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MANAGING RECREATIONAL RIVERS*

BEN A. RICH**

AMERICANS TODAY ARE ENJOYING a higher standard of living and more leisure time than ever before. As a result, there are unprecedented numbers seeking recreation and relaxation outside the major metropolitan areas. Camping areas, state and national parks, and other such facilities have lately found it necessary to turn away significant numbers for lack of space to accommodate them.

While the need and demand for recreational areas continues to expand, commercial, industrial and residential development threatens to consume the already inadequate supply of open space and natural terrain. Those few individuals who own first or second homes in wild or scenic areas vigorously oppose both development and efforts by local, state or national government to establish and maintain public recreation facilities in their vicinity.

This paper will discuss various approaches that have been or could be taken by government agencies in order to provide and protect rivers with recreational potential for use as public recreational facilities, in particular boating and canoeing, and consider them in the context of the state of Illinois, which has been faced with a tremendous increase in pressure for water based recreational facilities and anachronistic case and statute law of water and related land resources.

The fundamental issue in any situation involving use by the public of natural watercourses concerns the concept of navigability. Crucial and divergent sets of conclusions follow from a determination that a particular body of water is or is not navigable. There are, however, different definitions of navigability which must be applied depending upon the facts and issue at hand. Therefore, it is appropriate, indeed essential, that this analysis begin with a thorough discussion of navigability.

EVOLUTION OF THE DOCTRINE OF NAVIGABILITY

Navigability is important because any watercourse determined to be navigable is subject to a public easement of navigation such that the

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watercourse may be utilized as a recreational facility at least to the extent of boating, whereas the public has no right to use a non-navigable watercourse, and can be prevented from doing so by riparian owners.

The question has long been settled¹ that the federal government has the power to control navigable waters. Over the years a federal definition of the term "navigable waters" has been developed and refined from "navigability in fact"² as a vague, unexplained term, to the following more detailed discussion:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. . . . [W]hen they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.³

The term was further refined shortly thereafter in the following particulars:

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river.⁴

This view of navigability was reaffirmed in the later case of *United States v. Holt State Bank*, where the opinion of the court states that streams or lakes are navigable in fact:

. . .when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade or travel on water, and further that navigability does not depend on the particular mode in which such use is or may be

¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1842).

² *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

³ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

⁴ *The Montello*, 87 U.S. (20 Wall.) 430, 441-42 (1874). Note here that the terms navigable waters and public waters are and will continue to be used interchangeably.

had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.⁵

The most recent definitive treatment by the Supreme Court of the doctrine of navigability makes several significant clarifications and elucidations.

A waterway, otherwise suitable for navigation, is not banned from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. . . . Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic.⁶ Nor is it necessary for navigability that the use should be continuous. . . . It is well recognized too that the navigability may be of a substantial part only of the waterway in question.⁷

The language of the court has been quoted verbatim because it is applied by not only the U.S. Supreme Court but also by a number of state supreme courts,⁸ and is controlling when the issue of navigability is presented.

The federal test of navigability is used to determine several things; admiralty jurisdiction, regulation under the commerce clause of the constitution, and the title to the beds of rivers and lakes. The title question is most significant to our inquiry. The beds of streams and lakes navigable under the federal test belong to the respective states, consequently the general public has a right to use such waters for fishing, boating, swimming, commercial travel and recreation. So long as the public has lawful access to these waters, private riparian owners cannot object to these reasonable public uses.⁹

The federal test is applied to the watercourse in question at the time the state entered the union. If it was navigable at that time, under the federal test, then it remains a public waterway regardless of the nature of its uses subsequently, and the public rights enumerated above obtain. If, however, the watercourse should be deemed non-navigable under the

⁵ *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926).

⁶ *United States v. Appalachian Power Co.*, 311 U.S. 377, 407-08 (1940). It should be noted that this case does not necessarily vitiate the holding by the Illinois Supreme Court in *People v. Economy Light and Power Co.*, 241 Ill. 290, 89 N.E. 760 (1909), that an otherwise non-navigable stream cannot be rendered navigable by artificial improvements so as to deny a riparian landowner his rights to the streambed.

⁷ *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409-10 (1940).

⁸ *Potashnick-Badgett Dredging, Inc. v. Whitfield*, 269 So. 2d 36, 41 (Fla. Dist. Ct. App. 1972); *Discon v. Saray, Inc.*, 262 La. 997, 1007, 265 So. 2d 765, 769 (1972); *State v. Bunkowski*, 88 Nev. 623, 630-31, 503 P.2d 1231, 1235 (1972); *Wreyford v. Arnold*, 82 N. Mex. 156, 160, 477 P.2d 332, 336 (1970).

⁹ J. SAX, *WATER LAW PLANNING AND POLICY* 293 (1968).

federal test at the date of the state's entry into the union, then the title to the land under the waterbody passes to the private riparian owners.¹⁰

Thus it appears that to determine the navigability of a river under the federal test, some historical research must be conducted to determine the nature of the use of the river at the time the state wherein it is situated was admitted to the union.

For all other purposes than admiralty jurisdiction, regulation of interstate commerce, and determination of title to streambeds, the states have an independent right to establish their own definition of navigability to govern their regulation of waterways within their borders. So long as the states do not interfere with federal concerns, they are free to adopt reasonable regulatory measures.

State definitions of navigability run the gamut from expansive to restrictive. The Illinois Supreme Court, for example, appears to have adopted the more restrictive, commercially oriented federal test stated in the *Daniel Ball* case.¹¹ The case which spells out the Illinois definition states that in order to be navigable, the watercourse:

. . . must afford[s] a channel for useful commerce and [be] of practical utility to the public as such. The fact that there is water enough in places for row boats or small launches . . . or that hunters and fishermen pass over the water with boats . . . does not render the waters navigable.¹²

The definition was further elaborated in a subsequent case which stated:

A stream, to be navigable, must in its ordinary, natural condition furnish a highway over which commerce is or may be carried on in the customary modes in which such commerce is conducted by water.¹³

Clearly Illinois courts intended to adopt for state purposes the federal test of navigability. The federal emphasis on use of the watercourse for commerce is evident, and indeed, some of the language is taken verbatim from U.S. Supreme Court opinions. As a result, watercourses in Illinois which were not used for commercial purposes are not navigable under either the federal or the Illinois test, and therefore the public has no right whatsoever to use them. A riparian landowner is free to fence off or in some other manner impede the use of a non-navigable waterway over the portion of the bed which is part of his property.

Some state courts have held that commercial use of a watercourse does not simply mean large commercial vessels, but may also include

¹⁰ *Id.* at 295.

¹¹ *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

¹² *Schulte v. Warren*, 218 Ill. 108, 119, 75 N.E. 783, 785 (1905).

¹³ *People v. Economy Light and Power Co.*, 241 Ill. 290, 332-33, 89 N.E. 760, 771 (1909), writ of error dismissed, 234 U.S. 497 (1914). In this opinion the court goes on to say that the issue of navigability must be determined from the condition of the watercourse in its natural state, not from how it could be improved by artificial means.

the floating of logs downstream in the lumber industry.¹⁴ Such a view was considered and expressly rejected in Illinois.¹⁵

At the time the federal and Illinois tests of navigability were being devised, the use of waterways for commercial purposes was understandably predominant. However, today, with a burgeoning population, rapidly expanding leisure time and interest in recreational activities, and dwindling dependence on waterways primarily for commerce, it is not surprising that state courts who have addressed the navigability question recently have adopted a much more liberal test for navigability which looks beyond mere commercial uses.

The earliest acknowledgment of the validity of non-commercial uses of waterways which ought to be considered in determining navigability appeared in an 1893 Minnesota opinion quoted at length below because of the heavy reliance placed upon its reasoning in later opinions by other state courts.¹⁶

. . . The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters,—a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits.

In early times, about the only use—except, perhaps, fishing,—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and non-navigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and non-navigable, we have in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of “navigability” in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses

¹⁴ *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926).

¹⁵ *Hubbard v. Bell*, 54 Ill. 110, 123 (1870).

¹⁶ See *Bohn v. Albertson*, 107 Cal. App. 2d 738, 744, 238 P.2d 128, 132 (1951); *Steinem v. Romney*, 194 A.2d 774, 777 (Md. 1963); *Elder v. Delcour*, 364 Mo. 838, 269 S.W.2d 17 (1954); *Coleman v. Schaeffer*, 163 Ohio St. 202, 205, 126 N.E.2d 444, 446 (1955).

other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.

Many, if not the 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 now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.¹⁷

Another expression of the modern view of navigability appears in this excerpt from an Ohio Supreme Court opinion:

There is, however, much authority for the view . . . that it is not necessary that the water be capable of commerce of pecuniary value, and that boating or sailing for pleasure should be considered navigation as well as boating for . . . profit. . . . [N]avigability for pleasure is as sacred in the eye of the law as navigability for any other purpose. It has been held that the term navigable as used in a statute relating to the ownership of submerged land, includes waters which are naturally available for use by the public for boating, fishing, etc., although they may not be susceptible to use for general commercial navigation.¹⁸

The latest and most definitive holding by a state court on the subject appeared in a 1971 California decision.¹⁹ The facts of the case are similar to many of the cases already cited. A riparian landowner placed obstructions in a waterway to prevent passage over that portion of the bed contiguous to his property. If the stream were held to be navigable, such an obstruction would constitute a public nuisance and would be subject to removal. If, on the other hand, the waterway were found to be non-navigable, then there would exist no public easement of navigation, and the obstruction could remain.

The property owner argued that the stream was not navigable because it was not used for commercial purposes. The history of the waterway was such that the court could have easily chosen to rely on the former use of the watercourse for floating logs to find commercial navigability. Instead, the

¹⁷ *Lamprey v. State*, 52 Minn. 181, 198-200, 53 N.W. 1139, 1143 (1893).

¹⁸ *Coleman v. Schaeffer*, 163 Ohio St. 202, 205, 126 N.E.2d 444, 446 (1955), quoting 56 AM. JUR. *Waters* § 181 (1947).

¹⁹ *People v. Mack*, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).

court rejected the old commercial test for navigability. The court stated: "With the ever increasing population, leisure, and need for recreational areas, it is extremely important that the public not be denied the use of recreational water by applying a narrow and outmoded interpretation of navigability."²⁰

A number of cases were cited and briefly discussed by the court in which other jurisdictions had defined navigability in terms of recreational use.²¹ The court noted the continuing application by federal courts of the traditional and narrow federal test,²² but justified a more expansive state test on the ground that the federal test is used to determine questions of title to streambed property, while the state test only determines the right of public passage over waterways within a state.²³

The court restated the test of navigability which it would apply as follows: "[M]embers of the public have a right to navigate and to exercise incidents of navigation in a lawful manner at any point below high water mark on waters of the state capable of being navigated by oar or motor propelled small craft."²⁴ As a result, the riparian owner was ordered to remove the obstruction from the waterway.

An interesting sidelight to this decision is that the California Harbors and Navigation Code contains a list of legislatively designated navigable waters, but the watercourse in this case was not in that list. The court disposed of this issue by declaring that the failure of the legislature to so designate did not act to cede complete ownership and control of the watercourse to private parties.²⁵

This treatment by the court of a legislative determination of navigability should be compared with an Illinois case which said that even an unequivocal legislative declaration that a particular river was navigable would not deprive riparian landowners of existing vested rights.²⁶ The court went on to cite with approval an opinion by the Supreme Court of Kentucky which stated in pertinent part:

[W]hat is the effect of . . . the legislature declaring a creek to be a navigable stream? The Constitution of the state forbids the taking of private property for public use without just compensation. If the creek was not navigable when the act was passed, it was the private

²⁰ *Id.* at 1045, 97 Cal. Rptr. at 451.

²¹ *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914); *Rushton ex rel Hoffmaster v. Taggart*, 306 Mich. 432, 11 N.W.2d 193 (1943).

²² *See Utah v. United States*, 403 U.S. 9 (1971).

²³ *See also Youngstown Mines Corp. v. Prout*, 266 Minn. 450, 466-70, 124 N.W.2d 328, 341-42 (1963).

²⁴ *People v. Mack*, 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448, 554 (1971).

²⁵ *Id.* at 1048-49, 97 Cal. Rptr. at 453.

²⁶ *People v. Economy Light and Power Co.*, 241 Ill. 290, 330, 89 N.E.2d 760, 770 (1909).

property of the owners of the adjoining lands. The legislature cannot divest such rights by simply calling it a navigable stream when it is not one in fact.²⁷

The conclusion to be drawn from these cases is that the ultimate question of navigability of a watercourse as it relates to public use can only be determined by the courts. Legislative determinations are in no way conclusive or binding on the courts. Because courts in states such as Illinois have not addressed the issue of navigability on the basis of recreational use versus commercial use for some time, one cannot with any accuracy predict how receptive they would be to the reasoning expressed in opinions such as *Lamprey* and *Mack*. From the standpoint of future recreational use and development of waterways, an up-to-date statement by these courts is extremely important.

THE DOCTRINE OF RIPARIANISM AND WATER RECREATION

As important to the general discussion of recreational use of waterways as navigability is the concept of riparian rights. Throughout the eastern United States the common law doctrine of riparianism governs the use of water in natural watercourses. The doctrine, as it has developed in Illinois, declares that one who owns property contiguous to a natural watercourse has the right to satisfy all his natural needs for water (drinking water, household needs, livestock, etc.), and such artificial needs (all those not natural) as do not interfere with the natural use of other riparians on the watercourse.²⁸ Basically, then, the riparian doctrine regulates the use of water on land adjacent to the waterbody. However, in states such as Illinois, riparian owners own the beds of rivers and streams which have not been declared navigable, and, according to at least one authority, riparian owners also own the beds of navigable rivers and streams subject only to an easement of navigation in the state.²⁹ There may be instances, however, where the state may own the beds, so that the public rights would then be similar to those in navigable lakes.³⁰

In those cases where the watercourse has not been declared navigable³¹ and the state does not own the beds, riparians can lawfully exclude the public not only from the riparian land but also from that portion of the waterway which flows over their beds.

²⁷ *City of Murry v. Preston*, 106 Ky. 561, 562-63, 50 S.W. 1095, 1096 (1899).

²⁸ See generally F. MANN, *WATER—USE LAW IN ILLINOIS* 13-36 (1964).

²⁹ *Id.* at 63.

³⁰ *Id.* at 77-78.

³¹ The following rivers have been determined to be navigable: Wabash River [Ops. ATT'Y GEN. 179 (1944)]; Chicago River (*Leitch v. Sanitary Dist. of Chicago*, 369 Ill. 469, 17 N.E.2d 34 (1938)); Mississippi River [*People v. City of St. Louis*, 10 Ill. 351 (1848)]. To the contrary, these rivers have been determined to be non-navigable: Sangamon River [*Central Ill. Pub. Serv. Co. v. Vollentine*, 319 Ill. 66, 149 N.E. 580]; Big Creek [*Hubbard v. Bell*, 54 Ill. 110 (1870)].

The question arises, if the navigability of the river has not been determined, and the state, though it does not own all of the beds of the river, does own a parcel of riparian property, to what extent can the state, by virtue of its riparian ownership, open up the use of the river to the public, which would gain lawful access to the river by way of the state-owned riparian land? The rule governing use of water by riparians is that of reasonable use, a term which can only be applied with specificity by a court on a case by case basis. Generally speaking, however, if the public did not trespass on the land of other riparians, nor interfere with their use of the river, there is little chance that their use of the river would be found unreasonable. Again, the growing need for public recreation and the obligation of the state to meet this need would constitute a strong rationale for permitting reasonable use by the public.

There are several methods by which the state or one of its departments may acquire riparian land so as to expand water-based recreation facilities. The most straightforward, of course, is by outright purchase or lease of the property.³² In Illinois, if there are no willing sellers, the Department of Conservation has the statutory power to acquire property by condemnation proceedings under the Eminent Domain Act.³³ The Department is also authorized by the statute to "design, develop, operate, and maintain outdoor recreation areas and facilities; and to acquire land, waters, and interests in land and waters for such areas and facilities."³⁴ The major problem presented by such methods of acquisition is, of course, the high cost, since just compensation is required and that is generally determined to be the market value of the property interest, plus severance damages for reduction of value in any part of the property not taken in condemnation.

The question of the degree of ownership necessary to allow public use of the waterway has no clearcut answer. If the watercourse can be considered public in any way, an easement permitting lawful access to the watercourse is adequate. However, if the watercourse is not public in any sense of the term, then some more substantial interest in riparian property would be necessary, a long term lease or fee, to permit use of the watercourse by the general public.

At this point one should also consider the possibility of public rights to a waterway by prescription. In order to establish prescriptive rights generally, one must be able to prove use for 20 years which is adverse, uninterrupted, exclusive, continuous, and under claim of right.³⁵ All of the elements must be present, and in the case of a prescriptive right in

³² ILL. REV. STAT. ch. 127, § 63a18-19 (1973).

³³ ILL. REV. STAT. ch. 105, § 466 (1973).

³⁴ ILL. REV. STAT. ch. 105, § 533 (Supp. 1973).

³⁵ *Ruck v. Midwest Hunting and Fishing Club*, 104 Ill. App. 2d 185, 243 N.E.2d 834 (1968).

use of a river by the public, the elements must be shown to be present as to all riparian landowners along the section of the waterway in question and in regard to all members of the public using the river during the 20-year period. As a result, a prescriptive easement in the public is difficult to prove, and requires a careful empirical study of the nature of the use of the river by all parties during the statutory period.

In summary, one cannot make a full and complete determination on the best approach to take in acquiring riparian land or other access points to a river without detailed and precise empirical data on the history and present nature of the river and the use made thereof by all parties—riparians and the public, the type of riparian land available for public use, and the general feeling of local property owners in regard to the proposed public use. Once such information is obtained, an informed choice can be made from among the legal alternatives discussed in this section, in light of the funds available for the proposed project.

ALTERNATIVE COURSES OF ACTION

In discussing alternative strategies, we shall proceed from the simpler (though not necessarily cheaper) to the more elaborate and involved. First, the state or local government agency could simply create a *de facto* system of canoe trails under its authority to establish recreation areas.³⁶ This could begin modestly with small access points at points along the river where there are right-of-way easements. The result might be a test case on the issue of the navigability of the river for public recreational purposes. In such a case, which would likely be appealed eventually to the highest state court, the development of the broad interpretation of navigability, combined with a demonstrable need for more recreational facilities in the state,³⁷ would present a strong case for application by the courts of the recreational view of navigability.

If that method should prove unsuccessful, or as an alternative to be considered, the agency could acquire riparian land at key locations on potential recreational rivers, either by purchase or eminent domain. This method may also lead to a test case on the issue of whether riparian ownership by the state is sufficient to entitle members of the general public to use the river, and if so, what uses by the public the court would find reasonable. The notion of riparian use is problematic because use of water by riparians generally takes the form of withdrawal or diversion for consumptive uses rather than use for boating or other forms of water recreation.

The other techniques to be discussed, though also creating the

³⁶ ILL. REV. STAT. ch. 105, § 533 (Supp. 1973).

³⁷ A recent study indicates that Illinois has the lowest percentage of open space per capita of any state—5.7 acres/1,000 population. Additionally, at least half of this open space is in the nine southern counties farthest from the Chicago area where 62% of the population is located. See generally ILLINOIS TECHNICAL ADVISORY COMMITTEE ON WATER RESOURCES, WATER FOR ILLINOIS, A PLAN FOR ACTION ch. 8 (1967).

potential for litigation, are primarily based on legislative action. The first of these is a declaration by the legislature that all of the waters of the state not entirely contained within a parcel of private property are public waters, held in trust by the state for the people of the state. Such action could be based on a legislative determination that because riparians have only a usufructuary right in water in watercourses, and the public trust doctrine imposes on the state an obligation to protect scarce natural resources for the benefit of its citizens, it is necessary to administer water as a public resource.

Such an action has been taken by a number of states. The state of Iowa declared:

Water occurring in any basin or in any watercourse, or other natural body of water of the state, is hereby declared to be public waters and public wealth of the people of the state . . . and the control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures as shall effectuate full utilization and protection of the water resources of the state. . . .³⁸

Although the Iowa statute is designed primarily as a means of regulating consumptive uses of water, the issue of public versus private waters was also neatly decided without wrestling with the cumbersome issue of navigability.

The state of Wyoming declared in its constitution and in appropriate legislation that control of the waters of the state is vested in the state. In a case dealing with how that affects navigability, the court responded:

. . . except when . . . used or available for use in interstate or international commerce, the exclusive control of waters is vested in the state, whether the waters are deemed navigable in the federal sense or in any other sense. . . .³⁹

Irrespective of ownership of the bed of the stream . . . the state's right to control and use its own waters as it sees fit is paramount. . . . The test of navigability does not determine other uses to which the state may put its waters even though navigability would determine title to the land underlying.⁴⁰

The state of Missouri, in a somewhat similar fashion, held in a particular case that Missouri applies the federal test of navigability, by which the river in question was not navigable because only canoes and rowboats, but not commercial vessels, could utilize it. But nevertheless, because an early act of Congress for the Missouri territory had declared that "[t]he Mississippi and Missouri rivers, and the navigable waters

³⁸ IOWA CODE ANN. § 455A.2. See also ILLINOIS ECONOMIC AND FISCAL COMMISSION, WATER RESOURCES MANAGEMENT IN ILLINOIS ch. XI (1974).

³⁹ Day v. Armstrong, 362 P.2d 137, 143 (Wyo. 1961).

⁴⁰ *Id.* at 145.

flowing into them, and the carrying places between the same, shall be common highways and forever free to the people of the territory and citizens of the United States,"⁴¹ the court held that the river was public water available for recreational use by the public.⁴²

Finally, with legislative cooperation, the agency could establish a recreational river system patterned after the Wild, Scenic and Recreational Rivers System of New York and California.⁴³ Basically these statutes establish three categories of rivers to be protected by state conservation and management efforts, with controls and regulations tailored to the nature of the river. The river categories are defined as follows:

Wild River. Those rivers or sections of rivers that are free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with river areas primitive in nature and free of man-made development except foot bridges.⁴⁴

Scenic River. Those rivers or sections of rivers, that are free of diversions or impoundments except for log dams, with limited road access and with river areas largely primitive and largely undeveloped or which are partially or predominantly used for agriculture, forest management and other dispersed human activities which do not substantially interfere with public use of the rivers and their shores.⁴⁵

Recreational River. Those rivers or sections of rivers, that are readily accessible by road or railroad, that may have development in their river area and that may have undergone some impoundment or diversion in the past.⁴⁶

After a river has been designated in one of the three categories, existing land uses in the river area may continue, but may not be altered or expanded except as permitted by the classification.⁴⁷

Recent federal legislation has made funds available to assist states wishing to expand and improve their outdoor recreation facilities. One example of such legislation is the Federal Land and Water Conservation Fund,⁴⁸ which supports, among other things, state acquisition of land and waters for recreational programs.⁴⁹

⁴¹ Act of June 4, 1812, ch. 95, § 15, 2 Stat. 743, 747.

⁴² *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17 (1954).

⁴³ N.Y. ENVIRONMENTAL CONSERVATION LAWS § 15-2701 *et seq.* (McKinney Supp. 1973); CAL. PUB. RES. § 5093.50 *et seq.* (West Supp. 1973).

⁴⁴ N.Y. ENVIRONMENTAL CONSERVATION LAWS § 15-2701(2)(a) (McKinney Supp. 1973).

⁴⁵ *Id.* at (2) (b).

⁴⁶ *Id.* at (2) (c).

⁴⁷ *Id.* at § 15-2709. See also MICH. STAT. ANN. § 11.1504 (1970); ORE. REV. STAT. §§ 390.805-925 (1971); TENN. CODE ANN. § 11-1401 (Replacement 1973).

⁴⁸ Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-528, 78 Stat. 797 (1964).

⁴⁹ 78 Stat. at 900, § 5.

Another example is the National Wild and Scenic Rivers Act⁵⁰ upon which state programs already discussed are based. The purpose of the act is to assist in preserving environmental values which enhance the use and enjoyment of the river. Such values include natural physical features and geological structures of the river area, fish, wildlife, and vegetation. In addition to designating certain rivers as protected, the act provides the means whereby other rivers may be brought within the protection of the act, one of which is through approval of a state-administered river becoming a part of the national system upon request of the Governor.⁵¹ The state must continue to manage the river, but funds are available from the Conservation Fund.

Scenic rivers legislation, to be successful, must overcome vigorous opposition from private landowners along the designated rivers who strongly disfavor the regulation of the use to which they put their land. To be effective such legislation must contain adequate measures for controlling land use. Typically this is done by purchase or condemnation of land along the river, or by comprehensive zoning on the local or state level.

The most comprehensive zoning regulation is in Oregon, where the state high commission manages the scenic rivers and land within one-quarter mile of those rivers.⁵² Landowners within the protected area must give notice of any changes in land use, and if the commission determines that the proposed use would be detrimental to the river area, the owner must delay the change one year, during which time he may negotiate an acceptable plan with the commission, or the commission may exercise the power of eminent domain. After the year, if neither of these has taken place, the landowner may proceed with his written plan.⁵³

Whatever form of land use regulation is selected, some provision must be made to prevent development or use of the river and adjacent land which would defeat the purposes of the recreational program. Therefore, it is important that all interested parties be well informed of the exact nature and extent of the program and measures necessary to carry it out, so that misunderstanding and oversight do not generate needless fears or hostilities.⁵⁴

⁵⁰ Wild and Scenic Rivers Act, Pub. L. No. 90-542, 82 Stat. 906 (1968).

⁵¹ 82 Stat. at 910, § 2(a).

⁵² ORE. REV. STAT. § 390.545(3) (1971).

⁵³ *Id.* at § 390.845(4)-(6).

⁵⁴ See generally A. REITZE, ENVIRONMENTAL PLANNING: LAW OF LAND AND RESOURCES ch. 8 (1974).

CONCLUSIONS AND RECOMMENDATIONS

In an article on recreational use of waterways, one legal scholar said, apparently in exasperation, "It is time to stop worrying about navigability and title; they do not contribute to a solution, and they distract and divert our attention from what is relevant to a solution."⁵⁵ His point is well taken. The issue is no longer whether commercial vessels use a certain river, or who has title to its banks. The issue is whether or not the police power of the state can be used to regulate such rivers so as to provide the recreational facilities so desperately needed by an expanding population with unprecedented amounts of leisure time. As demonstrated by the actions of so many other states, the answer is a resounding yes.

The question for states which have not faced up to the problem is not whether such regulation will take place, but when. Since time is of the essence, and comprehensive legislation such as that in New York and California cannot be done quickly, the order of the alternatives discussed in the previous section should also be the order in which the agency proceeds to develop a recreational river system. There would seem to be no question that too many state courts and legislatures have taken an anachronistic approach to water resources for recreation. As a result, statutory law, case precedent and tradition do not favor progressive reform measures such as we are discussing. Nevertheless, armed with what has been done in other states already, the demonstrable need for development of similar projects in every state and a carefully prepared plan for action, governments can be the initiators of a recreational program that will benefit citizens for generations.

⁵⁵ Stone, *Legal Background on Recreational Use of Montana Waters*, 32 MONT. L. REV. 1, 70 (1971).