Wyoming Law Journal

Volume 12 | Number 2 Article 19

December 2019

Public Fishing Rights

John C. Karjanis

PUBLIC FISHING RIGHTS

As a general proposition of law, fishing in navigable streams is open to the public and not subject to exclusive riparian ownership and control.[1] The courts when speaking of navigability do so in either of two senses. The broad sense, commonly referred to as the "federal sense," encompasses extensive navigation by large vessels such as are used in river trade and establishes ownership of the stream bed.[2] If a stream is navigable in the federal sense the state retains title to the stream bed. The "narrow sense," on the other hand, merely establishes a public easement but title to the stream bed is retained by the riparian owner.[3] This article is devoted primarily to the narrow sense of navigability, but the concept of state ownership of water as a means whereby a public fishing right may be established is also covered.

Because of the peculiar application of the word "navigable" when used to determine rights other than the right to navigate by ships or vessels, courts have been quick to speak of water as being "public"[4] or "floatable"[5] rather than "navigable." The concept, however, is the same despite the fact that different terminology is used.

In some of the early cases, before a stream could be declared navigable, it was required that it be capable of transporting commerce.[6] An example is a Wisconsin case[7] where the so-called "saw-log" test of navigability was adopted. Under this test it was necessary that the stream be capable of floating logs to saw mills. Even though the navigability of the stream was periodical, it was, nevertheless, a navigable stream if its periods of high water or navigable capacity ordinarily continued a sufficient length of time to make it useful as a commercial highway. The test was whether the water course had a useful capacity as a public highway for commerce in its natural state and any operation that was precarious and unprofitable would not render the water navigable. If a stream was navigable under the "saw-log" test a public right of fishery attached as an incident thereto.

Although many jurisdictions still retain the commercial concept as a test of navigability in determining whether a public fishing right exists,[8] emphasis will be given to those jurisdictions which have generally abandoned the test and have established a public fishing right by some other means.

1. Hume v. Rogue River Packing Co., 51 Ore. 241, 92 Pac. 1065 (1907).
2. United States v. Holt State Bank, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1925).
3. Deering v. Martin, 95 Fla. 224, 116 So. 54 (1928).
4. Piezzek v. Jefferson County Drainage Dist., 119 Kan. 119, 237 Pac. 1059 (1925).
5. Attorney General v. Bay Boom Wild Rice & Fur Co., 172 Wis. 363, 178 N.W. 569 (1920).
6. In McKinney v. Northcutt, 114 Mo.App. 196, 89 S.W. 351 (1905), the court stated: "If they are capable in their natural state of being used for the purpose of commerce, no matter in what mode commerce may be conducted, they are navigable in fact, and become in law public highways."
7. Olson v. Merrill, 42 Wis. 203 (1877).
8. Boerner v. McCallister, 197 Va. 169, 89 S.E.2d 23 (1955); East Bay Sporting Club v. Miller, 161 N.E. 12 (Ohio 1928).

Wisconsin was the first state to break away from the test that a stream was navigable only if it was capable of being used for transportation or commerce of a pecuniary nature. The break occurred in a case[9] decided twenty years after the "saw-log" test had been firmly established. In this case the plaintiff owned both sides of a stream which met the "saw-log" test, but it was necessary to push a boat over the shallow parts. The defendant entered the stream in a rowboat from a point on public land and propelled it down the stream to a point where the plaintiff owned both sides. There he caught the ten trout which were the subject of the plaintiff's action. The court emphasized that the right to fish was incidental to the right to navigate for commercial purposes although commerce, in the intsant case, was but a negligible factor.

Somewhat later, in another Wisconsin case,[10] navigability was established, not through any commercial use, such as the floating of logs, but through the use of shallow draft boats for purposes of recreation. In that case the river had been navigated by the public generally in skiffs and rowboats for a period of at least thirty-five years. The plaintiff had a valid lease to certain lands over which the river flowed. Defendant, without trespassing upon the lands of the plaintiff, propelled his boat to a place on the plaintiff's property for the purpose of shooting wild ducks. At such place the water below the defendant's boat was about one foot deep. The court held that no trespass had been committed, recognizing that navigable waters should be free for recreation, which includes hunting and fishing.[11]

A number of courts have clearly recognized that the susceptibility of waters for uses purely recreational renders them public waters.[12] Even the enjoyment of scenic beauty has been declared one of the public rights in navigable waters.[13] It is not surprising, therefore, that a recognized authority on water rights has stated with reference to Wisconsin:

> Thus in Wisconsin when it is said that a water is navigable, it is merely a different way of saying that it is public—public not only for navigation, but for hunting, fishing, recreation, and for any other lawful purpose.[14]

9. Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273, 277 (1898).
10. Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).
11. The court stated: "Navigable waters are public waters, and as such they should inure to the benefit of the public. They should be free to all for commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly certain forms of recreation." Id. at 271, 145 N.W. at 820.
12. Lamprey v. Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893). In Nekoosa-Edwards Paper Co. v. Railroad Comm., 201 Wis. 40, 228 N.W. 144, 147 (1930), the court stated: "Indeed courts have recognized, and now more than ever before recognize the public's interest in pleasure and sports as a measure of public health. . . . In fact, navigable waters, in contrast with nonnavigable waters, is but one way of expressing the idea of public waters, in contrast with private waters." In State v. Korrer, 127 Minn. 60, 148 N.W. 617, 618 (1914), the court said: "If a body of water is adapted to use for public purposes other than commercial navigation it is to be held public water, or navigable water, if the old nomenclature is preferred. Boating for pleasure is considered navigation, as well as boating for mere pecuniary profit."
13. City of Madison v. State, 1 Wis.2d 283, 83 N.W.2d 674 (1957).
14. Kanneberg, The Rules of Law Pertaining to Navigable Water in the Several States, 4 Wis. L. Rev. 345, 347 (1946).

Once a right has been established in the public to fish and hunt on navigable waters within the state, that right cannot be divested unless reasons of public policy so demand. One case has recognized the increasing demand for recreational uses of navigable streams and stated that a public fishing right once established should remain.[15] It has been held that a right to fish may be acquired by exclusive enjoyment over a period of time, but not if the use of the fishing privilege is only annual and temporary.[16] In view of the fact that the majority of states permit fishing only during seasonal periods a public fishing right may not be established on a principle analogous to adverse possession, nor can it be established by prescription.[17] Reliance on the test of navigability or some other test is essential before a public right to fish may be established.

May the public have a right to fish in streams which have been made navigable by channeling or other artificial means? An early case held that for waters to be navigable they must be navigable or floatable in their natural state.[18] The court said that waters rendered floatable by artificial means cannot be regarded as public highways. It would seem that the better rule was stated in a recent case which held a water navigable notwithstanding the fact that a channel had been constructed to make it floatable.[19] The fact that a channel was capable of use only during the months of high water when the depth of the water was only about four inches in places did not render the water nonnavigable.[20] Michigan, in two cases, strained the meaning of the word navigable almost to an absurdity. In *Collins v. Gerhardt*[21] the Michigan Supreme Court held that a fisherman who waded a river, angling as he went, was not guilty of trespass, although the facts raised at least some doubt as to the actual floatability of the stream. A later case[22] before the same court, involved a stream which was not navigable by any kind of boat without the necessity of lifting or carrying it over shallow places even during seasonal periods of high water. The court, nevertheless, declared the stream navigable in fact but conceded that it was a borderline case. Query, whether a stream is navigable, in any sense, when portage of even the smallest boats is required? In view of the above two cases the navigability test is not appropriate for determining whether a public fishing right exists in certain waters.

Perhaps the case which has aroused the greatest attention in recent years with respect to the public right of fishing is the 1954 Missouri case

15. In Muench v. Public Service Comm., 261 Wis. 492, 55 N.W.2d 40, 46 (1952), the court said: "The fact that in many of our navigable streams the recreational uses thereof far outweigh the use made of such streams for the purposes of navigation alone, strongly supports the premise that sound public policy requires the retention of the trust doctrine as so expanded."
16. Improved Realty Corp. v. Sowers, 195 Va. 317, 78 S.E.2d 588 (1953).
17. Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); Water v. Lilley, 21 Mass. 145, 16 Am.Dec. 333 (1827); Beach v. Morgan, 67 N.H. 529, 41 Atl. 349 (1894).
18. McKinney v. Northcutt, 114 Mo.App. 196, 89 S.W. 351 (1907).
19. Bohn v. Albertson, 107 Cal.App.2d 738, 238 P.2d 128 (1951).
20. Kemp v. Putnam, 47 Wash.2d 576, 288 P.2d 837 (1955).
21. 237 Mich. 38, 211 N.W. 115 (1926).
22. Ruseton v. Taggert, 306 Mich. 432, 11 N.W.2d 193 (1943).

of *Elder v. Delcour*.[23] This was an action for a declaratory judgment to determine the plaintiff's right to fish in a river which flowed across the defendant's land. The river was navigable by canoes and other small craft, was heavily fished by sportsmen both by wading and by floating, and in the past had been used for floating logs in lumbering operations, but at the date of trial contained obstructions to navigation which required portage. The court held the river nonnavigable and that the defendant owned the bed, but nevertheless, said the river was a public highway over which members of the public could travel by floating and wading, either for business or pleasure. In a similar case the public right to fish in a nonnavigable stream was upheld although the bed and both sides of the stream were owned by the riparian owner.[24]

One could criticize the two preceding cases as reaching too far. There is the probabality that the relationship between fisherman and landowner will be anything but good as a result of them. In any event the courts recognized that public rights, including the right to fish, are superior to the rights of the riparian owner.

Aside from the theory that a public right to fish in a water may be established by a court declaring it navigable or floatable there is a separate theory which would establish the same right, based on the proposition that all waters have been declared the property of the state[25] or the public[26] and, as such may be navigated and fished by the public.

New Mexico's constitution declares that all unappropriated waters of every natural stream belong to the public. In *State v. Red River Valley Co.*[27] the question was raised whether the public had a right to fish in a portion of a reservoir, the portion of the bed being privately owned. The Supreme Court of New Mexico held that since the waters in question were unappropriated the public had a right to fish them notwithstanding the fact that title to the bed was in the landowner. By way of dictum the court stated that all unappropriated waters from every natural stream were public waters which the public had a right to fish. The court did not concern itself with any test of navigability but rather placed its decision squarely on the proposition that if a water belongs to the public there is a public right to fish it. Since all unappropriated waters[28] belonged to the public they could not become a part of a privately owned adjoining tract simply because they were enclosed by the landowner. The court went on to say that the public has no right to approach public water through private property or to fish in public water while on private property without the consent of the landowner, but that fishing in

23. 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (1954).
24. Medlock v. Galbreath, 208 Ark. 681, 187 S.W.2d 545 (1945).
25. Colo. Const., Art. XVI, § 5.
26. Neb. Const., Art XV, § 5; N.M. Const., Art. XVI, § 2.
27. 51 N.M. 207, 182 P.2d 421 (1945).
28. "Waters are not appropriated until an application to use has been effected. There must be a diversion and application to beneficial use to constitute an appropriation. A mere diversion alone is not sufficient." 182 P.2d at 431.

public water from a boat was not a trespass even though the underlying bed was privately owned. The question was left open as to whether a member of the public would be a trespasser if he walked along the bed of a stream angling as he went. It would seem that from the practical standpoint the public should also have an easement over the bed incident to its right of fishery; if not, the case would be reduced to nothing more than another application of a navigability test. The Colorado court, however, struck down as unconstitutional a statute which provided that the public should have the right to fish in any stream in the state subject to actions in trespass for any damage done along the banks.[29] There too, the waters of the state were declared public waters by constitutional provision. The court, nevertheless, held that where the owner of land owns both banks and the bed of a stream, he also has the exclusive right to the fishery notwithstanding the fact that the stream was stocked at public expense.

The two preceding cases are significant in a number of ways with respect to the establishment of a public fishing right by virtue of state or public ownership of water. The Colorado case was decided some fifty years ago at a time when recreational uses of water had not yet developed into a public problem. Colorado had expended large sums of money for the purpose of propagating, planting and protecting fish. This expenditure inured to the benefit of the landowners as a result of the decision. The holding that the riparian owner has a right to the fish while the state owns the water is a throwback to common law and is contrary to the principle that the right of fishery follows the title of the water.[30] The New Mexico case opened all waters to public fishing by using the public ownership concept. Would it have been a better result if, instead of declaring all waters open to the public, the court had, after first determining the adaptability of the stream for public fishing, declared a public easement over the particular stream? Could the court have established a public right without the aid of the public ownership concept? That is precisely what happened in Missouri in the *Elder* case, a state in which it has been held that title to nonnavigable water is in the riparian owner.[31] In any event, the use of the state ownership or public ownership concept as a basis for the establishment of public rights in water has been criticized as being nothing more than circumlocution since the same result can be accomplished without the aid of the concept.[32] Since it is unnecessary to apply this concept in the creation of other rights, there is nothing peculiar to the creation of public fishing rights that would require its application.

In some of the early cases involving navigable waters the courts held that the public right to navigate would be superior to the rights of the riparian owner only when the waters were used for purely commercial and

29. Hartman v. Tresise, 36 Colo. 146, 84 Pac. 685 (1905).
30. Lee v. Mallard, 116 Ga. 18, 42 S.E. 372 (1902).
31. Dennig v. Graham, 227 Mo.App. 717, 59 S.W.2d 699 (1933).
32. Trelease, Government Ownership and Trusteeship of Water, 45 Calif. L. Rev. 638 (1957).

pecuniary purposes. Over a period of years the conditions of society were bound to change. The hours of labor had shortened. There was a rise in the standard of living. Transportation became more available and public roads and highways were expanded. All of these factors made the use of leisure time a public problem.

A number of courts recognized that fishing, hunting and boating became important uses of leisure time. The logical conclusion was to expand the test of navigability so as to include waters which were susceptible of purely recreational uses. The recognition by these courts that the rights of the landowner with reference to fluvial waters were subordinate to the superior public right to use the waters for recreational purposes was an intelligent and public minded approach to the problem.

With reference to the holdings in the *Elder* and *Red River Valley* cases, that waters whether navigable or nonnavigable may be fished by the public, it may be argued that the interests of the landowner have been disregarded. One need not go far to find a stream that fishermen have littered to such an extent that even the most understanding landowner would be distraught. It seems that a more reasonable test must be established for determining whether a public right exists in a particular water. The test of navigability for commercial vessels was not suitable in determining the character of waters for floating logs. Is the floatability test appropriate for determining whether a public fishing right exists in certain waters, especially in view of the fact that this test was designed to determine whether a given body of water was suitable for commercial uses? The correct approach to the problem would be to determine the adaptability of a body of water for a certain public use such as fishing or boating. If it is adaptable for the particular use then a public right for that use should be established. Such a test would permit the courts to balance the interests of the riparian owner with those of the public much more adequately than the state ownership or navigability tests.

JOHN C. KARJANIS