Policy and Planning for Recreational Use of Inland Waters

Robert I. Reis

University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/articles

Part of the Land Use Law Commons

Recommended Citation

Available at: https://digitalcommons.law.buffalo.edu/articles/863

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Journal Articles by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
POLICY AND PLANNING FOR RECREATIONAL USE OF INLAND WATERS

ROBERT I. REIST†

Introduction

To note that there are only a limited number of natural lakes capable of satisfying the recreational needs of the general population is but to state the obvious. What is not often realized, however, is that the available public supply is considerably less than the number of existing lakes. A large number of small and medium size lake

† Assistant Professor of Law, University of Connecticut, School of Law. A.B. Adelphi University; LL.B. New York University; LL.M. University of Southern California (Title Insurance & Trust Foundation Fellow). Member, New York & Connecticut Bars. Member, Institute of Water Resources, Storrs, Conn.

The author wishes to acknowledge the assistance of the Institute of Water Resources, Storrs, Conn. as this article is an outgrowth of research on New England Water Problems conducted under a research grant provided by the Institute with funds made available by the Department of the Interior, Office of Water Resources Research, under P.L. 88-379.

A note of appreciation is also in order for the valuable assistance of Mr. Thomas O'Marra, a third year student at the University of Connecticut School of Law, during the research and editing stages of this article's preparation.

1. This is as good a place as any to introduce the controversies inherent in the definition of a lake. The Restatement of Torts definition of "lake" was adopted by the court in Block v. Franzen, 163 Neb. 270, 276, 79 N.W.2d 446, 450 (1956) as follows:

The term "lake," as used in the Restatement of this Subject, comprehends a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, and also the depression, both depression and body of water being of natural origin or a part of a watercourse. . . . A distinction is sometimes made between lakes and ponds; the term "lake" connoting a large body of water and the term "pond" connoting a small body of water ordinarily containing considerable aquatic growth. But since this distinction is based mainly on the size of the body of water, it is not essential for legal purposes, and the term "lake" as here defined includes both large and small bodies of water. . . . A lake is distinguished from a stream by the fact that in the former the body of water is substantially at rest while in the latter it has a perceptible flow. . . . To constitute a lake, a body of water must have a reasonably permanent existence. Many lakes have a permanent body of water. But the body of water need not be permanent in order to constitute a lake. Thus, a body of water which occasionally dries up in periods of drought is still a lake. On the other hand bodies of water, even
facilities have passed into private ownership over the course of the years. The seriousness of the problem is magnified by the large growth in population and the ever-increasing demand for recreational facilities. Popular leisure time activities, such as boating, waterskiing and fishing, place a premium on the availability of water facilities.

though of considerable size, which collect only in times of heavy rain, flood or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined. Restatement, Torts, § 842, at 324.

The court in Brignall v. Hannah, 34 N.D. 174, 180-81, 157 N.W. 1042, 1043 (1916) attempted the "dictionary approach":

Appellants' first contention is that the land within the meandered lines of survey was never a lake in the proper sense of the word, such as to give occasion for application of the doctrines applicable to riparian ownership. Funk & Wagnell's New Standard Dictionary defines a lake as an inland body of water or natural inclosed basin serving to drain the surrounding country. According to Webster's International Dictionary a lake is a considerable body of standing water in a depression of land; and when a body of standing water is so shallow that aquatic plants grow in most of it, it is usually called a pond; when the pond is mostly filled with vegetation it becomes a marsh.

2. By way of illustrating the extent of private ownership, see generally, Maloney & Plager, Florida's Lakes: Problems in a Water Paradise, 13 U. Fla. L. Rev. 1 (1960) [Hereinafter cited as Maloney]. See also Waite, The Dilemma of Water Recreation and a Suggested Solution, 1958 Wis. L. Rev. 542. Waite conducted a survey in Wisconsin of lakes with 40 acres or more. Some statistics of the survey are particularly interesting as reported id. at 543.

3. Consider the following from The Wall Street Journal, Dec. 6, 1966, p. 1, col. 6, p. 23, cols. 1, 2:

In the year 2,000 there will be more than six billion people in the world, double the present total. The population of the U.S. will be close to 340 million, compared with 198 million now.

The prospect seems horrifying. For impoverished lands whose food supplies already are stretched thin, it raises the specter of worsening hunger. For American city dwellers whose nerves already are rubbed raw by the crowds and clangor of urban life, it evokes nightmares of people trampling one another underfoot.

Besides the concern about whether men will have enough elbow room or whether golf courses and parks will be hopelessly jammed, there are questions such as these: What will happen to privacy? Will man be able to escape noise? Will the psychological pressures of crowding damage man's health? Will man's environment be polluted beyond repair?

Definitive answers aren't possible. A great deal depends on how much serious thinking about the future is done in and out of government here and abroad in the years immediately ahead. Fortunately, much scholarly attention is now being focused on the problems of the future.

Consider the matter of recreational space in the U.S. In the year 2000 population will probably be about 70% above today's total, but no more land will be available. Many analysts believe—the difficulties of urban life notwithstanding—that Americans will continue to move from rural areas to cities in the years ahead. By one estimate, five of every six Americans will live in urban areas in 2000, compared with roughly four in six now.

According to this projection, population density in the urban U.S. will reach about 4,000 persons per square mile by the year 2000, up from 3,000 per square mile at present. At the same time, the population pattern in the rural areas of the central part of the country is not expected to change significantly. This region, embracing the plains and mountain states, has actually been losing population during the past two decades and is expected to remain relatively sparsely settled.
The growing awareness by the public of the shortage of recreational water has created a demand for greater state activity to secure these facilities. Up to the present time the reasons for state ownership and control have not been fully appreciated and the response to public demand by the state legislatures has been slow. The absence of any formal state activity leaves the public need unsatisfied and too often results in numbers of private individuals taking matters into their own hands—acting unilaterally to extend their activities onto waters previously thought private.  

A recent conflict between nonriparian (public) users of a small inland lake in Connecticut and riparian (private) proprietors of the lake serves to highlight both the public need and a potential clash between public and private interests. During the summer of 1966, members of a private ski-club gained access to a small private lake and constructed a swimming raft and another structure which served as a ski-jump. Both were anchored to the lake bed and used by the ski group during the summer months over the protest of riparian owners. The use of these facilities disrupted the tranquility of the lake and made use by the riparian proprietors difficult and, at times, even hazardous. In September of 1966, an action was brought against the water ski club by the property owners around the lake to secure the removal of the rafts and a cessation of the water jumping activities.  

Public and private rights in and to the use of Twin Lakes had never been formally adjudicated by the courts. Any attempt to resolve the conflict between the professed right of “exclusive use” by the riparian proprietors and the rights asserted by members of the public raises two questions: (1) What are the rights of riparian proprietors to the use of the bed and surface of the lake? and (2) What are the rights of members of the general public to use the lake for

4. The extension of organized or quasi-organized private activities into areas where government fails to act is a phenomenon worthy of notice at this point—particularly where it affects resource allocation. Once individual activities solidify and become organized (or group) activities, public controls through planning and legislation are often on the near horizon. Obviously, this result is due to the increased pressure which an interest group can exert, as distinguished from the unorganized demands of individuals.

A discussion of the individual, to organizational, to state activity as related to consumptive ground water use in Southern California may be found in Reis, A Review and Revitalization: Concepts of Ground Water Production and Management—The California Experience, 7 Natural Resources J. 53 (Jan. 1967).


6. Maloney and Plager observe that public and private rights to the use of most of Florida’s lakes have not been adjudicated and they discuss some of the difficulties thus posed for extending recreational water uses by planned activities. See Maloney.
recreational purposes? Neither of these questions admits of a simple and straightforward response. Both raise the important problem of the proper role of the state in light of an ever-increasing public need for recreational resources.

There is much potential for inadvertent judicial encroachment upon the sphere of private ownership in the attempt to satisfy the recognized need for more open waters for public use. Correlatively, the satisfaction of broader public objectives by nonselective, haphazard and partial judicial response to public demands may hinder rather than help the resolution of underlying recreational difficulties.

Neither doctrines regulating private rights and public needs, nor public needs per se are at present sufficiently defined to allow intelligent decision-making in a matter affecting such a vast area of private rights.

The present article is motivated by the current need for placing public and private needs in perspective. In part, it will pursue the question of how the competing values of private rights and public needs can be reconciled. It should be noted that the article is not intended as a defense to the position that the owner of lake front property should continue to retain both the right and the power to exclude the general public from use of these lakes despite an obvious public need for increased recreational facilities. Neither is it intended to indicate that the public may usurp the property without affording some means of economic redress to the private owner. One question raised in the ensuing analysis is the propriety of the use of judicial interpretation of doctrines of private ownership as a means of altering public and private rights. This question must be viewed in the context of the constitutional guarantee of just compensation as a means of protecting the basic integrity of private ownership.

Part one is directed to an analysis and discussion of those doctrinal alternatives which set forth the nature and extent of private ownership of lakes. This part will delineate the conflict between private rights and the need to provide greater public use. Part two will discuss the philosophical and economic implications of judicial control over private ownership of lake facilities leading to the ultimate selection of condemnation as a means of acquiring rights to the use of private lakes. Thereafter, several planning alternatives available to the state in providing necessary public recreational facilities will be set forth.

I. DOCTRINES OF PUBLIC AND PRIVATE RIGHTS—JUDICIAL INTERPRETATIONS AND CHANGE

Without close examination, one might attach the significance of deliberation to the development of total patterns of property rights and interests. The evolution of the "doctrine" of today, however, is the product of an infinite number of individual pressures and peculiar factual circumstances of yesterday—long since forgotten and rarely recorded for posterity in judicial opinions. Concepts of public and private rights to recreational use of inland water resources are no exception to this time-honored pattern of common law doctrinal development. The selection of criteria to distinguish spheres of public and private ownership and control presumes the existence of value judgments and policy choices upon which to structure legal relations. The same can be said for the extent of private rights arising within the private sphere of ownership. Judicial involvement in the particularities of the conflict before the court, however, often results in a myopic failure to place in proper perspective concepts of public and private rights with regard to the utilization of inland lake facilities.

Early in the development of the country, ownership and control of lake facilities could have been either retained wholly within the public sector (title to inland water thereby passing to the state for the benefit of the general public) or left to the private sphere of control to operate under the selective process, of a market economy. As the present system has developed, there is a delicate balance, with limited spheres of ownership and control over lake facilities in both the public and private sectors.

Private expectations of ownership based upon past judicial decisions become important when the balance between public and private spheres of ownership and control is undergoing extensive judicial reevaluation. The two principal areas in which judicial decision-making operates to delineate rights in inland waters are:

1. In the primary judicial delineation of public and private waters under the "navigable-nonnavigable dichotomy"; and
2. In determining the rights accruing in nonnavigable waters.

A. PRIMARY DELINEATION OF PUBLIC AND PRIVATE RIGHTS—THE NAVIGATION CONCEPT

1. In General

Faced with the Maccabean task of constructing a clear definition capable of differentiating between public and private waters, the
common law courts ultimately selected the "navigable-nonnavigable" dichotomy. A determination by the courts that waters were "navigable" automatically resulted in their being labelled "public." Waters deemed "nonnavigable" were called "private" and left to the ownership and control of private individuals. By denoting water as "navigable," the state (or the Crown) became owner of the soil (bed) beneath the waters, with the corresponding right and power to control use of the surface for the public benefit. All incidents of general public use to which the waters were capable of being put, i.e., boating, swimming, conduct of trade, fishing, and the like, were permissible. To call a river, lake, or other body of water "nonnavigable," however, resulted in ownership of the bed by private individuals and exclusion of the general public, as such, from use of the surface.

2. Doctrinal Development: Common Law to Federal

The earliest common law differentiation between inland waters subject to public control and waters left to the private sphere of ownership was based upon the belief that the King had both proprietary interests in and control over the seas as a part of the public juris. The conceptual line of demarcation for public waters, arising from this rather ritualistic attribution of the sovereign prerogative, was closely related to the factual presence of the sea. Wherever the tide ebbed and flowed, wherever inland saline waters were attributable to the influence of the sea, there was affixed to that body of water the label “navigable” for purposes of public ownership.

In the context of early English development, the extent of public rights retained under the ebb and flow of the tides test was sufficient to satisfy the public need for transportation and commerce. Bulky goods could be carried around the periphery by sea to the nearest salt-water port and from there transported whatever short distance necessary over inland roads. In the United States, however, there

---

8. The first case reputed to have made the distinction is Murphy v. Ryan, Ir. R. 2 C.L. 143 [1868], 16 Weekly L.R. 678 (as cited in Annot., 23 A.L.R. 757 (1922)).
9. This has been commonly denominated the common law “ebb and flow” test. As noted in 56 Am. Jur. Waters § 452 (1947):

Under the common law of England the title to the bed of the sea below high-water mark, and to the bed of all rivers as far as the flow of the tide extended, was in the Crown, but the title to the bed of all fresh-water rivers above the ebb and flow of the tide, whether navigable or non-navigable, where the river formed the boundary between adjoining proprietors, was in the riparian owner to the thread of the stream. This rule of the common law seems to be a creature of relatively late growth, having had its inception during the reign of Elizabeth and its development under the Stuart Kings of England. Regardless of this fact, it has been the law of England since that time, and was, generally speaking, the common law adopted in this country by those states bounded by tidal waters.
was a greater need for inland transit over waters not connected with the sea, or affected by the ebb and flow of the tide. Early in the development of the country it became apparent that water routes were the best means of inland transit. Attempts were made to discover and plot the extent of water capable of use for trade and commerce. In fact, the Lewis and Clark expedition was financed by the federal government partially in the hope of finding a continuous water link between the country's two great oceans.\(^\text{10}\) If the public's right to use inland waters for transit and commerce were limited to those water courses connected with and affected by tides, then inland commerce and, correspondingly, the settlement of this country would have been severely impeded.\(^\text{11}\)

Although the earliest American decisions did distinguish navigable and nonnavigable waters on the basis of the ebb and flow of the tides, the inherent limitations of the English doctrine were fortunately avoided by subsequent state and federal decisions construing the

---

\(^{10}\) In The Journal of Lewis and Clark, xviii n.3 (DeVoto ed. 1953), the editor makes reference to this hope as follows:

> Jefferson was working out a transcontinental route for interoceanic trade, which was the hope that had sustained nearly three centuries of search for the Northwest Passage. He did not need to point out to Congress that some of the routes east of the Mississippi which he named were almost continuous. The one from the mouth of the Missouri to Lake Michigan by way of the Illinois River was interrupted only by the short Chicago Portage; indeed, during the flood season of some years this stretch could be paddled. After the Chicago Portage to Lake Michigan there was no interruption all the way to Oswego on Lake Ontario, and from Oswego a few easy portages led to the Mohawk River. (With equal ease an alternative route led from Lake Erie to the Finger Lakes. Note the relation of both these routes to that of the Erie Canal.) The Great Lakes were not navigable during the winter, however, and a route up the Ohio River would be far preferable—though Jefferson did not say so to New York congressmen. Such a route would necessitate a long interruption for the difficult and costly crossing of the Pennsylvania mountains. Yet in 1803 it was a reasonable expectation that various proposed canals would soon greatly reduce this difficulty, or perhaps even overcome it. In 1802 the Potomac Company, which Washington had helped to organize in 1785, had completed a series of locks around the Great Falls of the Potomac. By 1808 additional locks and short canals provided continuous passage to Harper's Ferry, and eventually, as the Chesapeake and Ohio Canal, the system extended to Cumberland.

\(^{11}\) This is implicit in the observation of the court in Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936) that the reason for the adaptation and change of the common law rules to the conditions of this country lay in the commercial utility of inland water courses:

This court has long ago departed from the narrow common-law rule for the determination of the navigability of streams. Under the English common law, streams on which the tide ebbed and flowed were prima facie navigable and the beds thereof were owned by the Crown. All streams or bodies of water not affected by the tide were non-navigable and the adjacent landowners held to the center of the stream or lake. Under this rule many of the large lakes were privately owned and the public generally was deprived of their use and enjoyment. This test for the determination of the navigability of streams, however, was not adapted to the conditions in this country where many large rivers and other bodies of water were susceptible of being used as highways of commerce. Hence, the common-law test, in the great majority of states, has been either repudiated or modified. Id. at 634, 56 P.2d at 1162.
federal commerce power.\textsuperscript{12} A broader and more realistic definition of navigable waters, based upon the factual and economic utility of inland waters, evolved from early judicial decisions. Thus, rather than distinguishing between public and private control over inland waters on the basis of the artificial criteria of the ebb and flow of the tide, the federal courts adopted a test based on whether the waters were “navigable-in-fact.” Under either test, where the body of water, whether a river or a lake, is labelled “navigable,” the state retains ownership of the bed and control over the surface of the water.\textsuperscript{13} The general public is accorded the right to use the surface of the water for at least navigational purposes, and, in most instances, for other uses such as swimming, boating and fishing. Where, on the other hand, the body of water is nonnavigable, it is the subject of private ownership and control.\textsuperscript{14}

Under the federal navigable-in-fact test the role of the courts has been vastly expanded because of the necessity for judicial development of criteria for determination of navigability. The courts no longer have to contend with the single characteristic of “ebb and flow of the tides,” but must develop criteria for characterizing the nature of the use made of the waters in an effort to find whether the waters are “in fact” navigable. Under the federal test of navigability, differing levels of abstraction inhere in both the fact finding and fact processing (evaluation) stages of decision-making.

At the first level of fact finding are the natural facts, such as the depth of the water, the type of foliage, proximity to other navigable bodies of water and the nature of the activity which the water is capable of supporting.\textsuperscript{15} These, however, are only evidentiary, not conclusive, facts, which must be interpreted to satisfy the second-level fact-finding process—evaluation of the waters to determine whether or not they are capable of commercial utilization. Since the navigable-in-fact test has its origins in the federal commerce power, the essential

\textsuperscript{12} Carson v. Blazer, 2 Binn. 475 (Pa. 1810), was the first American case to hold fresh water navigable and refuse title in the bed to riparians.

\textsuperscript{13} Both tests were designed with the object of bed ownership in mind. Obviously, it was thought that ownership of the bed meant control over the surface. The only difference lies in the criteria used to determine “navigability”:

(a) on the acceptance of the English test and private rights incident thereto, see Hayden v. Noyes, 5 Conn. 391 (1824); Adams v. Pease, 2 Conn. 481 (1818); (b) on the subsequent modification of the English rule and ultimate acceptance of the “navigable in fact” test, see Balf Co. v. Hartford Elec. Light Co., 106 Conn. 315, 138 Atl. 122 (1927); Orange v. Resnick, 94 Conn. 573, 109 Atl. 864 (1920); Groton & Ledyard v. Hurlburt, 22 Conn. 177 (1852); Wethersfield v. Humphrey, 20 Conn. 217 (1850); Enfield Toll Bridge Co. v. Hartford, N.H.R.R. Co., 17 Conn. 40 (1845).

\textsuperscript{14} See generally cases and discussion, Annot., 23 A.L.R. 757 (1922).

\textsuperscript{15} For an example of judicial treatment of these factors, see Lakeside Park Co. v. Forsmark, 396 Pa. 389, 153 A.2d 486 (1959).
nexus between federal control over these waters and the commerce power obviously resides in the utility of the waters for commercial purposes.

To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon.\(^6\)

At least for federal purposes, the navigable-in-fact test has developed to represent a twofold inquiry: (1) is the water capable of supporting boats and other floatable objects? (2) are these floatable objects utilized in commerce within the purview of federal concern? It is within the second inquiry, the meaning of commercial utilization of waters, that the federal test has its greatest potential flexibility. As modes of water transportation and commercial uses of water change, the concern of the federal government for the commercial utility of the waters also changes. As was said by the Court in *United States v. Utah*:\(^7\)

\[T\]he possibilities of growth and future profitable use are not to be ignored. Utah, with its equality of right as a State of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the State either because the location of the rivers and circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure, or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as these may arise in connection with the growth of the population, the multiplication of activities and the development of natural resources. And this capacity may be shown

---

17. 283 U.S. 64 (1931).
by physical characteristics and experimentation as well as by
the uses to which the streams have been put.\textsuperscript{18}

Even under this seemingly liberal definition, however, the distinction
between public and private waters remains one of commercial utiliz-
ation of the waters as a means of transportation of goods in commerce
as distinguished from business activities on the water.\textsuperscript{19} In this light,
it has been consistently held by the federal courts that:

Mere depth of water, without profitable utility, will not
render a water course navigable in the legal sense, so as to
subject it to public servitude, nor will the fact that it is
sufficient for pleasure boating or to enable hunters or fisher-
men to float their skiffs or canoes. To be navigable a water
course must have a useful capacity as a public highway of
transportation.\textsuperscript{20}

Dealing as we are with a means of distinguishing between public
and private ownership of land and water, the consistency of federal
and state courts in applying the federal test for federal objectives
satisfies a multitude of purposes, not the least of which is the need
for stability of property rights and expectations. Because land and
water rights were transferred from the public to private sectors many
years ago, any wholesale shift in policy orientation to include com-
mercial utilization of waters not within the context of fundamental
federal concern would certainly be directed to the heart of the institu-
tion of private property.

\begin{flushright}
\textsuperscript{18} Id. at 83.
\textsuperscript{19} Professor Waite makes this distinction in questioning the possible extension
of the federal commerce power over recreational use of inland lakes. Thus, in
he notes:

The interest the federal government has in the maintenance of order among
recreational water activities is greater today than it once was. It has always
been concerned with protecting interstate commerce from state harassment,
but in years gone by this meant keeping watercourses open for travel by
commercial vessels. Today, the automobile and boat trailer enable boatsmen
to pursue their sport in states other than their own. The manufacture and
distribution of the billions of dollars worth of equipment and supplies they
buy is interstate commerce, that depends for its prosperity on there being
waters available on which these materials may be enjoyably used. To some
extent the boaters engage in interstate boating. This, too, may afford an
interstate commerce basis of federal jurisdiction to preserve safety and order
afloat. (Emphasis added.)
\textsuperscript{20} Harrison v. Fite, 148 Fed. 781, 784 (8th Cir. 1906). See also Proctor v. Sim,
134 Wash. 606, 611, 236 Pac. 114, 116 (1925), where the court said:

A lake which is chiefly valuable for fishing or for pleasure boats of small
size is ordinarily not navigable. If in order to be navigable, it must be capable
of being used to a reasonable extent in the carrying on of commerce in the
usual manner by water. "Navigability in fact is, in the United States, the test
of navigability in law; and whether a river is navigable in fact is to be deter-
dined by inquiry whether it is used, or is susceptible of use, in its natural
and 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."
\end{flushright}
RECREATIONAL USE OF INLAND WATERS


Hesitancy to expand the federal navigation concept beyond those commercial activities coming within the purview of the limited powers of the federal government has rather narrowly restricted the extent to which public recreational use of inland water resources might develop under federal controls. However the states retain power over the health, safety, and welfare of their inhabitants. In response to social, economic, and political pressures to expand the public use of recreational water resources, several states have expanded the test of navigability for state purposes, arriving at a state adapted prototype of the federal navigable-in-fact definition.

The extent of state freedom to act in this area is not absolute. Before discussing what the states have done to the federal navigation definition, a brief consideration of at least two areas where the states are restricted (at least in theory) is in order.

First, the states cannot abridge the scope of the public right to use waters for federal navigational purposes, or grant private rights inconsistent therewith. Where the federal navigation power conflicts with state law it is supreme.

Although the states may convey title to the beds of federally defined navigable waters, they cannot au-


22. For two excellent treatments of the federal navigation power see Dean Trelease's article, note 21 supra, and Laurent, Judicial Criteria of Navigability in Federal Cases, 1953 Wis. L. Rev. 8.

23. This in itself is an interesting contradiction to the general observation that title to navigable waters is in the state. Perhaps those who believe the state cannot convey title, even where it does not interfere with the use of the waters for navigation, are guilty of the following "historical error":

The third error is in assuming that the King held the beds of navigable waters under a trust for the public, which he could not abrogate, and which prevented him from granting the beds of navigable waters into private ownership. This error loses sight of the distinction between the proprietary and prerogative rights of the King. In his proprietary right in the beginning, he theoretically owned all the land in the Kingdom which he had not granted away, and there was nothing to prevent his making grants of it to individuals at his pleasure. In fact he customarily, and without question, did make such grants, including lands under water both navigable and non-navigable, until practically all the land in the Kingdom had passed into private ownership except that retained for his own pleasure and emolument. But, so far as the waters were concerned, certain public rights had been attached to them which he could not destroy, either personally, or by granting the waters into private ownership, for the waters went into the hands of private owners subject to the rights of the public in them. The first and most important of these is the right of their use for navigation. When this right attached to the waters is lost in the haze of antiquity. There is nothing to show when or how it began, but from the very earliest records the waters which were capable of navigation were regarded as highways, and subject to a common right of passage.

thorize the construction of obstructions to navigation nor diversions of water which interfere with navigation. In the context of increased public use of navigable waters, this would seem to imply that the utilization of the waters for recreational purposes, if inconsistent with the conduct of commercial navigation, would not be permissible.

Second, as to those states created from the public domain, the federal navigation definition is binding insofar as the initial classification of public and private ownership is concerned. The relationship of the state to present or past federal lands has been succinctly characterized by Professor Munro as follows:

1. As to states carved out of the public domain, title to land underlying waters under the federal test of navigability passed to the states by the several acts of admission. Since they did so pass, it was entirely within the state's province to decide whether the lands of a riparian extended to high water mark, low water mark or the thread of the stream or center of the lake.

2. In such states, the title to lands underlying waters nonnavigable under the federal test did not and could not vest in the state. The title remained in the United States or vested in the riparian.

(a) Bed Title

The extent to which a state is "bound" by the federal conveyance of subaqueous land to individual patentees ostensibly appears as a principle of relative stability. The Supreme Court of North Dakota, when faced with an attempt by the legislature to "retroactively redefine" navigation so as to secure title for the state, unequivocally held the legislation to be unconstitutional.

24. See, e.g., Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); Union Bridge Co. v. United States, 204 U.S. 364 (1907). Consider also the question whether having once granted some rights on land adjacent to a navigable body of water, which land later results in an obstruction of navigation, or is affected by the removing of obstructions to navigation, the state (or federal government) need compensate the individual for the property so affected. For the federal approach see United States v. Twin City Power Co., 350 U.S. 222 (1956). For an example of the state approach, see Hollister v. The Union Company, 9 Conn. 436 (1833).


26. The relationship of powers was captured by Dean Trelease:

Thus, as far as the federal government is concerned, whatever rights a state may attempt to create in these waters are subject to its powers; these private rights carry within them an inherent infirmity. This has been frequently expressed by saying that the right is "subject to a dominant servitude" or to "a superior navigation easement." Trelease at 407.


The legislature may not adopt a retroactive definition of navigability which would destroy a title already vested under a federal grant, or transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner. A legislative declaration that all meandered lakes are navigable will not make them so if they are not navigable in fact, as against the pre-existing rights of riparian owners, unless compensation is made to such owners for the property thus injured or taken by the state. Thus we reach the conclusion that the state may not now successfully assert title, on the ground of navigability, to lands lying beneath nonnavigable waters unless those waters were in fact navigable at the time of statehood in the absence of subsequent conveyances to the state.29

Because of this limitation the "Title Game," as played by the states, manifests itself in forms other than a direct confrontation with the federal concept of navigability. Judicial construction of the concept and interpretation of the facts permit the states a degree of flexibility in opening new waters to public use. An excellent example of this flexibility is the "improved" waters definition of navigation successfully used by the court in Coleman v. Schaefer.30 The Supreme Court of Ohio stated that they were neither bound by the existing condition of the stream nor by an interpretation of commercial utilization of waters reflecting only current uses. Pursuant to their reading of United States v. Appalachian Electric Power Company,31 the court felt that a liberal but permissible definition of navigation for title purposes could take into account the following:

[L]ack of commercial traffic is not a bar to a conclusion that the stream is navigable, where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation; that the navigability of a stream is to be determined on the basis, not only of its natural condition, but also of its possible availability for navigation after the making of reasonable improvements; and that it is not necessary that such improvements be actually completed or even authorized.32

It is most important to isolate each of the three elements contained in the above definition: (1) possible improvement of the existing water condition; (2) improvements "actually" made which indicate the utility of the water; and (3) "simpler types of commercial navigation."

29. Id. at 317, 36 N.W.2d at 332, 333.
31. 311 U.S. 377 (1940).
Carried to the extreme, the elements of the Coleman decision strike at the "binding effect" of federal strictures on definitions of navigation at the state level. A rather strong comment on the effect on property rights and private expectations appears in the dissenting opinion of Justices Hart and Stewart.

Property rights in a nonnavigable stream do not change where, at a time subsequent to the acquisition of those rights, the owners, by artificial means, increase the depth and width of the stream to accommodate small boats which are used for fishing and other pleasures incident thereto. The property rights so fixed are not lost to the owners who, in the manner above indicated, improve the usefulness of their lands.33

The question should be asked whether or not the ultimate effect of this decision is really to penalize riparian owners where, because of their improvements, the waters have become "navigable." This is the very type of activity which the "institution" of private ownership was intended to foster—improvement of the utility of resources for the direct and incidental benefit of society generally. If, because of these improvements, public needs might be better satisfied by direct utilization of these properties, should the state be able to achieve this objective by a simple restructuring of the navigation concept; or should it be required to compensate the individual for the taking of his property for public use?34

(b) Surface Use

Whether a state can adopt a secondary test of "recreational navigability" for the purpose of providing an easement to the use of the surface is a distinct and even more perplexing problem. Since recrea-

33. Id. at 209, 126 N.E.2d at 448 (1955).

34. It would be foolhardy to attempt here to go into all the questions surrounding the fifth amendment—what is a "taking"; what is a "public use"; when is a "taking" distinguishable from "regulation"; and so forth. An excellent short treatment of the general area may be found in LEFCOE, LAND DEVELOPMENT LAW (1966).

In the water rights area, specifically on the question of redefining the incidents of use and the nature of state regulation, see what amounts to a most interesting shift in doctrine exhibited by the Connecticut court by reading the following three cases in seriatim: Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co., 101 Conn. 310, 125 Atl. 623 (1924); Harvey Realty Co. v. Town of Wallingford, 111 Conn. 352, 150 Atl. 60 (1930); State v. Heller, 123 Conn. 492, 196 Atl. 337 (1937), appeal dismissed, 303 U.S. 627 (1938).

The first two cases acknowledged the riparian right to swim and bathe in a stream and noted that state regulation for pure water supplies which foreclosed this activity amounted to a compensable "taking." The last case completely ignored the first two and held that state regulation did not amount to a "taking." For an excellent discussion of man made improvements and navigability on the compensation question, see Comment, 33 N.Y.U.L. Rev. 229 (1958).
tional use only requires surface access, and since private ownership generally has its basic value in the control of surface use, this problem lies at the heart of the current pressure to open fresh water lakes for recreational purposes.\(^8\)

Federal restrictions are directed to title and to uses inconsistent with traditional commercial activities. As early as 1936, the Oregon Supreme Court, in *Luscher v. Reynolds*,\(^6\) was able to distinguish "use" from "title" as a response to the impending need for recreational waters. The court skillfully utilized an earlier Oregon decision\(^7\) to side-step the "title" question, then shifted its concern to the ultimate utilization of the waters, and concluded as follows:

>We think Blue Lake comes within the . . . classification where title to the bed is in the adjacent owners, subject however to the superior right of the public to use the water for the purposes of commerce and transportation. "Commerce" has a broad and comprehensive meaning. It is not limited to navigation for pecuniary profit. A boat used for the transportation of pleasure seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber. There are hundreds of similar beautiful, small inland lakes in this state well adapted for recreational purposes, but which will never be used as highways of commerce in the ordinary acceptation of such terms.\(^8\)

*Luscher* is one of those rare instances in which the court both foresees and articulates the fuller extent of potential recreational pressures to achieve dramatic results. One of the few decisions other than *Luscher* to which any significance can be attached is *Lamprey v. State*,\(^9\) an 1893 Minnesota case. In that case, the court spoke even more graphically to the recreational question as follows:

>Many, if not the [sic] most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot

---

35. See generally Maloney.
39. 52 Minn. 181, 53 N.W. 1139 (1893).
now be enumerated or even anticipated. . . . If the term "navigable" is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private.40

While the easement approach has not been widely adopted,41 it remains as a tool available to the courts to open waters to the public.

4. The effect of recreational goals on the navigation doctrine: a brief summary and synthesis

Three propositions may be deemed basic in the realization of recreational use of inland waters. First, the traditional goal of the public-private dichotomy has been the commercial utilization of the waters. Second, within the private sector, extensive economic and social reliance has been placed upon private ownership and control of waters believed to be noncommercial. Third, the courts have not yet achieved a satisfactory balance between the protection of private expectations and the realization of public recreational objectives.

Despite the rather clear doctrinal development of the navigation concept as the sine qua non of state ownership and control over inland lake resources, it is apparent that the boundary lines between the public and private spheres of interest are by no means irrevocably fixed. While the courts adhere to the letter of the federal navigable-in-fact test, they may interpret it in such a manner as to find recreational use of lake waters a matter for federal concern. This interpretation assumes that title never was in private hands, thereby permitting public use. It is equally true, at the second level of construction, that courts can be persuaded to characterize the waters as public by finding an easement in favor of the state, while allowing title to the beds to remain in private hands. Opening waters to public use by these methods will not only seriously affect the structure of private property rights, but will fail to satisfy public needs.

40. Id. at 199-200, 53 N.W. at 1143-44.
41. Michigan is reputed to have made advancements in allowing an easement in the public to fresh water lakes for recreational purposes. See Munro at 468-69. However, this view may be due to an erroneous reading of cases in which the court has separated Michigan's lakes into two categories—the Great Lakes and inland lakes—and then found a right to use by the public in an inland lake. See Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953); Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117 (1946). A closer reading of these cases reveals that they involved lakes which were navigable under the federal definition. The rule is, if anything, more restrictive as to public rights in permitting riparians to retain title to the lake bed.
action is both sporadic and haphazard and, as demand for greater public recreational water use increases, the courts will be inundated with individual conflicts, the resolution of which will be an imperfect vehicle for solving the problem on a broader plane.

B. Public Use Through Doctrines of Private Ownership and Control

1. In General

Once there is a characterization of the waters as “nonnavigable,” the public interest in recreational use is relegated to development and satisfaction from within the private sphere of ownership. What are the nature and extent of private ownership in nonnavigable waters?

There are three major problems in delineating the rights of private ownership and control over lake resources. First, where ownership of the lake bed is the focal point of the controversy, what right does the bed owner have to exclude others from the use of the bed and the surface? Second, where ownership of the bed is incidental to riparian rights resulting from ownership of shore property, what are the correlative rights of riparians to use the surface of the lake inter se? Third, where ownership of the bed is incidental to riparian rights resulting from ownership of shore property, what are the rights of the general public to use the lake surface, either as members of the general public or as the licensees or invitees of the riparian owner?

2. Bed ownership as determinative of public and private user

Once a determination has been made that a lake is “nonnavigable,” the overwhelming majority of states have acknowledged that title to the bed passes into private hands and that use of the lake's surface

---

42. See, e.g., Hardin v. Jordan, 140 U.S. 371 (1890) (lake); McGahhey v. McCol-

lum, 207 Ark. 180, 179 S.W.2d 661 (1944) (lake—uses rules for lakes and streams inter-

terchangeably); Rhodes v. Cissel, 82 Ark. 367, 101 S.W. 758 (1907) (dry lake bed); Gager v. Carlson, 146 Conn. 288, 150 A.2d 302 (1959) (by inference from citation of New Jersey case which based its decision on private ownership); Osceola County v. Triple E. Development Co., 90 So. 2d 600 (Fla. 1956) (lake); Crutchfield v. F. A. Sebring Realty Co., 69 So. 2d 328 (Fla. 1954) (lake); Wilton v. Van Hessen, 249 Ill. 182, 94 N.E. 134 (1911) (lakes) (good discussion of state's admission to union); Sanders v. De Rose, 207 Ind. 90, 191 N.E. 331 (1934) (lake); Earhart v. Rowen-

is the subject of private control. The courts, however, are not prone to consistency in articulating reasons for assigning ownership of the bed to private individuals, or in distinguishing between sources of bed ownership, or in determining rights incident to bed ownership with regard to both use of the bed and control over the surface of the lake.\(^{43}\)

While of only limited practical significance in conflict resolution, the main rationalizations expressed by courts attributing ownership of lake beds to private individuals may be classified under two broad headings: the philosophical approach and the pragmatic approach. As representative of the reasoning offered by the philosophical school, the court in *Baker v. Normanoch Ass’n, Inc.*,\(^{44}\) said:

The policy of the common law is to assign to everything capable of ownership a certain and determinable owner . . . . If capable of occupancy, and susceptible of private ownership and enjoyment, the common law makes it exclusively the subject of private ownership; but if such private ownership is inconsistent with the nature of the property, the title is in the sovereign, as trustee of the public, holding it for common use and benefit.\(^{45}\)

The court captures the essence not only of the controversy before it, but also of the value of the basic institution of private ownership.

A statement by the court in *Lembeck v. Nye*\(^ {46}\) is representative of the pragmatic school of thought for assigning ownership of the bed to the riparian owner.

---

\(^{43}\) See generally Richardson v. Sims, 118 Miss. 728, 80 So. 4 (1918); Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925). See also Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 462 (1953).


\(^{45}\) Id. at 414, 136 A.2d at 649. The court is quoting from Cobb v. Davenport, 32 N.J.L. 369, 378 (1867).

\(^{46}\) 47 Ohio St. 336, 24 N.E. 686 (1890).
No solid ground is readily perceived for limiting ... the deed to the water's edge [in the case of nonnavigable lakes] ...; in this state, where the rule is so firmly established that a boundary on a running stream carries the land to the middle or thread thereof, principles of analogy afford strong grounds for applying it to nonnavigable lakes. The main reasons for the rule in one case apply equally to the other. The existence of "strips or gores" of land along the margin of nonnavigable lakes, to which title may be held in abeyance for indefinite periods of time, is as great an evil as are strips and gores of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable and alike vexatious in each of the cases, and the public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or nonnavigable lake that may be made a boundary of the lands conveyed, applies indifferently, and with equal force, to all of them.47

Although these statements assist in the clarification of the reasons for private ownership, they do not resolve individual controversies over the use of lake facilities. Once it is accepted that subaqueous lands are the object of private ownership, the process of delineating the consequences of bed ownership for recreational purposes may begin. The courts have treated bed ownership as the determinative factor in private control over lake resources in three factual situations: (a) where use of the bed itself is the object of judicial action; (b) where title to the bed has been segregated from shore ownership by express reservation in a deed, or by judicial construction of a grant of shore property; and (c) where title to all (or almost all) of the land surrounding the lake is in a single owner. Without making these distinctions, courts have treated all of these controversies under the so-called common law rule of *cujus est solum, ejus est usque ad coelum et ad inferos*.48 Lack of clarity in isolating the above factors occasionally leads to unjust results.

Whether bed ownership is the result of the riparian doctrine or of an express severance of title to the bed, the direct use of the lake bed by one other than the title holder constitutes a trespass. The Lakeville situation, set forth in the introduction, highlights a recurring pattern of recreational utilization of subaqueous lands. Boats require docks and wharfs; swimmers use rafts and diving structures; skiers use jumps and other floats. Each of these structures must be


48. Who owns the soil owns to the sky and to the depths.
permanently or temporarily anchored to the bed of the lake. Where it can be shown that the structure is affixed to the bed, even liberal courts will require its removal. Thus in Swartz v. Sherston,49 the court ordered the removal of "a diving dock on the lake at a point . . . some 150 feet from the shore" because it constituted a trespass on the plaintiff's land underlying the water.

The practical difficulties of pursuing this line of reasoning are not to be underestimated. Often where title to the bed is dependent upon riparian ownership, no certain allocation of the bed can be made because the boundaries of each riparian bed owner are unknown. When proof is not, or cannot be, offered to show on whose land the structure is anchored, the court can avoid ordering its removal. Thus, in Snively v. Jaber,50 the defendant anchored his dock at a point where it could not be determined on whose land the structure rested, no clear boundaries having been set forth by survey or deed. The court based its refusal to order the dock's removal on this ground.

Where bed ownership has been severed from ownership of the shore, the courts have consistently viewed this situation as giving bed owners the exclusive right to use and control the surface.51 Again, by focusing narrowly upon "title" to the bed, the courts, to justify a finding of trespass, utilize the common law notion that the owner of land owns the space above and below his land. This approach is illustrated in the leading case of Smoulter v. Boyd.

The ownership in fee of the soil covered by the waters of Lilly Lake outside Mrs. Wormser's lines being in the defendant, we think he has the right to control that part of the waters of the lake above his land to the extent, at least, of prohibiting the use of the waters by Mrs. Wormser or her grantees for boating purposes. His grant of the land in the bed of the lake gave him title ad coelum et ad inferos, and hence the waters on his land were subject to his use and

50. 48 Wash. 2d 815, 296 P.2d 1015 (1956). The court stated: The plaintiffs insist that the trial court should have ordered the removal of the defendant's rafts, having found that they are anchored across the section line. The trial court refused to make a finding as to the true boundary between that portion of the lake bed owned by the plaintiffs and the portion owned by the defendant, and rightly so. While it is true that this court in Snively v. State, supra, has determined that Angle Lake is nonnavigable and that the abutting owners own the bed of the lake, the bed has never been apportioned among the owners, and their respective boundaries are as yet indeterminate. Since the contour of the lake is uneven, a formula would have to be devised to apportion the lake bed ratably among the owners before such boundaries could be set. Id. at 822, 296 P.2d at 1019.
51. See Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 146 A.2d 527 (1958), aff'd, 59 N.J. Super. 1, 157 A.2d 15 (1959) (title to bed in one owner as bed was severed from adjoining ownership—no riparian rights); Shaffer v. Baylor's Lake
enjoyment. There were no rights of a riparian owner which made those waters subject to an easement in favor of the plaintiffs while they covered the defendant’s land. The grant to the plaintiffs of a part of the bed of the lake, as observed above, is clearly and distinctly defined by their deed, and does not extend to the other part of the bed of the lake owned in fee by the defendant. When, therefore, they entered on the waters covering defendant’s land with their boats for pleasure and recreation, they became trespassers. This logically results from the character of the title of the parties to the bed of the lake vested in them by their respective conveyances. Each of the parties owns his land in fee, and included in that ownership is the right to the use of the water while it is on the land. Any use of it for boating purposes by another is an infringement of the rights of property vested in the owner of the land. It follows from what has been said that the defendant had the right to erect the boom on his premises for the purpose of preventing the plaintiffs from boating or sailing on the waters covering his land, and that the trial judge was in error in requiring it to be removed.\[52]\[2]\[3]\[53]\n
To reach this result, the court’s reasoning seems to have proceeded as follows: first it was found that title to the bed had been severed from ownership of the shore; second, having been severed from the shore, ownership of the bed was then found to have some independent economic significance; third, control over surface use was deemed necessary to protect the independent significance of bed ownership.

The third fact situation is closely related to the above. It arises where ownership of both the bed and the shore are in the hands of one title holder. This is the most frequently recurring fact pattern. Where A owns all the land surrounding the lake and all of the bed itself, any attempted use of the lake by B without A’s permission is obviously a trespass. What happens, however, where A owns

\[52\] 209 Pa. 146, 152, 58 Atl. 144, 146-47 (1904).

\[53\] See McGahhey v. McColum, 207 Ark. 180, 179 S.W.2d 661 (1944) (one party owns all land around, and bed to nonnavigable natural lake and may exclude use by others); Sanders v. De Rose, 207 Ind. 90, 191 N.E. 331 (1934) (seems to say that any riparian owner of bed may exclude use by others of surface); Putnam v. Kinney, 248 Mich. 410, 277 N.W. 741 (1929) (owner of all bed and all land surrounding lake entitled to exclusive use of surface).
not all, but most, of the shore and bed? How much control over use of the surface of the lake overlying his portion of the bed should be accorded to one who has less than total ownership? If the power to exclude others from use of the surface is not absolute in all circumstances, how might the courts decide when to apply exclusionary rules? Finally, what expectations of riparian and bed proprietorship are being protected?

These questions were implicitly raised by the court in *Baker v. Normanoch Ass'n, Inc.* A discussion of this case may serve to highlight the underlying reasons (in all three fact situations) for application of the common law exclusionary rule. In 1920, a group of riparians on Culver Lake in New Jersey organized a nonprofit corporation for the purpose of acquiring title to the lake. Their rights passed to Normanoch Association, Inc., which was formed in 1929 as a business corporation. Apparently, the purpose of the Association was to maintain, develop and regulate use of the lake. During the first twenty years of the Association's ownership, enforcement of its exclusionary rights was sporadic, and primarily directed at the solicitation of "dues." In 1951, one of the plaintiffs was prosecuted for trespassing on the lake. After successfully concluding its action against one individual, the Association for the first time began to receive dues for the privilege of using the lake. The present action was brought by forty-three surrounding (not necessarily abutting) landowners to establish their rights to use the lake for recreational purposes. Some of these parties were owners of a small portion of the bed.

The court first dismissed the claims of those parties who were not riparians by saying that "the general public have no rights to the recreational use of a private lake, such rights being exclusively in the owner of the bed." This was the easy question. Of greater significance to the public's right to use the lake was the court's treatment of owners of small portions of the bed. The court, apparently influenced by the effect its decision would have on the realization of the Association's objective, explicitly negated the right of owners of minimal portions of the bed to use the entire surface of the lake. The court did this without indicating the meaning of the word "minimal."

---

53a. See Baker v. Normanoch Ass'n, 25 N.J. 407, 136 A.2d 645 (1957) (title to bed—90% reserved in grantor of uplands—court excludes owners of other 10% from use of that portion); Mayer v. Grueber, 29 Wis. 2d 168, 138 N.W.2d 197 (1965) (artificial lake, title to bed and surrounding land in one person; no right of public to use lake). *Cf.* Upper Greenwood Lake Property Owners Ass'n v. Grozing, 6 N.J. Super. 538, 69 A.2d 896 (1949) (exclude non-riparians—owned 90% of the bed of the lake—other shoreowners had easement to use entire surface).


55. Id. at 415, 136 A.2d at 650.
For the purposes of the present controversy we need go no farther than to hold that where, as here, one party is the undisputed owner of the substantial portion of the bed he may exclude therefrom owners of minimal portions of the bed. These plaintiffs are restricted to the use of such portions of the waters of the lake, the bed of which they may own.56

The restricted public use permitted under the Normanoch rule has little value in satisfying public recreational needs. By limiting use of the lake surface to the sole bed owner or owner of a substantial portion of the bed, public access to the lake in the right of numerous individual riparians is almost nonexistent. Had the court adopted the "civil law" rule under which the right to use the entire surface of the lake is common to all riparians or bed owners, public use by license or invitation would potentially have extended to a large portion of the public.

3. "Riparianism" and the "Civil Law" rule as determinative of public and private user

"Riparianism" 57 represents a distinct orientation to private expectations of ownership. The common law rule, illustrated by Normanoch, has been limited to factual situations where the nature of the individual's ownership accentuated his need for exclusive use of the surface.58 The great majority of cases, however, do not involve situations in which a single owner owns all or substantially all of the bed or the land surrounding the lake. Rather, they arise in a factual setting involving numerous parties, each owning fragmented shares of the land around the lake, title to the bed being incidental to, and arising from, shore ownership.59 Private expectations of ownership realistically temper any extension of the nonutilitarian common law rule to this class of cases. The value of riparian ownership commonly lies in the ability to develop the shore so as to permit utilization of the entire lake surface 60 for recreational purposes.

56. Id. at 419, 136 A.2d at 652.
57. "Riparianism" is really an expression to cover the multitude of labels given by the courts for recognizing the extraordinary utility of the entire lake surface for all owners of shore property.
58. See cases cited in note 53, supra.
59. See, e.g., Flynn v. Beisel, 102 N.W.2d 284, 290 (Minn. 1960), wherein the court noted that riparian rights were based upon expectations incident to shore ownership.
60. Under the riparian view see, e.g., Florio v. State, 119 So. 2d 305 (Fla. 1960) (rights of riparians to use of whole lake are equal so long as reasonable—skiing); Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950) (equal use of lake waters by all riparians); Thompson v. Enz, 2 Mich. App. 404, 140 N.W.2d 563 (1966) (common use of surface subject to restriction that it be reasonable—case where canal was dug to (create?) allow greater access to lake); Burt v. Munger, 314 Mich. 659, 23
The courts have uniformly recognized the recreational value of riparian proprietorship under a multitude of labels, each emphasizing different reasons. The court in *Flynn v. Beisel*\(^61\) articulated the following rule:

[A]n abutting or riparian owner of a lake suitable for fishing, boating, hunting, swimming, or other domestic or recreational uses to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless also of the ownership of the bed thereof.\(^62\)

The essence of this approach was captured in *Snively v. Jaber*,\(^63\) when, in rejecting the common law exclusionary rule, the court noted:

The adoption of the rule urged by the plaintiffs would in effect destroy all of the rights of riparian owners in non-navigable lakes except the right of appropriation. What practical value would vested rights to boat, swim, fish, and bathe, have to any riparian owner if such rights were restricted to his fenced-in pie-shaped portion of the lake?\(^64\)

\(^{61}\) 257 Minn. 531, 102 N.W.2d 284 (1960).

\(^{62}\) *Id.* at 539, 102 N.W.2d at 291.

\(^{63}\) 48 Wash. 2d 815, 296 P.2d 1015 (1956).

\(^{64}\) *Id.* at 821, 269 P.2d at 1019.
While it is safe to note that almost every jurisdiction which has had the opportunity to rule on the question has ultimately allowed each riparian the complete use of the lake surface, it would be foolhardy to characterize the area as one in which there has been uniformity of approach.

Cases such as Flynn and Snively recognize that each riparian owner has a common right to use the whole of the lake surface for his own needs. In addition, "... any proprietor or his licensee may use the entire surface of a lake so long as he does not unreasonably interfere with the exercise of similar rights by the other owners." 66

In this manner, the lake can be opened to satisfy the public need through multiplication of those persons using the lake in the right of the riparian. This is the outer limit of public access within the sector of private rights.

4. Recreational use in the private sector: a brief summary and synthesis

Members of the public, as such, are not accorded the right to use nonnavigable lake facilities coming within the sphere of private ownership. Some public use is available through doctrines of private

65. See cases cited in note 60, supra.


67. The unreasonableness of riparian use can be raised as a violation of riparian rights, a breach of covenant, or a nuisance. See generally Florio v. State, 119 So. 2d 305 (Fla. 1960) (skiing, high powered boats, etc., held: injunction should be granted where the defendant's use interfered with the use of other riparians) (injunction could not prohibit "all" activities, only those which were a "real" nuisance); Thompson v. Enz, 2 Mich. App. 404, 407, 140 N.W.2d 563, 565 (1966) (here, defendant attempted to give his lots access to lake by dredging a canal—"in a proper case, a use which adversely affects the rights of other riparian owners will be enjoined. If the pleadings raise the issue that a proposed use will, for example—adversely affect the level of the lake or will contaminate the waters, spoil the view or hurt the fishing or otherwise impair the rightful use of riparian owners, such proposed use may be enjoined upon proof of the fact."); Ottawa Shores Home Owners Ass'n v. Lechlak, 344 Mich. 366, 73 N.W.2d 840 (1955) (restrictive covenant—consideration of effect of noise of boating, etc., activities held in violation thereof); Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950) (Defendant owned a large motorboat. Each of the users of the lake acted pursuant to an easement of use, rather than in the exercise of a riparian right. The issue was tried on the question of nuisance, however, and the court held that an injunction would only issue where the defendant's use was unreasonable. Plaintiff tried to have "all" boating banned. The court refused. The plaintiff had the reserved express power under the easement to "reasonably regulate" the use of boats on the lake and defendant had stated his willingness to comply therewith. Plaintiff failed to show that the boat had been operated unreasonably so as to create a nuisance, although the court recognized that operation of the boat in this manner was possible); Snively v. Jaber, 48 Wash. 2d 815, 296 P.2d 1015 (1956) (states the traditional doctrine of reasonable use and then questions nuisance value of "raft" near "unused" shore, because it did not conflict with use of any riparians; held not a nuisance).

For an excellent general discussion of riparian uses and a specific analysis of an attempt by a land developer to increase the supply of "water-front" property, see Note, 1966 Wis. L. Rev. 172 (1966).
ownership but is dependent upon whether the common law or the riparian approach is selected.

The only way for the public to gain an independent right of access to recreational lake facilities would be for the courts to find that the state owned title to lake beds, or that the public had a surface easement in the waters. Such a result would not only defeat long standing property expectations but would also fail to satisfy the recreational needs of the public. Rejection of private control over public use of lake resources results in the rejection of the private market as the selective device to determine which lakes will be opened to public use, and the denial of participation by the private sector in the economic benefits deriving from public use.

II. PLANNING: GOALS AND ALTERNATIVES: SATISFACTION OF THE PUBLIC NEED

Any attempted solution to the problem of satisfying public recreational needs which fails to recognize the present pattern of private rights, or the need to effect change in an orderly and planned manner, must fail. Existing rights represent wealth and power in the private sector, built upon "propertied" expectations of a relatively firm order. Moreover, private ownership of inland recreational water resources represents a complex of private goals such as status or psychological regeneration.

Public activity has a more limited and defined objective which parallels private need-satisfaction but does not reach its intensity. Public ownership and control by its very nature precludes the idea of the passive recluse, of exclusive privacy, of complete tranquility, of status. The primary public objective is the active one of finding areas for the temporary outlet for recreational energies through water-oriented sports. The permanent, passive character of private ownership is distinguishable in the numbers satisfied, the intensity of need-fulfillment, and the duration of the activity.

Orderly development of state policy must take into account the relative satisfaction of public and private needs capable of realization.

68. This observation is applicable to all planning of whatever form. Particularly appropriate is the comment made in GOODMAN & GOODMAN, COMMUNITAS: MEANS OF LIVELIHOOD AND WAYS OF LIFE 10 (1960) that "no plan' always means in fact some inherited and frequently bad plan." Abdication of responsibility for recreational resources by the state to the courts is in itself the selection of a "bad plan."

69. "Propertied" expectations are to be distinguished from contract or tort expectations. For some historical reason (perhaps psychological and social) the label "property" generally means security and certainty. As used here it means the expectations of individuals with regard to those securities inherent in the label "property."
through public or private ownership. Further care should be taken to insure that the means selected to achieve these objectives reflect the broader social and economic implications inherent in the relationship between the private and public spheres of ownership and control of recreational resources.

The evolution of doctrines of water rights reflects the early settling of the country, cast in a social and economic footing which looked toward the beneficial utilization of vast expanses of virgin country. During these early stages of American land use and development, relatively few people were either desirous or capable of using lake facilities primarily for recreational purposes. The land was sparsely settled and the population was not mobile enough so as to be able to reach these remote areas for transient recreational use. Those who were in a position to take advantage of the natural attributes of lakes used them mainly for sustenance (i.e., fishing, hunting, and irrigation), and only incidentally for recreation.

To induce settlement, large areas of public lands were turned over to private ownership by federal and state governments. Developing land for the ultimate public benefit through the utilization of private property incentives reflected the abundant supply of land and water that existed at the time. It is no great revelation, however, that when a commodity once so plentiful becomes scarce, the public interest may shift away from use and development through private ownership incentives as a means of securing maximum benefits to the public. Moreover, the utility of use and development through private in-


71. Two of the most outstanding examples of state and federal generosity are discussed in RACHERIS & MARQUSEE, THE LAND LORDS (1963) as follows:

A sympathetic state legislature encouraged Flagler’s ambitions by granting him 8,000 acres of land for each mile of railroad he constructed south of Daytona. While the land Flagler eventually received—between 1,500,000 and 2,000,000 acres—did not come close to the grants the federal government had made to Jay Cooke, it was still a substantial property. After all, Flagler’s railroad, which in 1895 was definitively named the Florida East Coast Railway Company, never had more than 765 miles of track. Id. at 102.

The Jay Cooke referred to above by the authors had received his lands from the federal government.

... the land was there, it was idle, and it was the cheapest form of subsidy the government could provide. When the Union Pacific was approved as the first transcontinental line in the early 1860’s it was granted, in addition to a liberal construction loan, alternate sections running ten miles on each side of its tracks, a total of 12,000,000 acres. If there were those who thought this excessive, there were others, usually more influential, who thought otherwise. A railroad spanning the continent was the new symbol of an expanding America. Money was no object and the public lands even less so. “I don’t begrudge them,” said Senator Henry Wilson of Massachusetts in an impassioned speech defending his support of the railroad. By the time a charter was given to the Northern Pacific in 1864, the Senate did not even bother to record the vote by which the line was handed 47,000,999, acres, an area larger than the six New England states. Id. at 43-44.
centives may have less validity with regard to lakes, which, in their natural state, frequently approximate the form in which they will be used. There remains the question of how the broader objectives of public use may be realized without unnecessarily adverse effects upon either the values served or the needs satisfied by private ownership.

A. USE OF THE POWER OF EMINENT DOMAIN VS. JUDICIAL CHANGE

At least a portion of the problem is rooted in the question of which instrument of the state should be relied upon to secure those changes necessary for the public needs. The two major alternatives for change are judicial construction and enforcement of private and public rights, and legislative exercise of the eminent domain power.

The judiciary could place more lakes within the sphere of public ownership by a different interpretation of the navigable-non navigable dichotomy. It could also read the exclusionary element out of the concept of private ownership by altering basic doctrinal philosophies. Change by this means, however, must be wholly unsatisfactory to both private and public interests. A substantial economic detriment would be visited upon countless individuals if private exclusionary rights were "read out" by the courts since courts would have to hold that individuals "never had" the right of exclusive use. If courts were to begin to change the incidents of ownership in this manner, the very essence of "ownership" would be attacked and both the utility of the property to the individual and the market value of the property would be adversely affected.

This brings us to the heart of the present economic and philosophical question of change. Increasingly, the time worn question of the balance between private ownership and the power to regulate and redefine the incidents of private ownership is being resolved in the state's favor. The institution of private property itself is increasingly being confronted by a rising tide of public demand. If this is so, then the basic constitutional protection intended as a bulwark against state usurpation of private rights attains enhanced significance.

Through condemnation proceedings, the state can substitute "fair value" (by the payment of money) for the property of the individual. The displaced owner may then redirect his acquisitiveness

72. See Section I A supra.
73. See Section I B supra.
74. See, e.g., the cases cited in note 34, supra.
75. U.S. Const. amend. V provides: "... nor shall private property be taken for public use, without just compensation."
to other areas (within the sphere of private ownership) where exclusive ownership and control are both permissible and desirable. By using extensive legislative planning coupled with use of the eminent domain power to acquire selected properties, the short term objective of opening additional lake facilities for public use will not override the long term implications for the institution of private property.

B. Planning: Isolating Areas of Public Intervention for Recreational Needs

Since the public's interest in recreational water use is an object of state concern, merely removing the immediate obstacle to public use—private control over surface use—represents only a minimal state involvement and passive concern for maximum utilization of recreational resources. Planning means decision-making, and decision-making necessarily involves questions directed to the nature and extent of state activity. What lakes within a state should be open to public use? Should all lakes or only those necessary to satisfy the immediate needs be opened? Should these lakes be left in their natural state or improved? If improved, what priorities of development should be given? If the lakes are to be improved, what does improvement entail and what private interests, in addition to the obvious loss of control of surface use, will be affected? How are private rights to be valued for condemnation purposes and what broad condemnation form should the state utilize to deal most efficiently with the public's need and at the same time protect the interests of private individuals? These and other questions will be discussed in the succeeding sections.

1. Improving physical facilities of inland lakes for public recreational activities

Eliminating private controls over surface use would only be the first step. There must also be an improvement of the facilities for maximum use. Opening waters to public use without providing a means of access over private lands to the water leaves the public "high and dry." Even the condemnation of access routes without other facilities for effective use of waters falls short of the mark. Once there is access, there will be a demand for more roads, and more roads will mean more parking facilities. Large numbers of public users will require sanitary facilities, picnic areas, and eating facilities. Overnight sleeping accommodations will ultimately be necessary. Market places for the purchase of on-the-spot needs will have to be provided in the area. These facilities will ultimately whet the appetites of other users, leading to another increase in demand and
a need for further lake expansion, marinas, better swimming areas, and seasonal docking facilities.

Seven elements of physical control appear to be representative of the state activities necessary for maximum lake use. These are surface use; negative control over private use of the lake bed in order to prevent obstructions to surface use; control over lake levels; expansion of lake surface area—dredging and damming; development of access routes; "in-lake" improvements—docks, wharves, rafts, and swimming areas; and "on-shore" improvements—service facilities. These seven elements fall into two broader categories: (a) intangible rights of use and control; and (b) direct utilization of land by the state.

(a) Surface use and negative controls

Acquisition by the state negates the right of exclusive use and control by the shore and bed owners. It does not clearly delineate, however, the extent of the rights that are altered, how the owner's use and enjoyment of his property are affected, nor what the economic implications are for him.

Taking the right of exclusive use will not, in the majority of situations, deprive the landowner of use of the lake. It will, however, involve a greater sharing of the facilities with a much larger number of users. The landowner's right of use may be further restricted by extensive state development of the lake, possible fee schedules for use and, in all likelihood, regulation of the time and manner of use.

The right of the riparian to use recreational waters has been the subject of condemnation and has been held to be capable of valuation.\textsuperscript{76} But how shall compensation be determined when the owner retains the right of use? The private right of water use generally relates to the use and enjoyment of shore property. The market value of this land reflects the value of control over the lake's use. Entry of the public will result in increased lake activity, noise, fumes, and lack of privacy. All of these factors will inevitably affect

\textsuperscript{76} See Litka v. City of Anacortes, 167 Wash. 259, 262, 9 P.2d 88, 89 (1932), wherein the court said:

It is admitted that Campbell lake is non-navigable. Being non-navigable, the respondents as riparian owners own the property to the center of the lake. Riparian rights are recognized in law to be valuable property rights. Undoubtedly in this instance the riparian rights were the principal reason which induced the respondents to purchase this land tract. Since riparian rights are property rights, they cannot be taken by a municipality for public purposes without just compensation to the owner.

See also, Town of Orange v. Resnick, 94 Conn. 573, 109 Atl. 864 (1920), wherein the court notes that riparian rights have a distinct economic value and cannot be taken without compensation.
the desirability of the shore property and ultimately its market value. Land around a private lake derives its primary value from proximity to the water and the right of the owner to use it. What effect non-exclusive use will have on this element of valuation can only be determined by comparing market value before and market value after the lake becomes public.

What valuation should be made for prohibiting private development of the lake bed? To the state, certainly, it is necessary to prevent obstructions inhibiting surface enjoyment. To the private individual, the value of bed ownership, as it relates to surface use is minimal, and will be reflected accordingly (if at all) in the value of the shore property. In some situations, however, the bed may have an independent value (e.g., minerals) and in this situation valuation will be substantial.77

(b) Additional lands necessary for lake improvement

Many lakes capable of expansion have not been expanded because they presently satisfy the needs of private users. With increased public participation, however, the current surface area may not be sufficient. Maximum utilization of resources might warrant state development of the available area by raising the water levels or dredging to increase the size of the bed and the surface area of the lake.

Land around the lake also will have to be acquired for roads, launching areas, parking facilities, picnic areas and a multitude of other uses. Each of these activities and improvements presents traditional problems of condemnation and valuation which need not be pursued further here.

2. Differing levels of lake development

Not all lakes within a given area are equally affected by public demand and the corresponding need for maximum utilization through state improvements. Certainly not all lakes should be equally improved. Some lakes warrant full development, others moderate and some are best left in their natural state. Proximity of the lakes to areas of heavy urban concentration, and the probable nature, extent, duration, and intensity of recreational use, are variables to be considered in assessing the necessary degree of lake development and improvement.

77. The question of mineral value in lake bed ownership is raised in Note, Extent Of Private Rights In Nonnavigable Lakes, 5 U. FLA. L. REV. 166 (1952).
Those lakes in close proximity to urban concentrations are the most likely subjects for complete development. The large concentration of public users seeking boating, swimming, and "outings" necessitates extensive preparation for the servicing of public needs. As to these lakes, two primary needs must be satisfied: (1) access to the lake, and (2) direct use of the lake itself.

These needs are acute, but of short duration—the quick escape. They may be seen when John Q. drags his boat from its weekly cover and hitches it to the trailer for a day's use; or when the family plans a one-day "outing" or a quick swim, or perhaps merely a walk in the woods by the lake. The nature and extent of physical improvement will have to reflect this form of activity. The road system to and from the lake should provide ingress and egress for a huge number of cars with minimal transportation delays. Parking facilities must be effectively arranged to service large numbers of small water craft; and "all the comforts of home," such as eating places and sanitary facilities, should be available.

If these and other "urban" needs are not met through planning and development, then utilization of the lake will fail to meet the public need. If it takes longer to get to and from the lake, park the car, and launch the boat than is warranted by the amount of time which can be spent at the lake, then the lake has failed to fulfill its function.

"Moderate development" lakes represent those located on the fringes of suburbia, in the near countryside, servicing continual urban and suburban needs. The farther into the countryside the lake is found, the more likely it is that the nature of water use and the intensity of demand are going to differ both in kind and degree from the "urbanized" lake. The type of activity envisioned here becomes manifest when John Q. and his family "pack-up" for the weekend, the vacation, or the season. They not only bring their boat and swimming trunks, but also a tent, camping equipment and fishing tackle. They plan their trip as they would a permanent move to a new location. This represents a once or twice a year affair, an "escape" from the tensions of city life.

In this context, the recreational needs being serviced and the nature of public use warrant only moderate development of lake facilities. Certainly, to overdevelop the area would not only be un-
RECREATIONAL USE OF INLAND WATERS

The continuum from the active "urban" recreation area through the more moderate and more enduring "suburban" lake development ultimately leads to those public needs which can only be satisfied by having the lake and lake area remain as they are in a state of nature. The setting for the natural lake is typified by those which exist in areas of minimal human settlement, unspoiled by man-made developments, deep in a virgin forest or high on a remote mountain. It signifies the ideal long-term vacation spot for anglers, campers, and those that, for a time, want the seclusion of an area which is not easily accessible and which does not have the comforts or devices of modern civilization.

C. SELECTIVE VS. TOTAL ABSORPTION OF INLAND LAKES INTO PUBLIC OWNERSHIP

The question must inevitably arise as to how far the state should proceed in the abolition, through condemnation, of private control over inland waters. Consideration must be given to present and potential public needs, to the public expenditures necessary to meet the costs of acquisition and maintenance, to effects on the market value of remaining lake properties, and to the consequences of acquisition to the satisfaction of private needs. It is indispensible that each of these be considered in the ultimate resolution of public and private activities in this area.

The above questions will be considered under the headings of "selective" and "total" absorption. It is worth noting that any planning system involves problems in classification. Whatever plan is eventually adopted, all lakes within a given state will have to be surveyed and classified according to the degree of development to which they are susceptible and their potential utility for public need-satisfaction. Certainly, "selectivity" in condemnation is based upon some value judgment as to the suitability of a particular lake. Equally, if all lakes are taken for public use, which ones shall the state develop for immediate public utilization? Classification, in the context of recreational water use, may be thought of as the background to any
planning activities to be undertaken by the state and it must not be thought that the two alternatives proffered in the succeeding sections lessen this state responsibility.

1. "Selective Absorption"

"Selective absorption," simply defined, means limited state acquisition, through condemnation, of lake facilities, based upon their immediate and potential utility for public use, with particular emphasis upon the extent of private need-satisfaction presently borne by individual ownership.

A respectable level of public need-satisfaction can be achieved without total absorption of all privately held lakes into the public sector of ownership and control. To the extent that the state adequately plans which lakes are necessary to meet its objectives, it can fulfill its governmental responsibilities by opening to public use those lakes which satisfy the demands of the greatest number of present and potential public users. Reference has already been made to the differing levels of public demand as they relate to the nature of the recreational use. It is to these levels that selective condemnation of recreational facilities is directed. Decisions must be made as to which needs of the public are worthy of satisfaction. If only "urban" and "suburban" population demands are deemed of sufficient importance for state intervention, then only lakes capable of satisfying these needs should be condemned. Or perhaps, the type of demand having been resolved, not all lakes within a given geographic area are necessary for the satisfaction of the public need. In this case, only a few of these lakes need be taken for public use. The remainder may be left under private ownership and control.

Adoption of such a comprehensive and intricate program, involving the development of criteria and the implementation of "selective" condemnation of necessary lake facilities, will require that some state agency be charged with the continuing responsibility and authority necessary for its success. Almost all states have some administrative agency already operating within the area of either recreation or water resource control. Designation of a functionary should not, in itself, present a major obstacle to implementation of a program. At the operational level, however, the designated agency may encounter difficulties in the time and expense necessary for development and implementation of a comprehensive plan.

78. See supra Section II B.
79. The purchase of sufficient lake property to satisfy the reasonably foreseeable needs of the general public will help keep initial acquisition costs at a minimum. Thus, with reference to the prior classification of public needs, perhaps those lakes necessary for both urban and suburban needs might all be taken at this point.
Planning: Planning itself, although time consuming and expensive, is an unavoidable and inevitable consequence of state activity. Many states, however, have already surveyed and categorized their lakes for other purposes. Expenditures of additional time and money will be necessary to ascertain public needs and select appropriate facilities capable of satisfying these needs.

Condemnation: Since only selected lake facilities are to be condemned, each condemnation must be approached individually. On the surface, this approach involves little more than the traditional eminent domain questions (ascertaining the necessary parties, appraising the interests being taken, and responding to challenges addressed to either the propriety of the taking or the accuracy of the valuation result). Yet, the “taking” of lake facilities presents a situation which may involve emotional and political challenges not often found in the ordinary condemnation proceeding. This possibility exists because of the social, economic, and psychological attachments individuals have for lake properties. Also, residential land, while nominally unique, is under normal circumstances, ultimately “replaceable” both as a residence and as a place for the satisfaction of social needs and security. On the other hand, due to both the scarcity of land abutting waters capable of utilization for recreational purposes and the nature of lake community attachments, the value of interests taken by a condemnation of lake facilities is often irreplaceable.

Market Implications: The selective taking of lake facilities out of the private sector affects the market value of remaining facilities and consequently disrupts the operation of the market. The number of available lake facilities is presently limited. Taking more out of the private sector serves to decrease the available supply in proportion to demand. This presents two obvious results: first, private use of inland lakes will be available only to the wealthy; second, subsequent state expansion will have to reflect the increased value of lake facilities in the cost of future acquisitions for public use. The remaining value of private facilities will lie primarily in their “exclusiveness,” their utility as an escape for the recluse, and their importance to some as a status symbol. The increased cost of future expansion is of direct significance to the utility and adoption of a plan for “selective” absorption of recreational facilities. An adequate “hedge” can never really be provided against future needs since each successive condemnation will theoretically reflect the increased scarcity of lake facilities. The only means of preventing this lies in the immediate
condemnation of all lake facilities presently or potentially capable of public use—in effect, by “total absorption.”

2. “Total Absorption”

“Total absorption” may be defined as follows: acquisition by the state of all lake facilities presently or potentially capable of satisfying the need for public inland water recreation resources. In essence, “total absorption” means state ownership and control of almost all inland lake facilities. Any lake of potential consequence for public use thus becomes the object of immediate state acquisition. Many of the questions arising under “total absorption” are akin in direction and consequences to those previously raised with regard to “selective absorption.” Thus, the “broad brush” approach of “total absorption” does not lessen the need for adequate state planning, nor for the exercise of administrative responsibility, in accurately ascertaining public needs and developing criteria for selective improvement of lake facilities. Further, there must be the same type of administrative structure, delegation of responsibility to administrative functionaries, and expenditures of time and money. Several consequences of “total absorption,” however, are distinguishable and are worthy of further examination.

The administrative costs of condemnation (both time and money), as well as the costs of acquisition of particular properties, can be kept at a minimum under a system of “total absorption.” To borrow by way of illustration from the New England states which have in force the “colonial ordinance,” all lakes and ponds, natural or artificial, containing a surface area of twenty acres or more, can be classified as those to which state interest shall attach. Either by statute directly, or pursuant to an administrative order, the condemnation of private interests in all such lake property can be effected as follows: the statute (or order) can list all properties subject to condemnation, provide for an administrative procedure for both valuation and challenge, and set an outside date by which claims may be presented for payment or challenges made in opposition to the “taking.” In essence,

80. If public recreational needs will ultimately warrant the purchase of all lake facilities capable of use by the general public, then their purchase is only a matter of time. As each purchase is made, the remaining riparian property will become more valuable on the market—the very same market which is used to value property for eminent domain purposes.


81. See generally Smith.
the state has immediately asserted its interest in all the properties listed, fixed the valuation date (foreclosing the artificial price increases reflected by scarcity of lake facilities), and set a statute of limitations on the viability of the private interests represented by the lakes listed.

Under a plan of "total absorption," both the comprehensive scope of planned property acquisition and the inherent flexibility of an administrative valuation and claims procedure can be used to avoid many of the expenses of individual condemnation actions. Challenges made in the courts, directed at either the propriety of a "taking" for public use or the necessity of taking the property in question, are less likely to arise once there are decisions upholding the plan than where each proceeding is considered independent of all others. Furthermore, whole blocks of lake interests can be valued at the same time, thereby avoiding the duplicative costs of independent surveys.

Acquisition of lakes in seriatim would mean that each succeeding lake would be of greater value on the market and would represent (at least theoretically) a greater investment of private wealth. The condemnation of lake facilities at a single point in time avoids the problem of rising market values. However, a major off-setting question is raised. Is the state, by purchasing more lake facilities than can be put to immediate use, needlessly expending public resources and going beyond the scope of "public use?" One answer would seem to lie in the fact that until such time as the more generalized needs of the public reach out to these areas, all those lakes within a given jurisdiction will be the subject of at least the current level of use by the same persons who presently use them, under their newly created rights as members of the general public. Although not of the same exclusionary quality as if done pursuant to "private rights," the "use-in-fact" comes close.

This scheme would theoretically satisfy other needs. Members of the general public, previously unable to purchase or use lake facilities for the satisfaction of their "recluse" needs, should now be freed to satisfy their needs through use of unpopulated recreational areas. Unfortunately, unless the state condemns the land around the lakes, this result will probably never come about. The price of land in areas remote from urban concentrations, and particularly that by lakes, will reflect both the scarcity of lake property and the "in-fact" utility of the lake for private purposes. Thus, the market may still price the majority of people out of participation and satisfaction of their recluse needs.

III. Reflections

Public exclusion from direct recreational utilization of non-navigable inland lakes exists as a consequence of governmental failure to participate actively in providing recreational facilities. Recreational water needs have been treated by most states with an attitude of nonconcern and lack of planning more often than by an attempt to alleviate frustrated public needs. The problem is a real one which is fully deserving of attention, planning, and the expenditure of public revenues.

This problem cannot be left to the processes of the courts for its ultimate resolution. Two areas in which change might be effected by the courts are in the delineation of private rights and public needs through navigational definitions and through doctrines of private use. Both illustrate the impracticality of relying on judicial decision-making as a device for the alleviation of public recreational needs. Judicial change defeats legitimate private expectations (both economic and social) which have developed in the context of past federal and state definitions of navigable waters. Navigation, for the purpose of public ownership and control, has been closely linked with the possibilities for transportation of goods in commerce. Waters not within this category have been invested in and developed under private ownership in reliance on contemporary commercial definitions. The economic detriment suffered by private individuals is no less severe because the court now declares that they never had any right to exclude the public than it would be if the court directly and explicitly said, “We are taking your property for public use.” Moreover, this method of change is haphazard, since it is totally dependent on the stimulation of judicial action by private claims.

These latter observations are also applicable to alteration of private rights from within the private sector. Classifying the lake as “nonnavigable” and private, but withholding the right to exclude the general public from use of the lake is antithetical. Enforcement of the “public right” on a case to case basis can only resolve the problems of recreational needs in an haphazard and sporadic fashion.

Realizing that by far the greater number of inland waters capable of satisfying recreational needs are under private ownership and control, and rejecting change and resolution of this problem through judicial activities, the method of change suggested is in comprehensive state planning and utilization of the eminent domain power. If individuals are compensated for their economic investment in a lake thought necessary for public use, at least two functions are served. First, the state is able to acquire the necessary access to recreational
resources for public use. Second, the integrity of the institution of private ownership and the rights of particular individuals are protected.

In the attempt to ascertain public needs and the extent of physical improvement necessary, the nature, duration and intensity of public use, as well as proximity to "urban" concentrations, are important considerations. The two broad plans for state acquisition of lake resources may be classified as "selective" and "total" absorption of lake facilities. While the concept of "selectivity" is sufficiently broad to encompass almost total state ownership, "total absorption" may facilitate administration.

The longer it takes for states to act, the more vocal and widespread public demands will become, the more frequently will private individuals take matters into their own hands, and the more likely are resolutions of specific controversies in the courts to encroach upon private ownership. Further, it will become more difficult for the states to satisfy broader public needs, not only for recreational lake facilities, but for preservation of open spaces, prevention of pollution, and retention of the character of the countryside.

While state action lags far behind, the schism between public needs and their satisfaction continues to widen. Perhaps water resources for recreation will never obtain the significance of water for municipal supplies or irrigation, but someone should inform John Q. of this as he endures the trials and tribulations of urban life—looking forward to a restful lake—"somewhere."
TEMPLE LAW QUARTERLY

EDITORIAL BOARD

STEVEN MALLIS
   editor-in-chief

SANDRA BARENBAUM
   associate editor

DONALD E. MATUSOW
   executive editor

ALBERT L. BECKER
   associate editor

M. J. MINTZ
   associate editor

THOMAS R. BYRNE, JR.
   recent decisions editor

MICHAEL O'ARA PEALE, JR.
   book review editor

ANTHONY DOUGHERTY
   associate editor

RICHARD ROBINSON
   associate editor

NANCY L. KLEIN
   associate editor

ALBERT W. SHEPPARD
   associate editor

IVAN J. KROUK
   associate editor

BARRY SIMON
   note editor

RICHARD P. McELROY
   associate editor

HELEN H. STERN
   article editor

CAROLYN M. SHERMAN
   managing editor

Faculty Advisory Board

WARREN M. BALLARD
   chairman

PETER J. LIA COURAS

JEROME S. SLOAN

ERWIN C. SURENCY

(194)