

MEMORANDUM

TO: Rick Larson, Deputy Land Commissioner
FROM: Charles M. Carvell, Asst. Attorney General
DATE: June 17, 2005
RE: Ownership of White Lake

Issue

To ensure that North Dakota, upon achieving statehood in 1889, joined the Union on an equal footing with other states, North Dakota took title to the bed of all navigable bodies of water. Did North Dakota acquire title to the bed of White Lake under the equal footing doctrine? Stated otherwise, was White Lake navigable in 1889?

The question arises because there is oil and gas leasing activity in the White Lake area. If White Lake is navigable, North Dakota owns the bed and minerals under the bed.

Answer

Without evidence of actual commercial use on White Lake, it is unlikely a court would rule White Lake navigable at statehood.

Discussion

White Lake: White Lake is located in Mountrail County, a few miles northwest of the town of Stanley. This somewhat narrow lake is about five miles long. It covers 2,380 acres. When the federal government surveyed the area in 1898 it meandered White Lake. The lake, as depicted on the original survey maps, appears to have the same characteristics it has today. A recent aerial photo and one from 1983 do not show summer homes or boat ramps on the lake; they show no development of the littoral land. Neither the state parks and recreation department nor game and fish department have ever carried out any function or activity on the lake. White Lake can be considered isolated. It is not part of a chain of lakes and does not appear to have an outlet, at least not one of any consequence. Several small creeks drain into the lake. The Land Department has not undertaken a historical investigation to determine if White Lake has ever been used for boating or commerce.

The significance of meanders. The fact that White Lake is meandered does not settle the navigability question. "Meandered lakes are not necessarily navigable lakes. Meandering a lake does not determine the question of its navigability." *State v. Adams*, 89 N.W.2d 661, 689 (Minn. 1958). See also *Lefevre v. Washington Monument & Cut*

Stone Co., 81 P.2d 819, 822 (Wash. 1938).¹ “Meander lines are not per se boundary lines. Their purpose is to fix limits for the determination of the quantity of land to be paid for.” *State v. Brace*, 36 N.W.2d 330, 333 (N.D. 1949). See also *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488, 492 (N.D. 1949). Meander lines are just one circumstance to consider in the navigability analysis. See, e.g., *Lykes Bros., Inc. v. U.S. Army Corps of Eng’rs*, 64 F.3d 630, 636 n.5 (11th Cir. 1995); *McGahhey v. McCollum*, 179 S.W.2d 661, 663 (Ark. 1944).

The navigability test. Before North Dakota entered the Union, the United States held title to the beds of navigable waterways in the Dakota Territory. *Sprynczynatyk v. Mills*, 523 N.W.2d 537, 539 (N.D. 1994). Upon statehood, North Dakota acquired title to them under the equal footing doctrine and Submerged Lands Act. The equal footing doctrine entitled North Dakota to enter the Union on an equal footing with other states. *Id.* The doctrine accords “newly admitted State[s] the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown.” *Utah v. United States*, 403 U.S. 9, 10 (1971). Under the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.*, “the presumption of state title to ‘lands beneath navigable waters within the boundaries of the respective States’ is ‘confirmed’ and ‘established.’” *Alaska v. United States*, 125 S.Ct. 2137, 2143-44 (2005) (quoting 43 U.S.C. § 1311(a)).

Waterways are navigable for title if they are “navigable in fact.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

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.

Id. See also *Utah v. United States*, 403 U.S. 9, 10 (1971).² “The true test of . . . navigability . . . does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation.” *The Montello*, 87 U.S. 430, 441 (1874). It is the “capability of use by the public for purposes of transportation and

¹ On the other hand, the fact that a waterway was not meandered “does not establish that the waterway was not in fact navigable at the time of the survey, since surveying officers have no power to settle questions of navigability.” *Bingenheimer v. Diamond Iron Mining Co.*, 54 N.W.2d 912, 918 (Minn. 1952) (citing *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906)).

² “Navigability” can have different definitions depending on the context in which the term is used. Thus, the navigability test to employ “must be determined by the purpose for which navigability is being assessed, whether for admiralty jurisdiction, land claims, or for some other reason.” *North Dakota v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982), *rev’d on other grounds sub nom.*, *Block v. North Dakota*, 461 U.S. 273 (1983).

commerce” that affords the true navigability criterion rather than the extent and manner of actual use. *Id.* Because the test doesn’t require actual use, a river or lake can be navigable without ever having had a boat on it. *United States v. Utah*, 283 U.S. 64, 83 (1931). The test requires only that the waterway be susceptible or capable of being used as a highway for commerce. If the waterway is “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 navigable river or highway.” *The Montello*, 87 U.S. at 441-42. Further, the kinds of watercraft that can prove navigability needn’t be large. Typical craft in use around statehood can be used to measure navigability. Thus, canoes; small, flat bottom boats; and other shallow draft boats can suffice.

The navigability of White Lake - “Dead-end” lakes. There is little question that White Lake’s characteristics allow the use of an array of watercraft. It could probably even support steamboats, which were often designed to draw only a few feet of water. But the navigability test requires more than just the capacity to float a boat. The waterway must be useful as a highway for commerce. It requires that the waterway be used, or susceptible of being used, for trade or travel. Given White Lake’s size and location, it seems unlikely that it would have been used or even considered as a transportation route.

Dozens if not hundreds of court decisions apply the navigability test to particular bodies of water. Each case depends on its own facts. There is in this jurisprudence, however, a string of decisions analyzing the navigability of smaller, isolated lakes; lakes that begin “nowhere and lead[] nowhere.” *Lefevre v. Washington Monument & Cut Stone Co.*, 81 P.2d 819, 822 (Wash. 1938).

Lefevre dealt with Silver Lake, a lake not unlike White Lake. Silver Lake is 3.5 miles long, 80’ deep at its deepest, and from one-quarter to one-third of a mile wide. *Id.* at 820. The court found it non-navigable because it is “not so situated” where it is ever likely to be used as a means of transportation. *Id.* at 822. “It is simply an isolated pond of water.” *Id.* at 820. The navigability test requires that the water must be a highway of commerce, but Silver Lake “can’t be a highway for it starts from nowhere and leads nowhere.” *Id.* at 822 (quoting trial court).

Scipio Lake in Utah is meandered and about 1.5 miles long and five-eighths of a mile wide. *Monroe v. State*, 175 P.2d 759, 760 (Utah 1946). Its average depth is four to five feet and it covers about 580 acres. *Id.* It has been used for boating and fishing, but not for commerce.

Scipio Lake is comparatively small and so located that . . . it is easier to go around it than to cross it. The public left to itself, is not going to select the hard way of travel, and if it is a short cut to go around it, that short cut will be used.

Id. at 761. Finding it navigable would be inconsistent with the idea that navigable bodies must “meet the needs of commerce” and must “afford[] a channel for useful commerce.” *Id.* (quoting *United States v. Utah*, 283 U.S. 64, 83, 86 (1981)). Navigability depends not only on depth and width, but also on location. *Id.* (citing *State v. Aucoin*, 20 So.2d 136, 154 (La. 1944)). The lake must be “so situated that it becomes or is likely to become a valuable factor in commerce.” *Id.* at 762. See also *North Dakota v. Hoge*, No. A1-83-42, slip op. at 5 (S.W.D. N.D., Feb. 28, 1984) (geography important “in establishing that a waterway is capable of being used as a highway”).

Under such an analysis, even a tiny lake could be navigable, depending on its location. Thus, Syracuse Lake, a 33-acre Minnesota lake, was found navigable because it was part of a chain of lakes and rivers connecting Lake Superior to Rainy Lake and Lake of the Woods. *State v. Longyear Holding Co.*, 29 N.W.2d 657, 661 (Minn. 1947). Also, the waterway was used by Indians, fur traders, and lumber interests. *Id.* at 664. Liberty Lake, another small lake (.5 miles long and .75 miles wide) was found navigable in *Kalez v. Spokane Vally Land & Water Co.*, 84 P. 395, 396 (Wash. 1906). Small pleasure boats operated on the lake and a steamboat once did, carrying visitors and pleasure parties about the lake. *Id.* Evidence of the steamboat’s presence on the lake may have been the deciding evidence of navigability.

Lakes larger than Liberty and Syracuse Lakes have been found non-navigable. The court that found Syracuse Lake navigable, found Five Lake, a lake six times larger than Syracuse Lake, non-navigable because of its location. *State v. Bollenbach*, 63 N.W.2d 278 (Minn. 1954). While Five Lake may have physical characteristics that permit water travel, it is not “situated in a location useful to commercial trade and travel.” *Id.* at 289. Geographic location is important. Any body of water might be capable of floating a boat, but to determine navigability, “it is only those lakes and streams with a reasonable and practical possibility of future utility which are susceptible to use as a highway for commerce.” *Id.* The shores of Five Lake are wooded, and so it is possible that logging could occur in the area and the lake used to float logs, but “it is doubtful whether any practical commercial purpose would be served by floating logs across the lake.” *Id.* at 290.

Another Minnesota case considered the navigability of a chain of small lakes and connecting streams and channels. *State v. Adams*, 89 N.W.2d 661 (Minn. 1958). The upper part was found non-navigable; it “was only a watery cul-de-sac and led nowhere.” *Id.* at 762. This is despite the fact that a 1,160-acre lake in this chain has been used for recreational boating, swimming, and fishing, and that resorts on it rent cabins and boats. While the lake’s physical characteristics meet part of the navigability test, its location prevented a navigability finding. “The deadend watercourse had no commercial potentialities.” *Id.* at 676.

A landlocked lake, if sufficiently large to furnish a route of useful commerce within itself between places which have a need, actual or

potential, for such route of commerce, of course comes within the Federal [navigability] test. Also, a small lake may be navigable if so located as to provide a commercial route. The physical capabilities of a lake, together with its location and all surrounding circumstances, determine its navigability.

Id. at 676-77. Consequently, the court found the upper part of the chain non-navigable because its lakes and streams are “not situated in locations useful for commerce. They have not been used for commerce and do not provide practical routes for commerce, and no lake connects points between which they would be useful as a practical route for navigation.” *Id.* at 677.

Other state courts have applied the “dead-end lake” rule, although they may not have used that term. For example, the Texas Supreme Court stated:

Every inland lake or pond that has the capacity to float a boat is not necessarily navigable. It must be of such size *and so situated* as to be generally and commonly useful as a highway for transportation of goods or passengers between the points connected thereby. It must either alone or in connection with other bodies of water connect points between which it is practical to transport commerce by water. . . . While Stanmire Lake is large enough to float a boat, it is not wide enough or long enough to provide a practical route for the transportation of commodities in any direction and does not connect any points between which it would be useful as a practical route for navigation.

Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 129-30 (Tex. 1935) (emphasis added). See also *Snively v. State*, 9 P.2d 773, 774 (Wash. 1932) (119-acre lake has no inlet or outlet and “is not so located that it . . . could possibly be used as a portion of a public highway. . . . The fact that there is sufficient water to float a commercial boat is not enough”); *State v. Sweet Lake Land & Oil Co.*, 113 So. 833, 835 (La. 1927), *overruled on other grounds*, *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576 (La. 1974) (a lake that is “isolated . . . without a natural inlet or outlet large enough for a pirogue to navigate” is not navigable); *Proctor v. Sim*, 236 P. 114, 116 (Wash. 1925) (a lake’s navigability depends in part on location)

The Eighth Circuit Court of Appeals adopted the “dead-end lake” test in *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906), in which the navigability of Arkansas’ Big Lake was considered. Earthquakes in the early 1800s lowered land adjoining Little River, as a result, overflows from the river created Big Lake, which “embraces many thousand acres.” *Id.* at 782. Though Big Lake is meandered, the lake possessed “none of the characteristics of real commercial usefulness as a navigable thoroughfare.” *Id.* at 785. The lake contains inlets of deeper water, but these can in no sense “be termed useful highways of commerce. They are for the most part tortuous, lacking continuity, and, so to speak, end nowhere.” *Id.* at 786. See also *Gratz v. McKee*, 270 F. 713, 716 (8th Cir.

1921) (quoting *Griffith v. Holman*, 63 P. 239, 242 (Wash. 1900)) (among other characteristics necessary for a lake's navigability, the lake "must be so situated . . . as will enable it to accommodate the public generally as a means of transportation").

The "dead-end lake" cases express the "highway of commerce" element of the navigability test. A navigable river or lake must "afford[] a channel for useful commerce." *United States v. Utah*, 283 U.S. 64, 86 (1931). See also *The Montello*, 87 U.S. at 439 (navigable waters are "highways for commerce"). The "gist" of navigability is that the waterway serves as a "highway." *Utah v. United States*, 403 U.S. 9, 11 (1971). See also *Chisolm v. Caines*, 67 F. 28, 292 (Cir. Ct. S.C. 1894) ("The essential characteristic of a navigable stream is that it is . . . a public highway").

The typical small, isolated lake is unlikely a "highway." Without evidence of actual historical use, such lakes will likely be found non-navigable. Thus, unless there is evidence of White Lake actually having been used for commercial purposes, it is unlikely that a court would find the lake navigable.

Judicial decisions on the navigability of North Dakota lakes. The North Dakota Supreme Court has considered the navigability of three lakes not unlike White Lake. In 1921 it considered title to the bed of Sweetwater Lake, a meandered lake in Ramsey County, which is about six miles long and in some places two miles wide. *Roberts v. Taylor*, 181 N.W. 622, 623-24 (N.D. 1921). In *State v. Brace*, 36 N.W.2d 330, 331 (N.D. 1949), the court addressed Fuller's Lake, a meandered lake in Steele County covering 179 acres, and in *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488, 489-90 (N.D. 1949), it considered Grenora Lake No. 2, a meandered lake in Divide County covering a little more than a square mile.

The court found Sweetwater Lake navigable and Fuller's Lake non-navigable. *Roberts v. Taylor*, 181 N.W. at 626; *State v. Brace*, 36 N.W.2d at 334. The decisions, however, aren't instructive because the court failed to apply the federal navigability test. It stated that navigability for title may be determined by state law and applied what may be described as a "pleasure boat" test. *Roberts v. Taylor*, 181 N.W. at 625-26; *State v. Brace*, 36 N.W.2d at 319-22. This was error. Navigability "is necessarily a question of federal law." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). See also *Ozark-Mahoning*, 37 N.W.2d at 490 (title navigability "is a federal question").

When the court considered the navigability of Grenora Lake No. 2 in *Ozark-Mahoning*, it did recognize the applicability of the federal test. 37 N.W.2d at 490. The court stated that the lake has neither an inlet nor outlet; its waters are "malodorous and . . . unfit for use by man, beast, fish or fowl;" and that there "is no evidence that any use ever has been or could be made of the waters . . . either for pleasure or for profit, for travel, or for trade." *Id.* at 489-91. The court did not elaborate on these statements so the value of the decision and how it might apply to other small North Dakota lakes is uncertain. Nonetheless, it is clear that the North Dakota Supreme Court does not understand the federal navigability test satisfied merely by a lake's ability to float a boat. Thus, it would

be unsurprising were the court to use *Ozark-Mahoning* as a springboard to adopt the “dead-end” lake rule, or something like it.³

A federal court found Painted Woods Lake navigable. *North Dakota v. Hoge*, No. A1-83-42, slip op. at 6 (S.W.D. N.D., Feb. 28, 1984). This McLean County lake is about two miles long, very narrow, and covers about 165 acres. *Id.* at 2. It is located a few miles south of the town of Washburn. At one time the lake was part of the bed of the Missouri River but at statehood it was no longer connected to it. *Id.* 2-4. There was historical evidence that the lake was used for commercial purposes. “Twice entrepreneurs ran excursion boats on the Lake, one of which was 24 feet long and motor powered.” *Id.* at 4. There was also “recreational boating, hunting and fishing [on the lake] since at least the early 1990’s.” *Id.*

Conclusion. White Lake is, by North Dakota standards, a fairly large body of water. Its present characteristics are similar to those at statehood. Any number and manner of boats could traverse the lake. But the lake is isolated, and isn’t so large that it would be more convenient to cross the lake by boat than to travel around by land.

The “true criterion” for navigability is “usefulness . . . to the population . . . as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise,” and if the water in question “may be prudently relied upon and used for that purpose at some seasons of the year recurring with tolerable regularity, then, in the American sense, it is navigable.” *McGahhey v. McCollum*, 179 S.W.2d 661, 664 (Ark. 1944) (citing *Little Rock, M.R. & T.R. Co. v. Brooks*, 39 Ark. 403, 43 Am Rep. 277).

It seems far more prudent and practical that at statehood trade and travel in what is now northern Mountrail County would have been by horse and wagon on trails and roads, and not by boat on White Lake. It seems unlikely that White Lake would have been a part of the travel network. Because of this, coupled with the fact that I am unaware of any actual historical use of the lake, I conclude that White Lake was not navigable at statehood. If evidence of historical boat traffic on the lake comes to light, my conclusion might change.

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³ Devils Lake has also had its navigability assessed, and been found navigable. *E.g.*, *101 Ranch v. United States*, 714 F.Supp. 1005, 1007 (D.N.D. 1988), *aff’d*, 905 F.2d 180 (8th Cir. 1990); *Matter of the Ownership of Bed of Devils Lake*, 423 N.W.2d 141, 142 (N.D. 1988). But this finding is unhelpful in evaluating the navigability of lakes like White Lake. Devils Lake is an exceptionally large lake and there is abundant evidence of commercial boat traffic on it in the late 1800s and early 1900s.