

December 30, 1954.

Mr. A. A. O'Claire
State Fish and Game Warden
Mitchell Building
Helena, Montana

Dear Mr. O'Claire:

You have asked my opinion with respect to the following questions:

"1. How is a water determined to be 'navigable in fact'?"

"2. Who has the responsibility of determining that waters are 'navigable in fact' and of declaring them to be navigable so that the access provisions of Section 26-338 of the Revised Codes may apply?"

"3. How should our Commission proceed to have lakes, rivers, and streams which we believe are 'navigable in fact' declared navigable?"

"4. Is our interpretation of Section 26-338 of the Revised Codes correct that anglers would have free access along and on streams and lake declared navigable between the normal high water marks, and that the obligation of our Commission in such cases would be to provide access corridors from public roads to such navigable lakes, streams and rivers?"

Opinion No. 114.

Navigable Streams—Access—Fish and Game Commission.

HELD: 1. The Fish and Game Commission may negotiate with private landholders in order to obtain access to the fishing waters of navigable streams and lakes for the properly licensed fishermen in the State of Montana.

2. All streams capable of floating logs or which have floated logs to the mill or market are by the enactment of Chapter 95, Laws of 1933, made navigable in fact.

3. The legislature has by the above enactment declared all streams in the above category to be navigable in fact and the access provisions of the code apply thereto.

4. The streams which the Commission knows have floated or do float lumber and come within the above category have already been declared navigable in fact by the legislature and no further declaration is necessary.

In answer to your first question, Sections 26-336 and 26-337, R. C. M., 1947, provide:

"26-336. Definition And Use Of Lakes As Navigable Waters. All lakes, wholly or partly within this state, which have been meandered and returned as navigable by the surveyors employed by the Government of the United States, and all lakes which are navigable in fact are hereby declared to be navigable and public waters, and all persons shall have the same rights therein and thereto that they in and to any other navigable or public waters.

"26-337. Navigable Streams. All rivers and streams which have been meandered and returned as navigable by the surveyors employed by the Government of the United States, and all rivers and streams which are navigable in fact are hereby declared navigable."

The phrase "navigable in fact" is not defined in either the statutes of Montana or in its Constitution. It has not been defined by the Supreme Court of Montana. Consequently, it becomes necessary to examine the rules and decisions of the neighboring states containing similar topography in search of a definition. The states in the Pacific Northwest have similar physical features and the same economic interests as Montana. A rule of decision considering these identical interests should apply with equal pertinency to Montana as to the state for which it was made.

The Supreme Court of Idaho was confronted with this question at an early time. The opinion of that court in the case of *Johnson v. Johnson*, 14 Idaho 561, 95 Pac. 499, would be considered and probably followed if the matter were to come before the court in this state. The Idaho court examined the early common law definitions of navigable waters which were confined to waters which were affected by ebb and flow of the tides. That doctrine was, of course, too limited to apply in the United States which abounds with fresh water streams and lakes not affected by the tides. The Idaho court adopted the doctrine which the court determined to be most advantageous to the interests of the public and the private citizen in that state. By statute, the State of Idaho adopts the common law rules of England in the same manner as Montana. In determining what was a navigable stream in Idaho, the court referred to *Harrison v. Fite*, 148 Fed. 781, 78 C. C. A. 447, which said:

"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 . . . 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 . . ."

The Idaho court further said in the *Johnson* case:

" . . . It is common knowledge that most of the streams of this state rise in the mountains, and are used more generally for floating timber than for carrying passengers or freight. This being so, we deem it advisable to recognize as navigable streams used either for transporting freight or passengers by boats, or for floating lumber, logs, wood, or any other product to the market. The correct rule, we think, is stated in Black's *Pomeroy on Water Rights*, § 218, as follows: 'In those states where lumbering is a principal industrial interest, it has been found necessary to establish a new rule in respect to the use of the streams, which is not founded upon any principle or precedent of the common law, but solely upon the local exigencies and customs. This rule is that a fresh-water stream which is capable of being used for the purpose of floating down logs to the mills or to market, although it may be too small to admit of navigation is 'navigable,' (or, more properly, 'floatable') and a public highway, in the sense that the general public have an easement of passage over it for that purpose, though the title to the bed of the stream may remain in the riparian owners, subject to such public easement.' We believe, therefore, the conditions prevailing in this state fully justify this court in holding many streams to be navigable which under the decisions of other states would be non-navigable, and that this court is fully warranted in applying the principle of riparian ownership, as applied in many states to non-navigable rivers, to what we term 'navigable' rivers. The fact that navigable rivers are reserved as public highways, in no way interferes with the legal doctrine that the riparian owner takes to the thread of the stream. Snake river, being a navigable river, is a public highway, and subject to the use of the public, not only to low-water mark, but to high-water mark, and the riparian owner can in no way interfere with this use."

It is my opinion that the same rule prevails in Montana and that all streams, capable of floating logs or which have floated logs to the mill or market are by the enactment of Chapter 95, Laws of 1933 (Sections 26-336 and 26-337, *supra*) made navigable in fact.

In answer to your second question, it is my opinion that the legislature has by the above enactment allowed all streams in the above category to be navigable in fact, and that the access provisions of the code immediately apply.

In answer to your third question, the streams of which the Commission has knowledge which have floated or do float lumber and come within the above category have already been declared navigable in fact by the legislature and no further declaration is necessary.

In answer to your fourth question, I refer you to the case of *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328, where the court said:

"The State of Montana is the owner of all land below the water of a navigable stream . . . Perforce, then, the waters above the bed or channel of a navigable stream at low-water mark are public waters and in this the public have a right to fish, except as restrained by the general law . . ."

Since a properly licensed fisherman has a right to fish in navigable streams, the Fish and Game Commission may negotiate with the various land holders in order to obtain access to the various fishing streams which are at present inaccessible by virtue of surrounding private property.

It is, therefore, my opinion that:

1. All streams, capable of floating logs or which have floated logs to the mill or market are by the enactment of Chapter 95, Laws of 1933 (Section 26-336 and 26-337, *supra*) made navigable in fact.

2. The legislature has by the above enactment declared all streams in the above category to be navigable in fact and the access provisions of the code immediately apply.

3. The streams which the Commission knows have floated or do float lumber and come within the above category have already been declared navigable in fact by the legislature and no further declaration is necessary.

4. The Fish and Game Commission may negotiate with private land holders in order to obtain access to the fishing waters of navigable streams and lakes for the properly licensed fishermen in the State of Montana.