

**Lands, State. What May Be Leased, Bed of Lake—Lake Bed May Not Be Leased as State Land—Navigable Stream, Bed of May Not Be Leased.**

It is not within the power of the state of Montana to lease the bed of a lake, or that of a navigable stream.

Sept. 29, 1920.

Hon. Sidney Miller,  
Register,  
Capitol.

Dear Sir:

I have your letter of the 21st instant, with which you submit to me an application signed by Ezra N. Hill of Glasgow, Montana, to lease 313.07 acres of unsurveyed land within the meander lines of Lake Bowdoin. This land is located in Township 31 North, Range 31 East, Montana Meridian. You ask whether the State of Montana may lease this particular tract of land, and if so, through what particular agency.

With your letter there is attached a sketch of Lake Bowdoin as is shown by the meander lines of the Government survey. There is further attached a letter from A. W. Mahon, another applicant for a lease under the same circumstances as these connected with the Hill lease. This letter sets forth certain facts which have a vital bearing upon your question. The circumstances in connection with the leases, so far as material, show that Lake Bowdoin is a permanent body of water with an irregular shoreline covering several sections of land.

Comparatively speaking, the water of this lake is rather shallow, varying in different locations from one to several feet in depth. Motor boats are freely used upon this lake. The United States Government owns the largest portion of the land surrounding the lake. Some considerable part of it is privately owned, having been filed upon by individuals and patented to such individuals by the Federal Government. Mr. Hill's application for lease, as well as all the other applications, are for land permanently submerged under the waters of Lake Bowdoin; or the lake bed.

The first question which presents itself is as to the ownership of the lake bed.

It is the settled law of this country that for the purpose of jurisdiction or in the exercise of sovereignty all states occupy the same position. All states, therefore, whether one of the original thirteen that formed the union, or one admitted to the union since the forming and adoption of the Constitution, have the ownership, dominion and sovereignty over lands covered by navigable water, be such water in the form of a lake or a flowing stream. The ownership of lands constituting the bed of navigable waters rests upon a different basis than that of land generally. A state owning ordinary land stands in the same relation to such land as a private individual. As to lands constituting the bed of navigable waters, the ownership is that of a trustee for the general public. This ownership it cannot alienate, as it constitutes sovereignty itself. The state acquires such ownership as soon as it becomes a state and is admitted into the union. ((Ill. Cent. R. R. vs. Ill., 146 U. S. 430.) While the state cannot dispose outright of such navigable water beds, it may, however, devote them to remunerative uses such as the leasing of portions of them for fisheries, oyster beds, etc. The principle may be extended to include the development of oil and mineral deposits in such lands. The only restriction upon such leasing or disposition is that it must not interfere with the primary purposes of the water and water bed, viz, the purposes of navigation by the general public. (Ill. Cent. R. R. vs. Ill. supra; Morris vs. U. S. 174 U. S. 236; I Kinney on Irrigation, etc., page 937, Section 542; Hardin vs. Jordan, 140 U. S. 383; Hardin vs. Shedd, 47 L. Ed. 1156.) As to whether Bowdoin Lake is navigable is a question of fact. (Fukton L. H. & F. Co. vs. N. Y., 37 L. R. A. N. S. 307; Village of Bloomer vs. Town of Bloomer, 107 N. W. 974; Dawson vs. McMillan, 75 Pac. 807.) Sections 1326 of our Revised Code provides that "navigable waters and all streams of sufficient capacity to transport products of the country are public ways for the purpose of navigation and such transportation." While the opinion of the Attorney General would be of no value as to whether or not Lake Bowdoin is navigable or non-navigable, yet I believe that the facts and circumstances warrant the officials of the State of Montana in basing their conduct with reference to Lake Bowdoin and its bed upon the assumption that it is a navigable body of water.

In the event that Bowdoin Lake is a non-navigable body of water, I believe the law to be that the abutting property owners upon such water own in proportion to their land to the center of the water, be

it a running stream or a still lake. There is some conflict of court decisions upon this point, but the better view, in my opinion, and the weight of authorities support the assertion just made. (I Kinney on Irrigation, etc., page 936, Section 541, and authorities cited: *Bristow vs. Cormicon*, L. R. 3 App. Cases 641; S. C. Ir. 10 C. L. 398; *Hardin vs. Jordan*, 140 U. S. 371; *Woodruff vs. N. E. U. G. N. Co.*, 18 Fed. 77; *Thorpe vs. Freed*, 1 Mont. 651; *Morris vs. U. S.* 174 U. S. 227, 235.)

The fact that a stream or lake is meandered by public survey means nothing more than that it indicates the outline of the shore. The actual boundary of the water, and not the meander line, indicates the shore. Abutting property owners upon such meandered waters own to the actual shore.

It is also the law, as established by the Supreme Court of the United States, that land grants made by the Federal Government without restrictive or qualifying words are to be construed according to the law of the State in which such land is situated. (*Hardin vs. Jordan*, 140 U. S. 324.) The courts also hold that general statutes dealing with the disposition of public lands owned either by the Federal Government or by the State Government do not apply to land known as navigable water beds. This is due to the fact that such lands stand in a peculiar relationship to the public and require special legislation for their control or regulation. (*Morris vs. U. S.* 174 U. S. 235.) We therefore find ourselves in the dilemma which prevents the state from disposing of or incumbering by leases the bed of Lake Bowdoin, should this lake be held to be a non-navigable body of water; and, on the contrary, if it should be held to be a navigable body of water, we must have legislation specially supplying to the soil thereunder in order to permit the officials of the state to lease or otherwise dispose thereof.

The Supreme Court of our State, in the case of *State ex rel Galen vs. District Court*, 42 Mont. 113, 112 Pac. 706, has held that the state accepts public land from the Federal Government only upon the terms of the Enabling Act. Looking at the Enabling Act, we find that all land granted from the Federal Government to the state is to be used for certain definite purposes. These purposes are for support of the public schools and the State Institutions, such as the University, Penitentiary, etc. (*State vs. Cook*, 17 Mont. 554, 43 Pac. 929.)

Article XVII of the State Constitution provides as follows:

"All lands of the state that have been, or that may hereafter be granted to the state by congress, and all lands acquired by right or grant or devise, from any person or corporation, shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised; and none of such land, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by

law, be paid or safely secured to the state; \* \* \* \* \*  
Said lands shall be classified by the board of land commissioners as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands. Fourth, lands within the limits of any town or city or within three miles of such limits; provided, that any of said lands may be re-classified whenever, by reason of increased facilities for irrigation or otherwise, they shall be subject to different classification."

Section 2 of said Article of the Constitution provides, among other things, that disposition of the public lands shall be made under "such rules and regulations as may be prescribed by law."

I do not find that lake beds owned by the State have ever been classified for any purpose pursuant to any law. In fact, no statute has ever been enacted by our legislature calling for the classification of such land or otherwise permitting their disposition. Chapter 124, Laws of 1911, provides that no land lying between a high and low water mark shall ever be sold or leased. This legislation is the nearest of any statute we have upon our books affecting lands under navigable waters. This, however, does not reach the particular proposition which we are considering.

Chapter 147, Laws of 1909, creates a state board of land commissioners, consisting of the Governor, Superintendent of Public Instruction, Secretary of State and Attorney General. This statute is merely a reiteration of Section 4, Article XI of the State Constitution. The constitutional provision limits all activities of the State Board of Land Commissioners to such lands as are generally known as "school lands of the State, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions." These provisions would not give the State Board of Land Commissioners authority to dispose of or otherwise control or regulate lands known as navigable water beds. Such land as I have indicated above is not school land, but is a class of state property standing by itself.

In this connection I call your attention to Section 2193, Revised Code of 1907. This section reads as follows:

"The State Board of Land Commissioners are hereby empowered to accept, in the name of the State of Montana, by deed of sale or a gift, or by the operation of law, any lands of whatsoever nature, and said lands shall be appraised, managed, leased or sold in the same manner, as is prescribed herein for granted lands, and the proceeds of the lease or sale of all such lands shall be turned into the general school fund in the manner prescribed by law, or shall be applied to such specific purposes as may be designated by any grantor or testator."

The legislature might properly prescribe additional duties to be performed by the State Board of Land Commissioners than those indicated by the Constitutional provisions creating the State Board. It

might require the State Board to regulate, control and dispose of State lands, the proceeds of which do not necessarily belong to the school fund. Before the State Board of Land Commissioners can dispose of any particular lands, a method must be prescribed by legislative enactment whereby such disposition might be made. In addition, the legislation should provide for the application of the proceeds of the disposition of such lands. To the present time there is no legislation to this effect so far as navigable water beds are concerned.

I am therefore of the opinion that in no event at the present time has the State Board of Land Commissioners, or any other board or public officer of the State of Montana, any authority to dispose of the lake bed of Lake Bowdoin, even tho it might be considered as a navigable lake. I believe that for the best interests of the State of Montana, legislation should be enacted at the coming session of the Legislature whereby the State Board of Land Commissioners are given authority to lease navigable water beds for oil or mineral developments.

Respectfully,

S. C. FORD,

Attorney General.