

**Navigable Waters—Towpaths—Boating—Fishing—Hunting.**

For question of hunting and fishing on navigable waters federal meander lines determine rather than navigability.

There is no towpath along the bank of navigable waters in Montana but hunters and fishermen may use the bed of the stream in boats or otherwise. The owner of adjoining land may not prevent such use by "no trespassing" signs. Neither federal nor state authorities may give access to non-meandered streams by stocking them with fish.

Mr. H. E. Murdock,  
Agricultural Engineer,  
Agricultural Experiment Station,  
Bozeman, Montana.

October 18, 1931.

My dear Mr. Murdock:

In reply to your request for an opinion you are advised as follows:

"1. Is a stream like the Madison, Gallatin, or upper Missouri which can be used for canoes and boats considered navigable?"

The fact that a canoe or boat may be floated on a river or across would not be a test as to navigability for the purposes of answering the succeeding six questions.

A navigable stream is a stream which is considered capable of floating the produce of the country to market; this might include timber and in a sense no doubt the streams in question might be considered navigable streams for the purpose above mentioned. However, for the purpose of your questions a better test would be as to whether or not the land bordering on the stream has been meandered.

"2. Along such streams is there considered to be a towpath right-of-way as is the case in some eastern states?"

No; the owner of the land owns the land to low water mark and the meander line not being a boundary it is merely for the purpose of determining the amount of land for which the owner originally paid the United States. (See *Faucett v. Dewey Lumber Co.*, 82 Mont. 250.)

See *Herrin v. Sutherland*, 74 Mont. 587, where it is held:

"One who while hunting and fishing goes upon the land of an owner of land above ordinary low water-mark on a navigable stream is guilty of a trespass."

"3. Does a person have a right to row a boat on such streams if he passes land posted against trespass?"

Yes, if the stream is meandered; no, if it is not meandered.

See *Herrin vs. Sutherland*, *supra*.

"The state is the owner of all land below the water of a navigable stream, and therefore the waters above the bed or channel of such a stream at low-water mark are public waters in which the people have a right to fish, except as restrained by general law, and may shoot wild fowl upon the surface of the stream or flying thereover, so long as they do not trespass upon the land of an adjacent owner."

"Fishing in a non-navigable stream the bed of which is privately owned without permission of the owner, or going upon

the banks thereof and thus destroying grasses or willows, constitutes trespass, the owner of the land having the exclusive right to take the fish while in the waters of the stream within his land."

See the text of the decision.

"4: Does a person have a right to hunt and fish during open season from a boat on such streams?"

This question is answered in the affirmative in the light of the opinion in *Herrin vs. Sutherland*, supra, that is, if the stream is a meandered stream.

"5. Does the state or federal government have a right to stock such streams running through private property and then permit fishing in those streams?"

In the case of a meandered stream, yes, and in a non-meandered stream, no.

"6. If a land owner wishes to use his land for his own hunting and fishing, or to lease it for such purposes, what steps does the law require him to take to prevent trespassing?"

None. No one has a right to trespass on land of another for hunting or fishing. To make it a criminal offense for another to trespass on such lands the owner, however, must post his land.

As to steps necessary to establish and stock a muskrat farm we are referring you to the enclosed pamphlet of the fish and game commission. See section 3777 on page 90.

Very truly yours,

L. A. FOOT,  
Attorney General.