

No. 399

NAVIGABLE WATERS—STATE LANDS—
LANDS UNDER WATER

Held: Streams in Montana, with respect to which meander lines have been run along their banks when surveyed, are prima facie navigable; and the land lying beneath such streams should be claimed by the State of Montana unless and until it is determined such streams are as a matter of fact non-navigable and were so at the time the state was admitted to the Union.

April 14, 1942.

Mr. J. W. Walker
Commissioner of State Lands
and Investments
State Capitol
Helena, Montana

Dear Mr. Walker:

You have asked this office whether the State has any right to claim ownership of the bed of the Milk River in the area of the Bowdoin Gas Field, where a unit plan of operation is being worked out by the Montana-Dakota Utilities Company. The copy of the letter from the Montana-Dakota Utilities Company which you submitted with your inquiry states that, in making the government survey of the land in that vicinity, the lots were measured to the meander lines along the river and the stream bed of the Milk River was not included in the area of the lots.

The State is the owner of all lands below the water of a navigable lake or stream. (Section 6674 of the Revised Codes of Montana, 1935). The question is, therefore, whether the stream in question is navigable. In this connection, the fact the stream was meandered is important—for it is said that, although the running of a meander line along the bank of a stream does not establish its navigability, a body of water which has been meandered is prima facie navigable, but is not necessarily or conclusively so. (45 C. J. 416.) It is also held universally the question of navigability is a question of fact.

In the case of *United States v. Appalachian Electric Power Company*, 311 U. S. 377, 85 L. Ed. 243, 253, it is said navigability to fix ownership of the bed of a river, is determined as of the formation of the Union in the original states of the admission to statehood of those formed later, citing the cases of *Shively v. Bowlby*, 152 U. S. 1, 18, 26, 38 L. Ed. 311, 338, 341, 14 S. Ct. 548, *United States v. Utah*, 283 U. S. 64, 75, 75 L. Ed. 884, 849, 51 S. Ct. 438. We have no information as to the navigability of the Milk River when Montana was admitted to the Union. It is possible, and even likely, the Indians and early explorers of that region navigated

the stream with whatever kind of water craft they had—and the fact the stream was meandered makes the Milk River at least prima facie navigable, as above stated. It should be borne in mind, however, the burden of proving navigability rests finally on the party asserting the stream is navigable. Accordingly, your department should determine—as nearly as possible—whether the stream is navigable as a matter of fact and, also, whether it was navigable in 1889 when Montana was admitted to the Union.

It is my opinion streams in Montana, with respect to which meander lines have been run along their banks when surveyed, are prima facie navigable; and land lying beneath such streams should be claimed by the State of Montana unless and until it is determined such streams are as a matter of fact non-navigable and were such at the time the State was admitted to the Union.

Sincerely yours,

JOHN W. BONNER
Attorney General