

State of Montana

11 IBLA 3

The State of Montana claimed the bed of a small meandered lake in the eastern part of the State, because the lake is navigable. The Bureau of Land Management disagreed, claiming the bed as public land because the lake is non-navigable. Both plan to lease the bed for oil and gas. The case contains a brief discussion of the purpose of a meander line, the correct source of law (see Section 8-57 through 8-60 of the 2009 Manual), and the authority of the Secretary of the Interior in matters related to the administration of the public lands.

In this case all the abutting upland surrounding the lake is still public lands, the lake was found to be non-navigable and title to the underlying bed of the lake remained in the United States. As you read the case consider how the outcome might have changed if a portion of the abutting upland was patented.

ORIGINAL 1922 SURVEY PLAT



RECENT AERIAL PHOTO



STATE OF MONTANA

IBLA 72-189

Decided May 17, 1973

Appeal by the State of Montana from decision M 19544 by the Montana State Director, Bureau of Land Management, holding a lake to be nonnavigable, and asserting title in the United States to the bed of the lake.

Affirmed.

Navigable Waters

A lake is navigable in fact when it is used, or is susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. A meandered lake in Montana, containing 125 acres and which is not over waist deep, is nonnavigable where it is located in a remote region and there is no evidence to show that it has been used in the past or is susceptible of being used as a highway for commerce in the future.

Navigable Waters

Title to the underlying bed of a meandered lake which is held to be nonnavigable remains in the United States where all of

the abutting uplands surrounding the lake are still public lands.

Secretary of the Interior--Navigable Waters--Public Lands:

Jurisdiction Over--Title: Generally

The Secretary of the Interior has the authority and the duty to determine what lands are public lands of the United States, including the authority to determine navigability of a lake to ascertain whether title to the land underlying the lake remains in the United States or whether title passed to a State upon its admission into the Union.

APPEARANCES: Lawrence D. Huss, Esq., Office of the Attorney General, State of Montana, Helena, Montana, for appellant; David K. Grayson, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee, Bureau of Land Management.

OPINION BY MRS. LEWIS

The State of Montana, by and through its Commissioner of State Lands, appealed from a decision by the Montana State Director, Bureau of Land Management (BLM), dated November 2, 1971.

The decision held

Indian Lake to be nonnavigable and asserted title in the United States to the lands covered by the lake. 1/

The State maintains that it was granted title to all lands underlying navigable bodies of water upon its admission to statehood in 1889, and that Indian Lake was a navigable body of water at that time.

Since the United States Supreme Court decision in Pollard's Lessee v. Hagan, (44 U.S. (3 How.) 212 (1845)), it has been recognized that the lands under navigable bodies of water within the limits of a State passed to the State when it was admitted into the Union as an incident of sovereignty. Therefore, the first question to be determined in this proceeding is whether Indian Lake was navigable in 1889.

The record discloses that Indian Lake is meandered and contains approximately 125 acres. 2/
The facts on which the decision below

1/ The controversy arose over the desire of both the State and BLM to lease the lands for oil and gas.

2/ The lake is located in Secs. 21 and 22, T. 23 N., R. 30 E., P.M., Montana, and is entirely surrounded by lots bordering on the meander line. All of the lots are public lands. Thus, if the lake is nonnavigable, title to the bed of the lake would be in the United States. See Rust-Owen Lumber Company (On Rehearing), 50 L.D. 678, 682 (1924).

was based are set forth in a preceding letter dated September 30, 1971, from the BLM State Director to the Montana Commissioner of State Lands, as follows:

* * * * *

We realize Section 26-336, Revised Codes of Montana, 1947, read (sic) in part as follows:

"Definition and use of lakes as navigable waters. All lakes wholly or partly within this state, which have been meandered and returned as navigable by the surveyors employed by the government of the United States. * * *" (Underscoring added by BLM).

This definition is not compatible with the instructions given cadastral surveyors.

In the original surveys of the public domain, cadastral surveyors were instructed to meander the banks of all streams if more than three chains in width and the shores of all lakes having an area of 25 acres or more. This, of course, has nothing to do with navigability. The surveyors of the public domain were not instructed to make any determination relative to navigability of waterways during their surveys, and had no authority to do so.

Navigability is a matter of usage at the time the state entered the Union, not a determination by investigation or land survey. Montana was admitted to the Union November 8, 1889, and our records do not reflect principal routes of travel in the vicinity of Indian Lake which might have made it possible for the lake to have been used for commercial travel if enough water were present.

The area in which Indian Lake is situated is in somewhat remote area, which was the condition in 1889 as it is today.

The general description as contained in the 1920 official survey record of T 23 N, R 30 E, states: "Indian Lake is a shallow lake, nowhere being over waist deep, but always containing nearly a full supply of water and was therefore meandered, as it contains about 125 acres."

Based on the above facts and statements, it is our considered decision Indian Lake was not a navigable body of water when Montana was admitted to the Union. The lake is completely surrounded by federal land, and the U.S. Government, therefore, also claims ownership of the bed of the lake.

In the middle 60's the lake was visited by our Malta District field personnel and was found to be nothing more than a dry lake bed. Because of its being a dry lake bed, the Federal Government would still hold claim to the dry bed based on their littoral rights of reliction.

* * * * *

Montana does not attempt to controvert the facts upon which the BLM State Director based his decision. Instead its brief is confined to legal arguments as to why the lake should be considered as navigable in fact.

Although admitting that the fact the lake has been meandered is not conclusive evidence of its navigability, the State feels that it indicates the surveyors considered the body of water of sufficient

size to be considered an obstacle to surveying. The fact remains that the meandering of bodies of water in surveying the public lands is done for convenience and has nothing whatsoever to do with determining navigability, which is a question of federal law to be determined according to the general rule recognized and applied in the federal courts. United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926). The surveyors have no authority to make such determinations.

The State quoted the widely accepted definition of navigability by the United States Supreme Court as set forth in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870):

* * * 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. * * * 3/

In this connection the State contends that the phrases "or are susceptible of being used" and "may be conducted" do not require actual use but possible use (susceptible use); that it is not

3/ The Court has held this test to be applicable not only to "rivers" but to all water courses, including lakes. Utah v. United States, 403 U.S. 9, 11 (1971); United States v. Holt State Bank, supra, at 56.

incumbent upon the states to make a showing of actual past use of bodies of water, but only that they may have been used; and that the fact that the lake may have not been consistently used for travel is irrelevant and immaterial.

The State further asserts that the surveys of the government indicate that Indian Lake was a body of water of sufficient depth to accommodate the passage of flat bottom barges, canoes, rafts, and other modes of water travel commonly used by the Indian and pioneering populace of the western states. This is mere conjecture, as there is no evidence in the record to this effect, or to indicate that the lake has been used in the past or is susceptible of being used as a highway for commerce at present or in the future, nor has the State presented any such evidence. We do not rule out the possibility that it may have been used occasionally in the past by Indians or pioneers for fishing or boating in canoes or flat bottom boats, or that it may still be used by an occasional sportsman for similar recreational purposes. However, such uses could hardly be said to constitute the lake as a highway for commerce which is essential for a navigability classification.

In its reply to the State's appeal brief, BLM attached a copy of the northwest corner of the U.S. Geological Survey quadrangle map entitled "Indian Lake, Mont." (1965) showing Indian Lake.

This map shows an unimproved dirt road, the course of which would have taken it directly through the middle of the lake. BLM stated: "Rather than attempt to join the two parts of this road by a system involving navigation of Indian Lake, the road builders simply ran their road around the lake." As the State did not question the propriety of this map, although it was afforded an opportunity by this Board to file an answer to the BLM brief, the map is accepted in evidence. It is strong persuasive evidence that the road builders chose the path of least resistance in skirting the lake.

We agree with the following rationale of BLM in its reply brief:

No evidence of any commercial use exists in this case, and that is not surprising. It passes credibility that intelligent "traders or travelers" would have undergone the expense and bother of maintaining vessels of virtually no draft (since Indian Lake is not more than waist deep, it is probable that much of the area near the shore is considerably more shallow) in order to effect a "highway for commerce" across a lake containing only 125 acres. Common sense dictates that such hypothetical traders or travelers would rather have formed their highway for commerce so as to go around Indian Lake.

Montana attempts to compare Indian Lake with the lake which was held navigable by the Court in United States v. Holt State Bank, supra, although the Court there noted that the lake ranged from

three to six feet deep and that navigation was limited because trade and travel in the vicinity was limited. Any comparison between the two lakes stops with a similarity in depth. Mud Lake in Minnesota, which was involved in that case, covered almost 5,000 acres and in its natural and ordinary condition was from three to six feet deep. The Court set forth the following additional statements of fact upon which its conclusion of navigability was based:

* * * Mud River traversed it [Mud Lake] in such 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. * * * Id. at 56-57.

In United States v. Oregon, 295 U.S. 1 (1935), the Supreme Court held five bodies of water in Oregon to be nonnavigable, even though

some 10,800 acres of one of the lakes were between 3 and 4 feet deep and in spite of evidence of some actual use of the lakes for boating. In John Snyder, State of Montana, 72 I.D. 527 (1965), this Department determined that a shallow lake in Montana approximately a mile long and a half-mile wide did not meet the test of a navigable body of water set forth by the Supreme Court. The Department has also held that an inland lake, two miles long and three-fourths of a mile wide, is not navigable in the sense that its waters can be put to a public use for the purpose of trade or commerce. Reuben Richardson, 3 L.D. 201 (1883).

A United States District Court recently declared a 47-mile segment of a river to be nonnavigable although it was currently being used by very light sporting craft such as canoes, kayaks and rubber rafts. The Court stated: "It would be an affront to the public's intelligence to classify the river presently suitable for any kind of commercial navigation." United States v. Crow, Pope & Land Enterprises, Inc., 340 F.Supp. 25, 34 (1972).

Accordingly, we find that Indian Lake is not navigable as it does not meet the navigability test of the Supreme Court. Therefore, title to the lakebed is in the United States.

Finally, the State contends that this proceeding defies even the rudimentary principle of due process of law because the same administrative agency charged with the administration of the public lands is being called upon to decide the title of this land.

We find that appellant is not denied due process by this proceeding. The authority and the duty of the Secretary of the Interior to consider and determine what lands are public lands of the United States have been well established. See Burt A. Wackerli, 73 I.D. 280, 286 (1966). Furthermore, Montana has the right to appeal to the courts for judicial review of the decision herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is hereby affirmed.

Anne Poindexter Lewis, Member

We concur:

Edward W. Stuebing, Member

Martin Ritvo, Member

