark. Title to the bed of the lake within the boundaries of the reservation remained in the United States in trust for the confederated tribes.

Thus the Rochester case, by means of a law suit to which neither the confederated tribes nor the riparian owners on the lake were parties, determined issues materially affecting the rights of both. The balance of this paper will attempt to analyze two of the important issues raised by the decision: (1) the propriety of the court's determination that title to the lake bed below high water mark was held in trust by the United States for the confederated tribes, and (2) the effect of the decision upon access and wharfage rights of the riparian owners.

TITLE TO BEDS OF NAVIGABLE LAKES

English Common Law

The English common law rules governing title to navigable waters...
and their beds had their beginnings in the Roman law.\textsuperscript{23} By the seventeenth century it was fairly well established that the Crown held full proprietary rights and interests in the navigable waters of England and the colonies to a distance of three miles from the shoreline. These rights held by the Crown were of a dual nature. They consisted of the \textit{jus publicum} or “the right of jurisdiction and control [of the waters] for the benefit of [the King's] subjects,”\textsuperscript{24} and the \textit{jus privatum} or the proprietary right to the bed of the waterway.\textsuperscript{25} The \textit{jus privatum} was subject to conveyance by the King, but any land so conveyed remained subject to the rights of the public since the King could not convey the \textit{jus publicum}.\textsuperscript{26}

\textbf{American law}

The concept of the King's dual interests in navigable waters was the accepted rule in the American colonies at the time of the revolution.\textsuperscript{27} With the Declaration of Independence and the dissolution of ties with England the people of the individual colonies assumed the role of the sovereign and held absolute title and control of the navigable waters within their boundaries. The subsequent formation of the federal union and ratification of the Constitution by the individual states did not effect a grant of the lands beneath navigable waters to the central government.\textsuperscript{28} Instead, each state continued to hold title subject to the paramount right of Congress to regulate commerce.\textsuperscript{29} Of course the United States maintained complete control over the territorial lands held by the central government. The submerged lands below navigable waters within the territories were deemed to be held in trust for future states. As new states were carved from the territories and admitted into the union they acquired the same rights of sovereignty and jurisdiction over the submerged lands as had been exercised by the original thirteen states.\textsuperscript{30}

\begin{itemize}
\item See \textit{Gould}, op. cit. supra note 5, §§ 1-29 and \textit{Farnham}, op. cit. supra note 5, §§ 36-40 for excellent background material on development of the English position.
\item \textit{Gould}, op. cit. supra note 5, § 17.
\item \textit{Ibid.} See also \textit{Shively v. Bowlby}, 152 U.S. 1, 12-13 (1894).
\item Under the English common law the only rights held in trust for the public under the \textit{jus publicum} were navigation and fishery. \textit{1 Farnham}, op. cit. supra note 5, § 36. \textit{Gould}, op. cit. supra note 5, § 17.
\item The Supreme Court has adopted a different rule for submerged lands below non-navigable waters. Title to the beds of non-navigable waters did not pass to the state upon its entry into the union. Rather, this land remained a part of the public domain with title in the United States in its proprietary capacity. United States v. \textit{Utah}, 283 U.S. 64, 75 (1931), United States v. \textit{Oregon}, 295 U.S. 1, 14 (1935). In the capacity of a private owner the United States is subject to the general law of the state, so far as its conveyances are concerned, and if, under state law, riparian owners held to the thread of the stream, a grant from the United States of lands bounding on the stream would carry with it title to the center. See \textit{Hardin v. Jordan}, 140 U.S. 371, 384 (1891) and \textit{Hardin v. Shedd}, 190 U.S. 508, 519 (1903).
\end{itemize}
The title which the states acquired in the submerged lands below navigable waters is subject to one other important limitation in addition to the power of Congress to regulate commerce. Although supported largely by dictum, it has been accepted by the Supreme Court that: “The United States while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soils below highwater mark of [navigable] waters.”31 Congress has never adopted this approach as a general policy and only in instances where there is shown to be some international duty or public exigency in making such a grant will the doctrine be invoked.32

Thus, as a general rule once a state is admitted to the union the federal government holds no interest in the submerged lands beneath navigable waters of the state beyond the limitations of regulation of commerce and the doctrine of prior grants. A riparian grantee acquiring title from the United States would therefore secure, by virtue of such grant, no title below high water mark.33 This however, does not fully answer the question of what is the nature of the states’ interests. Nor does it determine what interest, if any, passes from the state to the riparian grantee of lands adjacent to navigable waters.

It is well settled that whatever interests the riparian owner possesses in submerged lands below highwater mark is solely a question of local law of the state in which the land is located.34 Moreover, because of a basic misinterpretation of the common law principles governing the Crown’s interests in navigable waters of the colonies prior to the revolution,35 laid down in the early Supreme Court case of Martin v. Waddell,36 a conflict of authority has developed among the states on the nature of the states’ interests in their navigable waters.

In the Waddell case the Court speaking through Mr. Chief Justice Taney, failed to distinguish between the Crown’s right of title in the soils under water, the jus privatum, and the rights of the public, the jus publicum. In so doing, the Court adopted a position that the only interest involved in a grant of fishing rights from the King, in navigable tide waters of what is now the state of New Jersey, was the jus publicum. The Court went on to state that title to the soil remained in “the king in his public and regal character as the representative of the nation and in trust for them.”37 This statement of the Court was clearly er-
ronous since it was the accepted common law rule that the Crown did have the power to alienate lands below navigable waters subject to the rights of the public. 38

As a result of the confusion created by the Waddell case some states have developed what is known as the “trust” doctrine governing title to lands below navigable waters. These states hold that the state cannot alienate the submerged lands, but must hold title in trust for the interests of the public. The riparian owner can take no title to the soil below high water mark. 39 Other states, on the theory that since the state is proprietor of the lands within its boundaries, follow the common law rule that the state has the power to grant submerged lands to private owners. 40

Montana, by both statute 41 and case law 42 has accepted the view that the owner of lands bordering on navigable waters takes title to low water mark. Thus, the riparian owners on Flathead Lake now hold title to low water mark if the submerged lands ever became vested in the state in its proprietary capacity. Any acquisition of title by the state would depend upon whether title to the land in question had ever passed to the confederated tribes, and if it had so passed whether at some later date the United States in its capacity as trustee for the tribes extinguished that title.

INTERESTS OF THE INDIANS IN FLATHEAD LAKE BEDS

As previously noted, the Rochester decision ruled that state law was not applicable to the lands below high water mark. Since the south half of Flathead Lake was within the boundaries of the reservation, the Ninth Circuit determined that there could be no question of the government’s intent to hold the submerged lands of the lake, as well as uplands, in trust for the tribes. The court reasoned that because the United States had held title to the submerged lands as trustee for the Indians at the time Montana entered the union, Montana gained no title at that time. Furthermore, the court ruled that there had been no subsequent relinquishment of the United States’ trust title after Montana gained statehood.

The circuit court relied upon two principal factors in determining

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81 KINNEY, IRRIGATION AND WATER RIGHTS, § 325 (2d ed. 1912).


39 See e.g., Rome Ry. & Light Co. v. Loeb, 141 Ga. 202, 80 S.E. 785 (1914); City of Covington v. State Tax Comm’n, 231 Ky. 606, 21 S.W.2d 1010 (1929); Kinkead v. Turgeon, 74 Neb. 580, 109 N.W. 744 (1906).

40 REvised Codes of uNtApa, 1947, § 67-712 provides:

Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

(Hereinafter Revised Codes of Montana are cited R.C.M.)

41 Faucett v. Dewey Lumber Co., 88 Mont. 250, 258, 266 Pac. 646 (1928).

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that title to the submerged lands remained in the Indians after the division and allotment of the reservation. One of these factors was Montana's enabling act which specifically provided that title to Indian lands within the state was to remain in the United States and under its exclusive jurisdiction and control until extinguished by the government. The other factor was the absence of any extinguishment of the United States' beneficial ownership. In view of the government's agreement under the treaty to hold the land in trust, the court ruled it would be "inadmissible to suppose" that the United States ever:

intended to put the tribes at the mercy of the future state, the policy of which was unknown at the time of the treaty... [or] at the time of the passage of the General Allotment Act; for by adoption of a proprietary policy the state might substantially interfere with, if not foreclose, use of the shores by the Indians in the conduct of their fishing rights.45

Lake Bed Was Not Part of Reservation

Although there can be no question of the right, until relinquished, of the United States to exercise exclusive control over any "Indian Lands" within Montana, a serious question remains as to whether the Rochester case ought to be accepted as stating the correct rule governing title to the lands beneath the waters of Flathead Lake. It is submitted that the Rochester decision was erroneous. The riparian owners on the lake should be deemed to hold title to low water mark in accordance with the accepted law of Montana.

A basic assumption in the Rochester case was that because the north boundary line of the reservation bisected the lake, the land under the south half, as well as the waters thereof were held by the United States for the "use and occupancy" of the tribes and were thus a part of the reservation. The validity of this assumption must, to a considerable extent, rest upon the correctness of the court's interpretation of the Hell Gate Treaty.

Indian treaties are said to be a "closed account in the Constitutional Law ledger. The policy of treaty making as a method of regulation of Indian affairs was ended by act of Congress in 1871, but prior to that date a substantial number of treaties had been negotiated out of which has grown the body of law governing treaty interpretation. The Hell Gate Treaty is but one example of the continuing importance of this body of law, since the same act which extinguished the treaty making policy also provided for a policy of non-interference with existing obligations under previously ratified treaties.48

"Ibid.
"Ibid.
The basic question which must be answered in interpreting any Indian treaty is: What was the intention of the treaty makers? It is accepted that ambiguities are to be resolved in favor of the Indians, but it is equally well established that the tenor and terms of the instrument must control, notwithstanding that this may result in injustices to either party. Moreover, treaties are often in effect for long periods of time before any judicial interpretation of interests thereunder is made, and any after the fact determination of what was intended at the time of signing will necessarily be influenced by subsequent events.

The cases dealing with determination of Indian title in submerged lands have been limited largely to the lower federal courts. These cases have considered boundary question regarding many types of reservations on both non-navigable and navigable waters. A wide variety of results have been reached on the issue of what title, if any, the tribe or tribes involved held in the submerged lands in question. These decisions are valuable in analyzing the problem now under consideration. A comparison of the facts of these cases with those of the Flathead Reservation situation reveals one important factor: a supportable conclusion that the United States undertook to hold the south half of the bed of Flathead Lake in trust for the confederated tribes cannot rest solely upon the description of the reservation found in the treaty. In every decision dealing with boundaries on navigable waters the courts relied to some degree upon a peculiar interest of the Indians in the submerged lands in finding that the lands were a part of the reservation. In no case did the court find the submerged lands to be a part of the reservation in the absence of some type of special or specifically stated interest in the land.

Only two cases have reached the Supreme Court on the specific issue of Indian interests in submerged lands of navigable waters. In one


United States v. Romaine, 255 Fed. 253 (9th Cir. 1919) (navigable river); Taylor v. United States, 44 F.2d 533 (9th Cir. 1930) (navigable river); United States v. Boynton, 53 F.2d 297 (9th Cir. 1931) (navigable tidelands); United States v. Elliott, 131 F.2d 720 (10th Cir. 1942) (non-navigable river); United States v. Champlin Ref. Co., 156 F.2d 769 (10th Cir. 1946) (non-navigable river); Moore v. United States, 167 F.2d 769 (9th Cir. 1946) (navigable river); Choctaw and Chickasaw Nations v. Seay, 235 F.2d 30 (10th Cir. 1955) (non-navigable river); United States v. Ashton, 170 Fed. 509, (W.D. Wash. 1909) (navigable tidelands); United States v. Hutchings, 252 Fed. 841 (W.D. Okla. 1918) (non-navigable river); United States v. Stotts, 49 F.2d 619 (W.D. Wash. 1930) (navigable tidelands); United States v. Ladley, 4 F.Supp. 580 (D. Idaho 1933) (non-navigable lake).

See United States v. Romaine, supra note 55 (Coastal Indians—land used for fishing and digging shellfish); United States v. Boynton, supra note 52 (reservation boundaries specifically extended to low water line); Moore v. United States, supra note 53 (Indians used lands in connection with established industries of fishing, fur seal hunting and whaling); United States v. Stotts, supra note 52 (reservation boundaries specifically extended to low water line).

of these cases the Court utilized the same “special interest” approach taken by the lower federal courts in ruling the submerged lands were within the reservation.\textsuperscript{56} It relied heavily upon the fact that the submerged lands were part of fishing grounds which were essential to the Indians’ livelihood.

In addition to the necessity of finding some special interest of the Indians to be protected, another related obstacle must be overcome before any grant of lands under navigable waters can be found. This is the presumption that all submerged lands of this type within a territory are held in trust by the government for future states to be carved from the territory.\textsuperscript{57} As previously noted, a prior grant will not be presumed, but will be found only where “international duties or public exigencies” so demand.

Did an “international duty or public exigency” exist under the terms of the Hell Gate Treaty? An examination of the obligations created and the rights secured in the treaty, especially when considered in light of the nature of the tribes’ habits at the time of signing, indicates that it did not.

The Hell Gate Treaty contains only two provisions which relate to submerged lands. The first of these reserves to the Indians the “use and occupancy” of the described “tract of land” as a general reservation.\textsuperscript{58} The other provision reserves to the Indians “the exclusive right of taking fish in all streams running through or bordering on [the] reservation. . .[and] the right of taking fish at all usual and accustomed places in common with citizens of the territory.”\textsuperscript{59}

It has already been noted that the “reserving” of a “tract of land” alone would not justify the Ninth Circuit’s conclusion that the south half of the lake’s bed was a part of the reservation.\textsuperscript{60} Therefore, any justification for invocation of the “international duty or public exigencies” doctrine enunciated in Shivley v. Bowlby,\textsuperscript{61} must come from the treaty’s reservation of fishing rights. The language utilized to describe these rights is very similar to that found in other treaties\textsuperscript{62} and its meaning has previously undergone judicial construction.

\textsuperscript{56}United States v. Alaska Pacific Fisheries, supra note 55.

\textsuperscript{57}Supra note 30.

\textsuperscript{58}12 Stat. 975-76 (1859). A subsequent paragraph of the treaty states that the Tribes were to have the “exclusive use and benefit” of the tract. But, the extent of this “exclusive use and benefit” is further indicated by other language in the paragraph prohibiting white men from living on the reservation. Thus, it would seem that “exclusive” as used here referred to the \textit{quality} rather than the \textit{quantity} of the Tribes’ interests.

\textsuperscript{59}12 Stat. 976 (1859).

\textsuperscript{60}Text supra at note 54.

\textsuperscript{61}Supra note 25.

\textsuperscript{62}Compare Treaty With Dwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat. 927 (Proclaimed April 11, 1859); Treaty With S’Klallam Indians, Jan. 26, 1855, 12 Stat. 933 (Proclaimed April 29, 1859); Treaty With Makah Tribe of Indians, Jan. 31, 1855, 12 Stat. 939 (Proclaimed April 18, 1859); Treaty With Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, 12 Stat. 945 (Proclaimed April 11, 1859); Treaty With Yakama Nation of Indians, June 9, 1855, 12 Stat. 951 (Proclaimed April 18, 1859); Treaty With Nez Perce Indians, June 11, 1855, 12 Stat.
The treaty recognized two different fishing rights. One right was that "of taking fish at all usual and accustomed places in common with the citizens of the territory." In the United States Supreme Court case of United States v. Winans an identical clause was interpreted. The Court held that the clause applied to lands outside the reservation and a servitude for this purpose was imposed on all lands ceded by the Indians under the terms of the treaty. This servitude or easement continued against the United States and its grantees. This right is not a right exercisable on reservation lands and therefore it cannot properly be relied upon as a basis for concluding the bed of the lake was a part of the Flathead reservation.

The second fishing right guaranteed by the treaty was the "exclusive right of taking fish in all streams running through or bordering on the reservation." This right has been interpreted as prohibiting any regulation thereof by the state, but in a factual setting very similar to the one presented by the Hell Gate Treaty the Department of the Interior, relying upon the language of the Winans case, ruled that the exercise of this right was not dependent upon the ownership of the bed of the lake and was thus unaffected by the state's ownership of the bed. There was therefore no necessity for the United States to undertake to hold title to the soil to insure protection of the right. This right, like the other reserved in the treaty, is in the nature of an easement or servitude. Its protection for the Indians does not require and should not support an exception to the general rule that the title to the bed of the lake was held in trust for the future state to be formed from the territory.

Two other matters should be noted in connection with the "exclusive" fishing right guaranteed by the treaty. Both minimize the value of looking to this guarantee as a basis for finding that the Indians held title to the lake bed under the terms of the treaty.

First, it is doubtful that the right was even intended to extend to the lake itself. By its own description the exclusive feature was limited to streams "running through or bordering on the reservation." The south half of the lake did lie within the boundaries of the reservation and had the treaty makers intended this feature to apply to the southern...
portion of the lake it would have been a simple matter to have so stated. Any construction which defines the word streams to include a lake is overly strained. It would also seem unrealistic to believe that the government intended the Indians to exercise exclusive control over half of the lake while the other half was open to the public.

Second, language identical to that utilized to describe the “exclusive” right in the Hell Gate Treaty can be found in four other treaties with Northwest Indians negotiated by Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington in 1855. Some of the tribes involved were coastal Indians for whom protection of fishing rights was vitally important for their livelihood, whereas others like the Flathead, Kootenay and Upper Pend d'Oreilles were native to the Rocky Mountain area and were much less dependent upon fishing. The inclusion of this particular fishing right thus may have resulted from the utilization of an established format for the treaty, throwing little light on the actual intent of the treaty makers.

The most authoritative decision which can be looked to in answering the question of ownership of the submerged lands of Flathead Lake is the Supreme Court case of Holt State Bank v. United States. This decision was handed down some fifteen years before the Rochester case but it was neither cited in the briefs of counsel nor mentioned in the Rochester opinion. Of the two cases reaching the Supreme Court on the question of Indian ownership of lands below navigable waters, Holt State Bank is the only decision which deals specifically with the issue of title to beds of navigable lakes.

The Holt State Bank case arose out of an attempt on the part of the United States to dispose of the lands which made up the bed of a drained lake. The lake lay wholly within the confines of the Red Lake Indian Reservation in Minnesota, and had been drained some years after the shoreline properties had been disposed of pursuant to act of Congress. Under this act the Indians had formally ceded the reservation lands to the United States in order that the lands might be disposed of for the Indians’ benefit. This case is particularly important to a determination of the problems raised by the Rochester decision due to the remarkable similarity in the facts of the two cases. The case

7Treaty With Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, 12 Stat. 946 (1859); Treaty With Yakama Nation of Indians, June 9, 1855, 12 Stat. 953 (1859); Treaty With Nez Perce Indians, June 11, 1855, 12 Stat. 958 (1859); Treaty With confederated tribes and bands of Indians in Middle Oregon, June 25, 1855, 12 Stat. 964 (1859).


7All of the treaties negotiated by Governor Stevens between January and July, 1855, with Washington Territory Indians are markedly similar in format and content. This is especially true of the treaties with the Walla-Wallas, the Yakamas, and the Nez Perce.

7270 U.S. 49 (1926).

7See Brief for Appellant and Brief for Appellee, Rochester v. Montana Power Co., 127 F.2d 189 (9th Cir. 1942).


directly considers the problem of Indian ownership and protection of Indian rights in light of the government's established policy of holding beds of navigable waters in trust for future states.

In both cases the United States had negotiated treaties with Indian tribes—the Chippewas in *Holt* and the Confederated tribes in *Rochester*. In each case the treaty involved was negotiated prior to statehood of the state in which the reservation was situated, and subsequently the lands of both reservations were divided and conveyed by government patent to individual land owners.

The government in *Holt State Bank* did not claim an affirmative disposal of the drained lands. It sought to rely upon the fact that the lake was within the reservation at the time Minnesota was admitted into the union. The Court did not find it necessary to comment upon whether this factor, if unopposed, would have been construed as a grant to the Indians. Rather it looked to certain aspects of the treaty with the Chippewas and other existing circumstances which led it to conclude that title had remained in trust for the future state. The treaty under which the Indians had claimed title did not formally set apart the lands which were not ceded to the United States; it did not contain any affirmative declaration of rights of the Indians; nor did it attempt to exclude non-Indians from the use of navigable waters within the reservation. Although the Indians were to have access to the navigable waters and were entitled to use them in accustomed ways, the Court ruled there was nothing that approached a grant to the Indians of lands under navigable waters.

There are, of course, some differences between the factual setting and the treaty involved in the Flathead Lake situation, and that found in *Holt State Bank*. An argument may be made that the two cases are sufficiently distinguishable to prevent application of the *Holt State Bank* rationale. Such an argument might run as follows: (1) In *Holt State Bank* the treaty under which the Chippewas occupied the reservation did not contain a formal setting apart of what was not ceded, whereas the Hell Gate Treaty defined the boundaries of reservation; (2) the *Holt State Bank* treaty did not contain an affirmative declaration of rights, but the tribes under the Hell Gate Treaty were guaranteed the right to the use and occupancy of the lands as well as hunting and fishing rights; (3) there was a grant of exclusive occupancy in the Hell Gate Treaty but none in the *Holt State Bank* case. Thus, under the Hell

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*United States v. Holt State Bank, supra note 74, at 58.*

*Minnesota did not become a state until almost four years following negotiation of the treaty, and Montana not until some forty-four years after the signing of the Hell Gate Treaty.*

*In the *Holt* case the Chippewas had formally ceded the reservation lands to the United States for disposal for the Tribes' benefit. *United States v. Holt State Bank, supra note 74, at 52; Act of Jan. 14, 1889, 25 Stat. 642. No such formal cession occurred in *Rochester*. In the latter case the United States acted under the terms of the General Allotment Act, 24 Stat. 388 (1887) which made formal cession unnecessary.*


*Minnesota v. Hitchcock, 185 U.S. 373, 389 (1902).*
Gate Treaty, the combination of definite reservation, guaranteed rights of occupancy and use, guaranteeing hunting and fishing rights, together with the "exclusive" feature of the occupancy should imply a grant of the land making up the bed of the lake. Notwithstanding the seeming plausibility of this argument, the rationale of the Holt State Bank case should nevertheless control the question of passage of title to the Flathead Lake lands.

The fact that the boundaries of the Red Lake Reservation were not specifically set out in the treaty with the Chippewas did not, in fact, make the Red Lake Reservation's boundaries less definite. Prior to the formation of the Red Lake Reservation the Chippewas had negotiated several treaties with the United States. These treaties had the effect of ceding to the government a large portion of the lands which the Indians had held in aboriginal possession. The creation of the reservation, which was on lands that remained a part of the aboriginal possession after the cessions, was described by the Supreme Court as follows:

While there was no formal action in respect to the remaining tract, the effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation. Now, in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting aside a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.8 3

Thus each case contains the parallel of a reservation of a specific tract of land containing navigable waters. This should negate any grant of the bed being implied from, or any significance being attached to, the physical fact that Flathead Lake lay within the exterior boundaries of the Flathead Reservation. This is particularly true since the whole of Mud Lake lay within the Red Lake Reservation and only one-half of Flathead Lake is within the Flathead Reservation.

The additional factors of specifically reserved hunting and fishing rights in the Hell Gate Treaty did not make the nature of the confederated tribes' occupancy of the Flathead Reservation significantly different from that of the Chippewas in Holt State Bank. As previously noted, the only exclusive rights of fishing given to the tribes was in the streams running through or bordering on the reservation.8 4 The other fishing rights secured by the treaty, as well as hunting rights specifically mentioned, were to be exercised outside the reservation.

The final distinguishing aspect in the Flathead situation—the right of the confederated tribes to the exclusive use and benefit of the tract making up the reservation—is likewise insufficient to require a rule different from that laid down in Holt State Bank. The "tract" referred to is the "tract of land" set apart for the "use and occupancy" of the

83Id. at 389-90. See also Spalding v. Chandler, 160 U.S. 394 (1896).
84See supra note 74.
tribe as a reservation. An indication of the meaning of this "exclusive use and benefit" clause is found in the next sentence of the same paragraph. This next sentence prohibits white men from residing on the reservation. It appears that in context the clause is referring to lands, not to navigable waters of the reservation. It would be against the long established United States policy on navigable waters to believe that the government intended to turn over exclusive use of one-half of a navigable lake to the Indians and leave the other half open to navigation. It would be even more unrealistic to believe that the Indians expected to receive any such exclusive use and control. The confederated tribes were no doubt entitled to have access to the lake and to use it in their accustomed ways. Precisely the same type of use was found to exist in the Chippewas in *Holt State Bank*.

The conclusion which must be reached from the above analysis is that by the terms of the Hell Gate Treaty the United States did not undertake to hold the lands in the south half of Flathead Lake in trust for the confederated tribes. The submerged lands, by the rule laid down in *Holt State Bank*, should have passed to the state of Montana upon its admission to the union.

**Indian Title in Lake Bed was Extinguished**

Even if the United States originally undertook to hold the bed of Flathead Lake in trust for the confederated tribes, a serious question still exists as to whether the Ninth Circuit in *Rochester* correctly held that this trust title had not been extinguished by the government grants of the shoreline properties.

In the *Rochester* case plaintiff argued that provisions of the General Allotment Act which made Indian allottees, upon the expiration of the trust period subject to the civil and criminal jurisdiction of the state, had the effect of making applicable the Montana rule that riparian owners held to low water mark. The court rejected this argument on the ground that the Montana Enabling Act absolutely exempted from state control all Indian lands. The court reasoned that Montana law could have no effect upon the extent of the Indian allottee's grant unless the United States' trust title for the Indians had been extinguished. In finding no extinguishment, the court stated: "So far as we are

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65 12 Stat. 976 (1859).
66 For statements of the principle that all persons are to have the right to access to and use of navigable waters for commerce and navigation see e.g., St. Paul & F. R.R. v. Schurmeier, 74 U.S. (7 Wall.) 272 (1869); Economy Light and Power Co. v. United States, 256 U.S. 113 (1921).
advised, the beneficial ownership of the Indians in the bed and shores of the lake has not been extinguished by the government."^90

The weakness of the Ninth Circuit's analysis on this point is that it failed to give full consideration to other relevant circumstances. The United States as trustee for the confederated tribes had plenary power to manage the tribes' property for their benefit.^91 This plenary power allowed disposal of tribal lands by the government without reference to the wishes of the tribes, so long as the government did not violate its position of trusteeship.^92 The intent of Congress, subject to this constitutional limitation, must therefore be looked to in determining the extent of the interests taken by the individual owners under the allotment and sale of the Flathead Reservation property.

The Ninth Circuit held that there was "nothing in [the treaty or the setting] or in subsequent legislation, suggestive of an intent that the ownership of lands in the Reservation below the line of ordinary high water was to be at the disposal of the state."^93 This sweeping statement completely ignores several factors connected with the legislation under which the reservation was allotted and sold. These factors, when taken together, offer a substantial insight into the intent of Congress.

Under the terms of the legislation opening the reservation to allotment, and subsequently to settlement, Congress *did* intend to extinguish any title which the government held in trust for the tribes in the submerged lands. The original act opening the reservation to settlement, after providing for allotments to eligible individual Indians, provided that *all* the lands of the reservation were to be surveyed and, with the exception of timbered lands, were to be sold for the benefit of the tribes.^94 Moreover, the subsequent Act of April 12, 1910,^95 which created the "Villa Sites" specifically provided that *all* the unallotted lands fronting on the lake within the confines of the reservation were to be sold to the highest bidder. Once the "Villa Sites" were disposed of under the Act of April 12, 1910, no tribal lands remained fronting on the lake. Tribal ownership of lands fronting on the lake was extinguished and replaced by individually held titles in both Indian allottees and non-Indian grantees.^96

With all tribal ownership rights ended in the shoreline properties, could Congress have intended that trust title to the lake bed was to

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^92Congressional power, although "plenary" in this area is not absolute. The government's power of disposal over tribal lands is subject to constitutional limitations and such lands can not be appropriated to United States use or given to others without just compensation being paid. United States v. Creek Nation, 295 U.S. 103, 109-10 (1935); Chippewa Indians v. United States, 301 U.S. 358, 375-76 (1937).
^93Rochester v. Montana Power Co., supra note 75, at 192. Only the "subsequent legislation" aspect of this quotation will be considered at this point.
^96In addition to the reservation of timbered lands, tribal ownership was also maintained in certain power and reservoir sites under the Act of Mar. 3, 1909, 35 Stat. 795.
continue? It is submitted that it did not. Support for this position can be found in four separate criteria: (1) Congressional declarations and governmental statements relating to the Act of April 12, 1910; (2) the complete lack of any necessity for any continued holding in order to insure protection of Indian fishing rights; (3) the established United States position that the extent of grants of lands bordering on navigable waters are to be governed by state law; and (4) recognized public policy against hardship and litigation resulting from the anomalous situation created by the Rochester decision.

The Act of April 12, 1910 was enacted for the specific purpose of dividing unallotted shoreline properties into small plots to take full advantage of the land's value as residential property. The purpose of the legislation is clearly shown in a committee report accompanying the bill:

> The bill in question proposes to survey and subdivide into small lots for summer residence sites the entire unallotted lands fronting on Flathead Lake, the proceeds from the sale of these lots to be used in furthering the reclamation of the allotted Indian lands which is now being carried on.

> The lands fronting on this lake are of little agricultural value, and it is believed that a large amount of money can be realized from the sale of the lake frontage; much more than can be realized under the present status of these lands. . . .

An advertising circular issued by the Department of the Interior in connection with the sale of the shoreline plots further shows the government's recognition of the unique character of these lands: "The lake is utilized for bathing, sailing, boating and yachting and several steamboats ply between various towns upon its borders. The shores are well adapted for boat landings and the erection of wharves." These documents indicate that the government intended to sell the shoreline properties complete with all the usual incidents of access, right to build wharves and docks, etc. Moreover, since the amounts received from the sales were to be applied for the benefit of the tribes, it is apparent that the Indians received full compensation for the rights and interests which passed to the riparian grantees. With all the normal incidents of riparian ownership resting in the grantees and with the Indians having received full compensation for their rights the United States would have no need to continue holding the lands.

Protection of either the "exclusive" fishing rights which the tribes held in streams of the reservation or those fishing rights which were to be exercised in common with other citizens of the state did not require that the United States continue to hold the beds in trust for the tribes after disposal of the shoreline properties. As noted in the discussion of the interests conveyed under the treaty, these rights are not dependent upon ownership of the soil upon which they are to be exercised. These interests at most only subjected the affected lands

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98 U.S. Dep't of Interior, Flathead Lake, Montana (1911).
99 See text supra at note 69.
to a servitude which the owner thereof cannot avoid. The fishing rights never had their foundation in ownership of the lake beds and they would not be affected by an extinguishment of the United States' trust title. The shoreline properties would simply remain subject to an easement guaranteeing the Indians' fishing rights.

Although the United States may have originally undertaken to hold the reservation, including the bed of the lake, in trust for the tribes, it extinguished that trust on the lands which were allotted to individual Indians or were divided and sold to non-Indian grantees. After the grants, the United States no longer had any ownership interests in the lake bed to protect. It would be fully in accord with the long recognized governmental policy of leaving the determination of interests in lands under navigable waters to the states to allow Montana law to govern the interests which the grantees received in lake bed lands.

Public policy also demands that a situation which could lead to litigation and strife not be created. As has been shown, the government sold the shoreline lands without limitation upon the rights appurtenant thereto, and the tribes were fully compensated for their interests. The Eighth Circuit in considering the *Holt State Bank* case before it reached the Supreme Court, quoted from *Mitchell v. Smale*:

> We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often the most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. (Emphasis added.)

It is submitted that the United States did not intend to create a situation which would, at a future date, result in lawsuits over the extent of the riparian owners' rights.

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101 The lands allotted to individual Indians in severality were, of course, subject to governmental control as trustee until expiration of the trust period or until the trust title was otherwise extinguished. See note 12, supra.


103 The policy of allowing interests in submerged lands to be determined according to state law has been followed frequently in cases dealing with United States grants of lands on non-navigable waters. See e.g., Hardin v. Jordan, supra note 102, at 384; Hardin v. Shedd, 190 U.S. 508, 519 (1903); Whitaker v. McBride, 197 U.S. 510, 513 (1905). See particularly, Oklahoma v. Texas, 258 U.S. 574, 595 (1922) holding the same rule applies when the United States disposes of tribal land of Indians under its guardianship. At least one court of appeals case can be cited as authority for the rule that state law governs on navigable as well as non-navigable waters. United States v. Champlin Refining Co., 156 F.2d 769 (10th Cir. 1946). The latter view is also taken in Gould, *Waters* § 203 (3d ed. 1900).

104 The easement allowing the tribes exercise of their fishing rights discussed supra at note 66 is a possible exception to the unrestricted nature of the grants.

RIPARIAN RIGHTS OF ACCESS & WHARFAGE

Common Law Background

By common law doctrine riparian lands, because of the advantage resulting from their peculiar location, have certain "natural rights." As described in an early English case,

"[T]he rights of a riparian proprietor . . . exist jure naturae because his land has, by nature, the advantage of being washed by streams; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize fully the course of nature. . . ."

Riparian rights are generally not thought of as servitudes upon another's property and do not arise by artificial condition resting upon grant or prescription. No act on the part of the owner is needed for him to acquire riparian rights as they are part and parcel of the riparian lands and pass without express grant.

Riparian rights are available only to riparian or littoral proprietors, that is, proprietors whose lands border upon a natural stream or lake or through whose land a stream flows. If the land is riparian the owner may exercise his riparian rights regardless of the type of water course involved.

Under the English common law the riparian right of access was well recognized as a right which could not be cut off, even by the Crown, without compensation. By contrast, the companion right of wharfage was non-existent. Any structure erected below high water mark without the consent of the Crown was treated as a purpresture.

Access and Wharfage in United States

Developments in the United States law governing access and wharfage rights have been closely related. The extent of their recognition

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108 Lyon v. Fishmongers' Co., 1 App. Cas. 662 (1876).
109 See McCordic and Crosby, The Right of Access and the Right to Wharf out to, 4 HARV L. REV. 14 (1891) for discussion of the proposition that the riparian rights of access and wharfage do not, strictly speaking, meet this definition since they may be exercised over lands of another.
110 Mettler v. Ames Realty Co., 61 Mont. 152, 201 Pac. 702 (1921); Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); 1 WEIL, op. cit. supra note 107, § 711.
111 Fee ownership of the land is not required. The one claiming riparian rights need only have exclusive use and possession of the riparian land. GOULD, op. cit. supra note 103, § 168.
112 Mettler v. Ames Realty Co., supra note 110. One who holds title only to the bed of a watercourse or body of water is not a riparian proprietor. Lux v. Haggin, supra note 110; 1 WEIL, op. cit. supra note 107, § 723.
113 FARHAM, WATERS AND WATER RIGHTS, § 63 (1900); 1 WEIL, op. cit. supra note 107, §§ 725-728.
115 McCordic and Crosby, supra note 109; GOULD, op. cit. supra note 123. A purpresture at common law was "an encroachment on and appropriation of land or waters which [were] common or public." THE SELF PRONOUNCING LAW DICTIONARY, (2d ed. 1948).

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within a particular state is a question of state law, but the several states have not been uniform in this matter. Both rights have generally been recognized, but in varying degrees. A few states adopt the English rule and recognize the right of access but not the right of wharfage; some states treat both as if they were one right; and still others go so far as to deny such rights at all. Even those states which allow the riparian owner to exercise both access and wharfage rights impose qualifications upon their exercise.

Due to the parallel development of access and wharfage rights in the United States the two rights have several features in common relative to their nature and extent. The rights as such exist only in those submerged lands which do not belong to the riparian owner. If the owner of the bank also has title to the bed, either to low water mark or the thread of the stream, he may make such use of his soil as he sees fit so long as this use does not interfere with use of the waters for navigation or other public purposes. Although in such case he would be exercising property rights analogous to wharfage and access rights, the two types of interest have different bases. This is best exemplified by a comparison of the remedies available for violation of the respective rights. If the riparian owner is also the owner of the bed, the structures he builds thereon are fixtures, and any interference with them or with his right of access would be in derogation of his possessory interests and actionable in trespass. But, if he does not own the soil below the water line, interference with access or wharfage is actionable not for violation of possessory interests, but for violation of his riparian rights.

In those states where access and wharfage rights are recognized, these “natural rights” have been called variously easements, licenses, franchises and grants. Labels are of little value since the rights are clearly sui generis and, like the English access right, not subject to destruction without compensation. As stated in an early Supreme Court case:

This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in

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117 For a complete discussion of the various positions taken by the states, see Gould, op. cit. supra note 103, §§ 149-154, 167-179; and 2 Tiffany, Real Property § 606 (3d. ed. 1939). Those states which completely deny access and wharfage rights generally do so on the “trust” theory that title to the beds of waters lie in the state and private owners thus have no right to erect permanent structures thereon. Note, 7 Wayne L. Rev. 492 (1961).
118 Tiffany, op. cit. supra note 117, § 666.
119 1 Farnham, op. cit. supra note 113, §§ 75, 114; 2 Tiffany, op. cit. supra note 117, § 666; McCorde and Crosby, supra note 109.
120 Herrin v. Sutherland, 74 Mont 588, 241 Pac. 328 (1925).
121 2 Tiffany, op. cit. supra note 117, § 666.
122 1 Farnham, op. cit. supra note 113, § 66.
123 Here the Court speaks of access and wharfage as if they were one right.
accordance with established law; and if necessary that it be taken for the public good, upon due compensation.\(^{124}\)

The right of access involves more than simply the right to unobstructed access to the water. The riparian owner may also utilize the right to beach boats on the shore. He may likewise pass through shallow water on foot or otherwise to reach his property when it is inconvenient to bring his boat to his own land.\(^{125}\)

The wharfage right has, with few exceptions, been generally accepted as the logical extention of the riparian's right of access. But as with the right of access and the question of title to lands below high water mark on navigable waters, the ultimate determination of the extent of the right is one of state law. The extent of this right is best described in the oft quoted statement of Mr. Justice Miller in *Yates v. Milwaukee*:

> Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.\(^{126}\)

The right to wharf out is not unlimited and must be exercised so that it will not interfere with navigation or with other rights of the public. The right may be exercised out from shore to the point of navigability\(^{127}\) or point of practical navigability,\(^{128}\) and the wharf or dock must be so constructed as to be in front of the owner's own property and not cut off the right of access of other riparian owners.\(^{129}\)

The rules which govern the access and wharfage rights of riparian owners on Flathead Lake must necessarily be found within the general doctrines set out above. However, the question of what law should ultimately be applied is complicated by the seemingly incorrect position taken in the *Rochester* case. Therefore, in addition to the Montana view on riparian access and wharfage rights the proprietary policies of the United States on these rights must be examined.

**Montana Law of Access and Wharfage**

Like many other western states, Montana has repudiated the riparian doctrine of water rights in favor of the appropriation theory.\(^{130}\) However, the language of the case announcing this position pertains

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\(^{124}\) *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1871).

\(^{125}\) *Tiffany*, op. cit. *supra* note 117, § 666.

\(^{126}\) *Supra* note 124, at 504.

\(^{127}\) *Brunswick v. Union Depot Street Ry. & Transfer Co.*, 31 Minn. 197, 17 N.W. 626 (1883).


\(^{130}\) *Mettler v. Ames Realty*, *supra* note 110.
only to the use of water and makes no reference to other riparian rights. Apart from the use of water, rights of riparian ownership have been the subject of little litigation in the Montana Supreme Court. There is no direct holding in Montana on the rights of access and wharfage, but Montana statutes, as well as the language of the available cases, show that Montana is in accord with the majority of American jurisdictions in recognizing both access and wharfage as rights of the riparian owner.

At an early date the Montana Supreme Court gave support to the existence of wharfage and access rights in Montana by strongly favorable dictum in Gibson v. Kelly. The court, after holding that a riparian owner on a navigable river could maintain an action of ejectment against one occupying the land between high and low water marks abutting on the riparian's property, quoted from a Michigan case:

[T]he rights of riparian proprietors upon our interior lakes...are the same as those of proprietors upon navigable streams. They have the right to construct buildings, wharves, and other improvements in front of their lands, so long as the public servitude is not thereby impaired. They are a part of the realty to which they attach, and pass with it. Certainly, no one can occupy for his individual purposes the water front of such riparian proprietor...

Another case decided since the appropriation theory was formally recognized discussed the Gibson decision, but neither this case nor Mettler v. Ames Realty Co. took issue with the favorable recognition of access and wharfage found in Gibson.

Effect of Rochester Decision on Access and Wharfage Rights

If the basic contentions of this paper are accepted, that either the beds of Flathead Lake never belonged to the confederated tribes, or that the United States extinguished any title which it originally may have undertaken to hold for the tribes, then the rights of the riparian owners on the lake would be governed by Montana law. By the terms of Revised Codes of Montana, 1947, section 67-612 and the holding of the Gibson decision, the riparian owner takes title to low water mark. He would therefore have the proprietary right by virtue of his possessory interests, to wharf out to low water mark. In addition, Revised Codes of Montana, 1947, section 89-601 allows him to wharf out over land belonging to the state below low water mark so far as is necessary to safely allow all vessels to land and take on and discharge passengers and cargo. Thus, in summary it can be

16 15 Mont. 417, 39 Pac. 517 (1895).
18 Gibson v. Kelly, supra note 132, at 423 (39 Pac. at 520).
19 Faucett v. Dewey Lumber Co., 82 Mont. 250, 266 Pac. 646 (1928).
20 Supra note 110.
said that the riparian owners on the lake are entitled to the exercise of full rights of access and wharfage out to the point of navigability.

Notwithstanding the contention that the United States should not be deemed to hold any interests in the bed of the lake, the fact remains that the Rochester decision must be presumed to be law, and until such time as it may be overturned, must control. Under the law of that case, Montana law can not be looked to for a determination of the riparians' rights. Rather, a determination must be made of what riparian rights the owners can exercise against the United States in its capacity as trustee for the confederated tribes.

This question is unique among the wealth of federal precedent dealing with access and wharfage rights on navigable waters. The problem seems to be one never directly considered by the courts, and cases precisely in point are not available. However, analogous situations arising in cases of federally held beds of navigable waters in the District of Columbia and the Territory of Alaska have been passed upon by the Supreme Court and the lower federal courts.

In the first of these cases, Potomac Steam Boat Co. v. Upper Potomac Steam Boat Co., the Supreme Court considered rights of riparian owners in the District of Columbia in a controversy involving adverse claimants to a wharfage right. There the Court said:

"Among the rights he [the riparian owner] is entitled to as such, are "access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the Legislature may see proper to impose for the protection of the rights of the public, whatever those may be." The Court then went on to recognize the wharfage rights in question to exist in the party claiming as a riparian owner.

Since the District of Columbia was within the exclusive jurisdiction of the federal government, the Supreme Court in the Potomac Steam Boat case was free to apply any rule relating to riparian rights that it thought best. It chose to adopt the majority position taken by the states and gave full recognition to both access and wharfage subject only to the power of Congress to regulate commerce. This position has since been adopted in the lower federal courts of the District of Columbia and is now the settled law of the district.

The Ninth Circuit and the United States District Court for the Territory of Alaska, through a series of cases, have adopted the same position as that taken in the District of Columbia on the nature and extent of access and wharfage rights over submerged lands of territorial navigable waters. As stated by the United States District Court for Alaska in Ketchikan Spruce Mills v. Alaska Concrete Products Co.: "It is well established that a right of access... is a property right and

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1871 United States v. Belt, 142 F.2d 761 (D.C. Cir. 1944); Martin v. Standard Oil of
may be exercised by constructing a wharf, pier or dock over the intervening tide lands to the navigable waters."

The positions taken by the courts in the District of Columbia and Alaska clearly show recognition of the riparians' wharfage and dockage rights over the lands held by the United States in fee. Although the fee title held by the United States in the beds of Flathead Lake is in trust for the Indians, just as the bed of navigable waters within Alaska were held in trust for the future state, the United States does have plenary power over Indian lands and the same rationales should be applicable to delineate the rights held by the riparian grantees on the lake: (1) The United States has, except in limited cases consistently taken the position that rights of riparian on navigable waters should be determined by state law, and Montana law would recognize access and wharfage rights; (2) unless the United States were to adopt a stand completely contra to its present position, the United States could not allow the Indians to interfere with the exercise of riparian rights without making compensation therefor; (3) wharfage and access by the riparian owners would in no way interfere with the fishing rights of the tribes in the lake; and (4) the whole tenor of the legislation and administrative activity under which the unallotted lands were sold indicated that the government expected the grantees to exercise riparian rights.

CONCLUSION

The riparian owners on Flathead Lake possess full access and wharfage rights which cannot be destroyed or infringed upon without compensation. This conclusion is based upon either of two alternate approaches. (1) The United States as trustee for the confederated tribes has no interest in the lands below high water mark because either the lands were never held in trust for the Indians, or because any title which the United States did undertake to hold was extinguished upon the allotment and sale of the reservation lands and by implication passed to the State of Montana and ultimately to the riparian owners. (2) Even if the title to the lake bed is still held in trust for the confederated tribes, the United States would recognize the rights of the riparian owners to access and wharfage.

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