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**Following the Crowd: The Supreme Court of South  
Dakota Expands the Scope of the Public Trust  
Doctrine to Non-Navigable, Non-Meandered  
Bodies of Water in *Parks v. Cooper***

by

Janice Holmes

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**FOLLOWING THE CROWD: THE SUPREME  
COURT OF SOUTH DAKOTA EXPANDS THE  
SCOPE OF THE PUBLIC TRUST DOCTRINE TO  
NON-NAVIGABLE, NON-MEANDERED BODIES OF  
WATER IN *PARKS V. COOPER***

“We never know the worth of water till the well is dry.”<sup>1</sup>

INTRODUCTION

The western section of the country was once known as “The Great American Desert.”<sup>2</sup> To make the land useful for living and carrying out tasks such as farming and grazing animals, the settlers of the area knew that water would be their most needed and most scarce resource.<sup>3</sup> In response to that need, Congress passed the Desert Land Act of 1877,<sup>4</sup> for the main purpose of keeping the water available for all the people in that area of the country.<sup>5</sup> The Desert Land Act of 1877 still has effect today in the semi-arid and arid western states of America.<sup>6</sup> Federal and state courts use either federal or state made tests to determine navigability of waters to indicate whether the beds of bodies of water are state or privately owned.<sup>7</sup> In determining uses of waters, courts also apply the public trust doctrine, which provides that all of the waters of the state belong to the people of the state and the state holds and regulates the water in trust for the benefit of the people.<sup>8</sup> This doctrine has evolved over the years, and there is disagreement in the western states about its applicability to waters that are not navigable under the commerce-based federal test for naviga-

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1. THOMAS FULLER, *Gnomologia: Adages and Proverbs*, 1732.

2. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935). The Court recognized the difficulties that the western pioneers would face in settling the dry, desert western states. *Id.* at 156-157.

3. *California Oregon*, 295 U.S. at 158. If the western frontier were to be cultivated, water would have to be freely accessible to all that toiled to make the area viable. *Id.*

4. 43 U.S.C. §§ 321-339 (2000).

5. *California Oregon*, 295 U.S. at 157. The Desert Land Act operated to separate water rights from land rights so that all who took land under a federal patent took the land without the water rights that would be attached under the common law that prevailed in the eastern states. *Id.* at 158. The Desert Land Act essentially stated that the water in any body and from any source was to be free for the public to use and appropriate. *Id.*

6. *Parks v. Cooper*, 676 N.W.2d 823, 831 (S.D. 2004).

7. *Parks*, 676 N.W.2d at 830-31.

8. *Id.* at 829-30. The Supreme Court of South Dakota referred to *Illinois Central Railroad Company v. Illinois*, 146 US 387 (1892), in which the United States Supreme Court defined the public trust doctrine.

bility, but may still provide use to the people of the state for recreation under a recreational-based state test.<sup>9</sup>

In *Parks v. Cooper*,<sup>10</sup> several landowners who owned land surrounding Long Lake, Parks Slough, and Schiley Slough, in South Dakota, brought suit to enjoin the public and the State from using the waters, which they claimed were privately owned because the lake beds were privately owned.<sup>11</sup> The Supreme Court of South Dakota determined that while the lake beds were privately owned, the waters over them were not.<sup>12</sup> The court reasoned the waters were subject to the public trust doctrine and were thus publicly owned.<sup>13</sup> The court pointed to South Dakota legislation concerning water rights in the State, as well as case law from similar jurisdictions as a basis for declaring that the waters were held in trust by the State for the public.<sup>14</sup> The court stated that because the waters lay over privately owned beds, the legislators would have to determine the highest and best use for the waters.<sup>15</sup>

This Note will discuss the Supreme Court of South Dakota's correct conclusion that the waters in the nonmeandered, non-navigable lakes were held in trust by the State.<sup>16</sup> First, this Note will review the facts and holding of *Parks*, and the *Parks* court's application of the federal test for navigability for title, the *Parks* court's decision to expand the scope of the waters included within the public trust doctrine, and the limitations placed on the public's use of the waters in Parks Slough, Schiley Slough, and Long Lake.<sup>17</sup> Second, this Note will explain how the Desert Land Act operated to separate the granting of title to waters and lands underlying the waters, thus making the waters a separate asset from the underlying lands.<sup>18</sup> This Note will also demonstrate the differences between the federal test for navigability for title and the state test.<sup>19</sup> This Note will then review the changing view of the limitations the public trust doctrine imposes on the use of water resources.<sup>20</sup> Next, this Note will review statutes and case law affecting the scope of waters included within the purview of the public trust doctrine.<sup>21</sup>

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9. See *infra* notes 84-125 and accompanying text.

10. 676 N.W.2d 823 (S.D. 2004).

11. *Parks v. Cooper*, 676 N.W.2d 823, 824-25, 829 (S.D. 2004).

12. *Parks*, 676 N.W.2d at 838, 839.

13. *Id.* at 838.

14. *Id.* at 833, 836.

15. *Id.* at 840, 841.

16. See *infra* notes 397-556 and accompanying text.

17. See *infra* notes 25-132 and accompanying text.

18. See *infra* notes 133-70 and accompanying text.

19. See *infra* notes 172-234 and accompanying text.

20. See *infra* notes 236-92 and accompanying text.

21. See *infra* notes 294-378 and accompanying text.

Further, this Note will demonstrate the *Parks* court correctly followed precedent in choosing and applying the federal navigability for title test to the waters in Parks Slough, Schiley Slough, and Long Lake.<sup>22</sup> This Note will also examine the South Dakota Supreme Court's correct decision in interpreting South Dakota legislative intent to expand the scope of the public trust doctrine to include all waters, and compare that decision with other opinions from the semi-arid western states regarding the treatment of water resources and the waters included within the purview of the public trust doctrine.<sup>23</sup> Finally, this Note will review the court's recognition of legislative limitations on the uses of the non-navigable waters within the public trust doctrine in South Dakota.<sup>24</sup>

## FACTS AND HOLDING

Ordean Parks ("Parks") owned the lands surrounding three bodies of water in South Dakota: Long Lake, Schiley Slough, and Parks Slough.<sup>25</sup> The United States Surveyor General's Office commissioned surveyors to survey the lands in the 1870s.<sup>26</sup> The United States had issued the original federal patents to the land as early as 1888.<sup>27</sup> The lands, which have now become lakebeds, were once either dry lands or marshy lands covered with varying depths of water.<sup>28</sup> The surveyors used the instructions created in 1868 that stated meander lines should not be drawn if the waters were "(a) 40 acres or less; or (b) shallow or likely in time to dry up or be greatly reduced by evaporation, drainage, or other causes."<sup>29</sup> The surveys indicated that private citizens could settle the lands.<sup>30</sup> The surveys excepted two parcels of land from private settlement, but eventually private individuals came to own the two parcels.<sup>31</sup>

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22. See *infra* notes 403-47 and accompanying text.

23. See *infra* notes 471-517 and accompanying text.

24. See *infra* notes 519-54 and accompanying text.

25. *Parks v. Cooper*, 676 N.W.2d 823, 823, 824 (S.D. 2004). Austin, Patricia, and Irl William Schiley, Harlo House, Inc., Charles Saylor, the Estate of Constance Saylor, et al. were landowners involved in the suit as well. *Id.* at 823.

26. *Parks*, 676 N.W.2d at 825.

27. *Id.* at 831.

28. *Id.* at 826.

29. *Id.* at 825.

30. *Id.*

31. *Id.* The State has title to an eighty-acre section that the South Dakota Department of Game, Fish, and Parks purchased in 1963, which is located along Long Lake. *Id.* at 825-26. The State claims a title to the abandoned rail bed that runs through Schiley Slough as well. *Id.* at 826.

Long Lake historically has not had as much water as it did since the late 1990s.<sup>32</sup> Observations of past soil surveys, climatic studies, aerial photographs, and topographic maps showed the area had no standing water in 1939 and 1979, which were normal years of rain-fall.<sup>33</sup> The land became flooded during the 1990s after heavy rainfall and snowmelt.<sup>34</sup> The lake is currently connected to Horseshoe Lake by a culvert under a nearby country road.<sup>35</sup> Horseshoe Lake is a meandered body of water.<sup>36</sup> Before the flooding, the owners used the land for farming, haying, and grazing.<sup>37</sup> Before 1998, fish would not have been able to survive in Long Lake.<sup>38</sup> Now, there are public rights of way for ice fishing, fishing, and snowmobiling in the area.<sup>39</sup>

The Surveyor General sketched Schiley Slough as a drain, but the Slough is also referred to as a hay marsh.<sup>40</sup> In 1889, a railroad line was built in the area, to which the State claimed title.<sup>41</sup> In the early 1900s, the owners used the area for harvesting ice, the grassland as a pasture and for hay, and some of the remaining area for farming.<sup>42</sup> Historically, there was never a solid body of water located on the land.<sup>43</sup> However, in 1997, six hundred and twenty-five surface acres of water, with a maximum depth of thirteen feet in some areas, existed on the land.<sup>44</sup>

Parks Slough was formerly a hay slough.<sup>45</sup> The land flooded generally during the spring, which allowed vegetation used for cattle feed

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32. *Parks*, 676 N.W.2d at 827. The deepest the water has been within recorded history, before the flooding, was only four to five feet. *Id.* at 826.

33. *Parks*, 676 N.W.2d at 826-27. The soil remained moist, however. *Id.* at 826. The only water on the land in 1979 was found in dugouts that were constructed during the 1950s and 1960s to water the livestock. *Id.* at 826-27. Only one small parcel of standing water, which was not waist deep, was found on the land in 1991, which was another normal year for rain fall. *Id.* at 827.

34. *Parks*, 676 N.W.2d at 825.

35. *Id.* at 826. Dr. Jim Richardson, a geomorphology expert for the State, said that a continuous strandline was located around Long and Horseshoe Lakes showing that strong wave actions occurred around the combined bodies of water. *Id.* at 826, 827.

36. *Parks*, 676 N.W.2d at 826.

37. *Id.* The land use was dependent on the amount of moisture. *Id.*

38. Brief for Appellee, at 6, *Parks v. Cooper*, 676 N.W.2d 823 (S.D. 2004) (No. 22601).

39. *Parks*, 676 N.W.2d at 826.

40. *Id.* at 828. In the survey notes, the area is called a hay marsh. *Id.* Hay marshes and hay sloughs are areas that flood with shallow water during the spring for a certain period of time. Brief for Appellee at 6.

41. *Parks*, 676 N.W.2d at 826, 828.

42. *Id.* at 828.

43. *Id.* In 1939, two small bodies of open water were present, but the bodies were only waist deep or less, and in 1958, there was no standing water. *Id.* From 1950 to 1970, four dugouts were constructed to water livestock. *Id.* In 1991, three small areas of standing water were on the land and, again, were only waist deep or less. *Id.*

44. *Parks*, 676 N.W.2d at 828.

45. *Id.* at 827.

to grow.<sup>46</sup> The largest slough on the land was generally about sixty-six acres, and the smallest only about fifteen acres.<sup>47</sup> In the 1930s, the owners hayed, grazed, and farmed the land.<sup>48</sup> During the 1950s and the 1970s, the owners constructed dugouts to water livestock because the land was so dry.<sup>49</sup> However, by 2003, the area was covered with two hundred and forty-five surface acres of water, which was thirty feet deep.<sup>50</sup>

In the mid-1990s, Parks introduced perch into the water.<sup>51</sup> The Parks family also agreed to allow the State to introduce walleye fry into one of the sloughs on the property in return for the State's assurance that the public would not be allowed access to their land.<sup>52</sup> The body of water became too large in a short amount of time, which made it impossible for the State to remove the fingerlings from the water.<sup>53</sup> Subsequently, the waters became stocked with the fish.<sup>54</sup> Members of the public began using the waters that lay over the Parks' land for ice fishing and launching boats.<sup>55</sup>

Parks filed suit against the Secretary of State of the South Dakota Game, Fish and Parks Department, John Cooper ("Cooper"), in the Circuit Court of the Fifth Judicial Circuit in Day County.<sup>56</sup> Parks claimed the State and the public had no right to the use of the waters on these properties and sought an injunction and declaratory judgment covering his rights in the land and the water.<sup>57</sup> Parks argued that because he owned the land, which had become lake beds, he also owned the rights to waters overlying the beds.<sup>58</sup> Judge Larry Lovrien, writing for the court, found that Parks was correct and concluded the bodies of water were not navigable under the federal test for navigability.<sup>59</sup>

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* The dugouts are now under several feet of water. *Id.*

50. *Parks*, 676 N.W.2d at 827.

51. *Id.*

52. Brief for Appellee, at 7-8, *Parks*, (No. 22601). The State was to introduce the walleye fry into the slough, and the fry would become fingerlings. *Id.* at 7. The State would then remove them from the water. *Id.* Fingerlings are matured walleye fry. *Id.*

53. Brief for Appellee, at 7, *Parks*, (No. 22601).

54. *Id.*

55. *Parks*, 676 N.W.2d at 827-28. Parks requested assistance from the State to stop the public's use of the waters, but the authorities would not lend assistance because they believed the waters were public, and thus the public was not trespassing. *Id.* at 828.

56. *Parks*, 676 N.W.2d at 823. The suit also included Chad Strand, Richard Waba, Lyle Johnson, Colby Hunsley, and a class of other persons as named defendants. *Id.*

57. *Parks*, 676 N.W.2d at 825.

58. *Id.* at 835.

59. *Id.* at 823, 828, 831. The trial court also reasoned that some bodies could be navigable but still be considered private. *Id.* at 828.

The trial court concluded the waters were not navigable because the federal government did not plot the waters out as lakes during the surveys in the 1870s.<sup>60</sup> The court reasoned that because the lakes were not navigable, the State did not have title to the beds under the equal footing doctrine, which would have given title of navigable waters to the State when South Dakota was admitted to the Union.<sup>61</sup> The court further reasoned some bodies of waters could be considered navigable under a state formed test for navigability, but those bodies would still be considered private waters because the waters would not be considered navigable under the federal standard for navigability.<sup>62</sup> The court declared that Parks Slough, Long Lake, and Schiley Slough were private waters and the court enjoined the State from allowing the public to use the waters.<sup>63</sup>

Cooper appealed the circuit court's decision to the Supreme Court of South Dakota, arguing the correct test for determining the navigability of waters was the state test, the public trust doctrine operated because ownership of the waters was separate from ownership of the beds, and the public had access to the waters for recreational uses.<sup>64</sup> Parks again argued that because the beds were privately owned, the waters were private as well because South Dakota case law had only applied the public trust doctrine to waters overlying beds that passed to South Dakota under the equal footing doctrine.<sup>65</sup> Judge John Konenkamp, writing for the court, reversed the decision of the circuit court and remanded the case for further consideration of the proper public uses the legislature allowed for the waters.<sup>66</sup>

In *Parks*, the South Dakota Supreme Court recognized that the public trust doctrine, as the United States Supreme Court had observed in *Illinois Central Railroad v. Illinois*,<sup>67</sup> gave states title to the waters and beds of navigable bodies of water, to be held in trust for the public.<sup>68</sup> The *Parks* court determined that the circuit court had applied the correct test for determining the navigability of the waters.<sup>69</sup> The *Parks* court concluded that after applying the federal navi-

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60. *Parks*, 676 N.W.2d at 825, 828.

61. *Id.* at 828, 829. The United States Supreme Court defined the equal footing doctrine in *Pollard v. Hagan*, 44 U.S. (3 How) 212 (1845). *Parks*, 676 N.W.2d at 829 n.9. In the original thirteen states, the federal government kept title to non-navigable waters, and the equal footing doctrine extended that theory to all States as the States entered the Union. *Id.*

62. *Parks*, 676 N.W.2d at 828.

63. *Id.*

64. *Id.*

65. *Id.* at 829.

66. *Id.* at 841.

67. 146 U.S. 387 (1892).

68. *Parks*, 676 N.W.2d at 829-30.

69. *Id.* at 831.

gability test for title, which considers a body of water navigable if it can be used as a highway for commerce at the time the State was admitted to the Union, Parks held title to the lands, which had become lake beds.<sup>70</sup> The *Parks* court further concluded that, under the public trust doctrine, the Water Resources Act,<sup>71</sup> and the Water Resources Management Act,<sup>72</sup> all of the water in the State belonged to the people of the State.<sup>73</sup> The *Parks* court also stated the legislature had the duty to decide what uses controlled public access to the waters.<sup>74</sup>

First, the court noted that there were two tests used for determining navigability for title of waters, the federal test and the state test.<sup>75</sup> The court explained that precedent in South Dakota called for the use of a state test to determine questions of navigability for title.<sup>76</sup> The *Parks* court recognized that the Supreme Court of South Dakota, in its previous decisions, had assumed the court had the jurisdiction to formulate a state test for determining navigability of the waters within the State.<sup>77</sup> However, the court determined the lower court correctly employed the use of the federal test for navigability because federal patents had granted the land.<sup>78</sup> The *Parks* court noted that the Supreme Court of the United States had stated that the question of navigability for title was a federal issue, and courts should use a federal test to determine whether bodies of water are navigable.<sup>79</sup>

The *Parks* court then followed the reasoning used by the United States Supreme Court in *United States v. Holt State Bank*,<sup>80</sup> and determined the lower court was correct in applying the federal test for navigability.<sup>81</sup> In *Holt State Bank*, the United States Supreme Court

70. *Id.* at 830, 831.

71. S.D. CODIFIED LAWS §§ 46-1-1 to 46-1-16 (2004).

72. S.D. CODIFIED LAWS §§ 46A-1-1 to 46A-1-106 (2004).

73. *Parks*, 676 N.W.2d at 838, 839, 840.

74. *Id.* at 841.

75. *Id.* at 830-831. (citing *Utah v. United States*, 403 U.S. 9 (1971) (establishing a federal test for navigability) and *Hillebrand v. Knapp*, 247 N.W. 821 (S.D. 1937) (establishing that states have the right to formulate their own tests for navigability and adopting the "pleasure boat" test, which makes waters navigable that are capable of floating and leisure activities)).

76. *Parks*, 676 N.W.2d at 830.

77. *Id.* In the previous decisions, the court relied on *Lamprey v. Metcalf*, 53 N.W. 1139 (Minn. 1893), which implemented the use of a state based "pleasure boat" test, in making the decision to adopt a broader navigability for title test. *Id.*

78. *Parks*, 676 N.W.2d at 831.

79. *Id.* (citing *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926)).

80. 270 U.S. 49 (1926).

81. *Parks*, 676 N.W.2d at 831. The court also looked to other Supreme Court decisions concerning the use of a federal test to determine navigability for title such as *The Daniel Ball*, 77 U.S. 557, 563 (1870) (stating navigable waters are those "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"), *Utah v. United States*, 403 U.S. 9, 10, 11 (1971) (stating the federal



had stated the question of navigability for title was a federal question and reasoned state law did not affect titles held by the United States.<sup>82</sup> Accordingly, the *Parks* court applied the federal test for navigability and concluded *Parks* had title to the beds because there was no evidence of commercial use of the waters at the time South Dakota was admitted to the Union.<sup>83</sup> The *Parks* court reasoned that the lack of water present on the lands at the time of survey revealed the waters could not be susceptible for use as a highway for commerce.<sup>84</sup> The *Parks* court reasoned the trial court was correct and the waters were not navigable, and thus title to the beds did not pass to the State upon its entry to the Union.<sup>85</sup>

Next, the Supreme Court of South Dakota observed that the western states of the United States were applying the public trust doctrine in a non-uniform manner.<sup>86</sup> The court noted that *Parks* had argued the owner of the lands owned everything above the lands and because he owned the lake beds, he owned the waters above the beds.<sup>87</sup> The court further noted that a number of states applied the public trust doctrine to waters, considering the waters to be an asset separate from the beds.<sup>88</sup> The court relied on case law from the states that have expanded the view that navigability of bodies of water did not matter in determining who owned the water, because all of the waters belong to the public as declared by state statutory and constitutional provisions.<sup>89</sup> The court refused to follow the lead of states that had declined to follow the trend in extending the scope of the public trust doctrine to declare all waters public, even when those states had similar provisions to the other group of states.<sup>90</sup> The court set South Dakota apart from the states that declined to follow the trend by referring to the passage of all the sections included within the Water Resources Act,<sup>91</sup> which the court claimed evidenced the legislature's

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test for navigability applied to all water courses), and *Brewer-Elliott Oil and Gas Co. v. United States*, 260 U.S. 77, 88 (1922) (stating "[i]t is not for a State by courts or legislature, in dealing with the general subject of beds of streams, to adopt a retroactive rule for determining navigability which would destroy a title already accrued under federal law").

82. *Parks*, 676 N.W.2d at 831 (quoting *Holt State Bank*, 270 U.S. at 55-56).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 836.

87. *Id.* at 835.

88. *Id.* at 835, 838.

89. *Id.* at 838. The states that have chosen to expand the scope of the waters included in the purview of the public trust doctrine are Utah, Oregon, North Dakota, Idaho, Minnesota, Iowa, Montana, New Mexico, and Wyoming. *Id.*

90. *Parks*, 676 N.W.2d at 836, 837, 838.

91. S.D. CODIFIED LAWS §§ 46-1-1 to 46-1-16 (2004).

intent to codify the public trust doctrine and subject all water, regardless of navigability, to public ownership.<sup>92</sup>

The court recognized the Desert Land Act,<sup>93</sup> which Congress passed in 1877, separated the ownership of water rights from the ownership of the lands beneath the waters.<sup>94</sup> The *Parks* court stated the United States Supreme Court had explained the implications of the Desert Land Act in *California Oregon Power Co. v. Beaver Cement Co.*,<sup>95</sup> and held that non-navigable waters, which were a part of the public domain, became subject to the states' control.<sup>96</sup> The court further held the rights of riparian owners and rights obtained through prior appropriation of the waters tempered the states' control.<sup>97</sup> The *Parks* court reasoned that the Supreme Court's decision in *California Oregon Power* gave the settlers the rights to only the water they appropriated and used, releasing all other waters for public use.<sup>98</sup>

The court then traced the history of the South Dakota code and its treatment of ownership rights to the waters within the State.<sup>99</sup> The court noted the original provision contained in the *Civil Code of Dakota Territory*<sup>100</sup> defined the common law rights of riparian owners.<sup>101</sup> The court stated that while the provision in the code defined the riparian owners' rights, the State did not recognize, in its riparian or appropriation doctrines, a complete right to control and own water.<sup>102</sup> The court further acknowledged that the legislature had adopted provisions into the code concerning appropriation and irrigation.<sup>103</sup> The court reasoned these provisions announced the public trust doctrine in South Dakota, and the legislature had extended the

92. *Parks*, 676 N.W.2d at 838. The court concluded that the Water Resources Act did not supplant the public trust doctrine, but only attempted to codify the principles of the doctrine. *Id.*

93. 43 U.S.C. §§ 321-323 (2000).

94. *Parks*, 676 N.W.2d at 832.

95. 295 U.S. 142 (1935).

96. *Parks*, 676 N.W.2d at 832.

97. *Id.* at 832.

98. *Id.*

99. *Id.* at 832-35.

100. CIVIL CODE OF DAKOTA TERRITORY § 256 (1866). Section 256 stated in relevant part: "[t]he owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream." *Id.*

101. *Parks*, 676 N.W.2d. at 832.

102. *Id.* The court noted that the legislature in the Legislative Assembly of the Territory of Dakota in 1881 announced its intention to reject the idea that riparian owners had an absolute and unqualified right to control the waters. *Id.* The Assembly allowed the riparian owners to have ownership of consumptive uses. *Id.*

103. *Parks*, 676 N.W.2d at 833. The provisions, as found in 1905 S.D. Laws Ch. 132 § 1 stated in relevant part: "[a]ll waters within the limits of the state from all sources of water supply not navigable, belong to the public and are subject to appropriation for beneficial use." *Id.*

scope of the doctrine in 1907, when it amended the code provision to include all waters.<sup>104</sup>

The court noted that the legislature repealed an earlier section of the South Dakota Code that espoused a common law right giving the owner of land ownership of waters standing on the land.<sup>105</sup> The court determined the change in the section showed the legislature's attempt to abolish the common law right and subject all waters within the State to public ownership.<sup>106</sup> The court reasoned the change in the sections reflected the legislature's intent to open all of the waters of the State to public use.<sup>107</sup> The court further reasoned the provisions did not violate the owner's constitutional rights because the statute gave protection to any of the rights vested in the owner before the statute passed.<sup>108</sup> Thus, the court determined landowners in the State could gain rights to the water through appropriation or as a riparian owner, but that those rights were subject to the public's right to use the water.<sup>109</sup>

Next, the court recognized that the private nature of the ownership of the beds of the waters would not affect the public's right to access to waters above them if the legislature intended the public to be able to use all waters.<sup>110</sup> The court opined a number of states had dispensed with the requirement that the lake beds must be navigable and not subject to private ownership to allow the public use of the waters overlying the beds.<sup>111</sup> The court noted that several state supreme courts had determined the waters in their states would be for public use—in spite of the ownership of the beds—because those states' constitutions declared all water in the states were for public use, but that the South Dakota Constitution had no such provision.<sup>112</sup>

In contrast, the court noted that other states refused to subject waters overlying privately owned beds to public use.<sup>113</sup> The court stated that other state supreme courts, such as the Kansas Supreme

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104. *Id.*

105. *Parks*, 676 N.W.2d at 833 (quoting South Dakota Code § 61.0101 (1939) (The legislature repealed the section that stated "the owner of the land owns water standing thereon")).

106. *Parks*, 676 N.W.2d at 834.

107. *Id.*

108. *Id.* The Supreme Court of South Dakota had declared the statute was constitutional in *Knight v. Grimes*, 127 N.W.2d 708 (S.D. 1964).

109. *Parks*, 676 N.W.2d at 833.

110. *Id.* at 835.

111. *Id.*

112. *Id.* at 836. For example, the Supreme Court of Montana, in *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984), stated the Montana Constitution provided that all the water in the state was subject to appropriation for public use. *Parks*, 676 N.W.2d at 836.

113. *Parks*, 676 N.W.2d at 836.

Court, did not construe a statute similar to the South Dakota statute concerning ownership of waters to include public use of waters over private lands.<sup>114</sup> The *Parks* court reasoned the South Dakota legislature, unlike the Kansas legislature, evidenced an intent to extend the public trust doctrine to all waters, regardless of bed ownership, when it passed the Water Resources Act, which stated all water in the State belonged to the people of the State for their use.<sup>115</sup> The Act “declared that the people of the state shall have a paramount interest in the use of all the water,” and that the water would be converted for the public’s use and controlled in to protect the water for that use.<sup>116</sup>

The court concluded South Dakota precedent and statutes gave the State the right to control, use, and develop the waters for the public’s use.<sup>117</sup> The court stated the waters were separate interests from the lands and were subject to the public trust doctrine.<sup>118</sup> The court reasoned the application of the public trust doctrine to the waters of navigable bodies of water should be extended to the waters overlying private lands as well.<sup>119</sup> The court acknowledged that the waters, regardless of the application of the federal test for navigability, were subject to the public trust doctrine and subject to state regulation for public use.<sup>120</sup>

Finally, the court noted that while all of the waters of the State belonged to the people of the State, the legislature had not determined that the public would have a right to use the waters for recreational uses.<sup>121</sup> The court stated that the Water Resources Act did not explicitly give the public rights to use the waters for recreational purposes.<sup>122</sup> The court identified several other states that had determined recreational use fell within the purview of the public trust doctrine for waters that lay over privately owned lands.<sup>123</sup> The court noted that under a statute similar to the Water Resources Act, the

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114. *Id.* at 837. The Supreme Court of Kansas in *Kansas ex rel. Meek v. Hays*, 785 P.2d 1356 (Kan. 1990) refused to extend the public trust doctrine to waters overlying privately owned beds because it reasoned statutory provisions applying to consumptive uses of water could not apply to a riparian owner’s rights. *Parks*, 676 N.W.2d at 837.

115. *Parks*, 676 N.W.2d at 837.

116. S.D. CODIFIED LAWS § 46-1-1 (2004).

117. *Parks*, 676 N.W.2d at 838.

118. *Id.*

119. *Id.*

120. *Id.* at 838-39.

121. *Id.* at 840.

122. *Id.* The Act defined “beneficial uses” as “any use of water within or outside the state, that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public of this state in the best utilization of water supplies.” S.D. CODIFIED LAWS § 46-1-8 (2004).

123. *Parks*, 676 N.W.2d at 839. Montana, Washington, Idaho, and Utah have determined recreational uses fall with the scope of the public trust doctrine. *Id.*

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Supreme Court of Utah in *J.J.N.P. Company v. State*,<sup>124</sup> had declared that the all waters in the state were subject to the public trust doctrine for public uses—including recreational uses—despite the private nature of the lands surrounding the lake.<sup>125</sup>

The court declined to follow the trend of Utah and other states considering recreational use to fall within the public doctrine.<sup>126</sup> The court reasoned the legislature of South Dakota did not necessarily intend to include recreational uses, because it had declared the highest use for water was “domestic use” under the Water Resources Act.<sup>127</sup> The court opined the legislature must decide whether the public would have a right to use the waters for recreational purposes, and that the judiciary would not decide the issue.<sup>128</sup>

Accordingly, the court determined the trial court applied the correct test for determining the navigability of the waters and correctly determined the waters to be non-navigable.<sup>129</sup> However, the court held all waters to be subject to the public trust doctrine regardless of the ownership of the beds under the waters.<sup>130</sup> The court also stated the legislature must determine whether the public would be allowed to use the waters for recreational uses.<sup>131</sup> The court reversed the decision of the trial court, but left the injunction in place for the trial court to decide, on remand, the appropriate relief for the parties consistent with its opinion.<sup>132</sup>

## BACKGROUND

### A. THE DESERT LAND ACT OF 1877

In *California Oregon Power Co. v. Beaver Portland Cement Co.*,<sup>133</sup> the United States Supreme Court held the Desert Land Act of 1877<sup>134</sup> gave states control of the non-navigable waters, which lay over beds conveyed by federal patent, within the public domain.<sup>135</sup> In *California Oregon Power*, California Oregon Power Company (“California Or-

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124. 655 P.2d 1133 (Utah 1982).

125. *Parks*, 676 N.W.2d at 839 (quoting *J.J.N.P. Co.*, 655 P.2d at 1137).

126. *Id.* at 839.

127. *Id.* at 840. Black’s Law Dictionary defines “domestic” as “[o]f or relating to the family or household.” BLACK’S LAW DICTIONARY 396 (7th ed. 2000). The Court has determined that watering livestock is a domestic use. *Romey v. Landers*, 392 N.W.2d 415, 422 (S.D. 1986).

128. *Parks*, 676 N.W.2d at 841.

129. *Id.* at 829.

130. *Id.* at 838, 839.

131. *Id.* at 841.

132. *Id.*

133. 295 U.S. 142 (1935).

134. 43 U.S.C. §§ 321-323 (2000).

135. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935).

egon") sued Beaver Portland Cement Company ("Beaver Portland") to enjoin the company's interference with the waters of the Rogue River in the United States District Court for Oregon.<sup>136</sup> California Oregon owned lands located on the eastern bank of the Rogue River, which was a non-navigable stream.<sup>137</sup> The United States had used federal patents to pass title to the lands under the Homestead Act of May 20, 1862.<sup>138</sup> Beaver Portland possessed land on the western banks of the river.<sup>139</sup> Beaver Portland applied for and obtained a permit from the state engineer to engage in rock mining activities.<sup>140</sup>

Beaver Portland began exploding dynamite charges on the company's side of the river to allow freer flow of the water and to create a supply of broken rock that Beaver Portland could use to build a dam.<sup>141</sup> California Oregon claimed that Beaver Portland's blasting operations would divert water from the eastern portion of the river, thus interfering with the company's riparian water rights to use the water.<sup>142</sup> California Oregon sought to enjoin Beaver Portland from blasting the rock on the western portion of the river, removing the rock from the river bed, and engaging in any activities that would interfere with the flow of the water on the eastern side of the river.<sup>143</sup>

The district court did not grant the complete injunction as California Oregon requested, but did enjoin Beaver Portland from reducing the water's surface elevation below 1,070.056 feet above recognized sea level.<sup>144</sup> The district court reasoned Beaver Portland had applied for and had obtained a permit pursuant to the Oregon guidelines governing the state's waters, and that the matter had already been adjudicated.<sup>145</sup> California Oregon claimed that it had not been a party to the first action concerning the granting of the permit, and thus was not bound by the decision in that action.<sup>146</sup> The district court also reasoned California Oregon's failure to use the procedure prescribed in the state's water code resulted in the court's decision to refuse to grant the injunction to halt Beaver Portland's blasting and rock mining operations.<sup>147</sup>

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136. *California Oregon Power*, 295 U.S. at 143, 150, 151.

137. *Id.* at 151.

138. *Id.*

139. *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F.2d 555, 557 (9th Cir. 1934).

140. *California Oregon Power*, 295 U.S. at 151.

141. *Id.*; *California-Oregon Power*, 73 F.2d at 557.

142. *California-Oregon Power*, 73 F.2d at 557.

143. *Id.*

144. *Id.*

145. *Id.* at 558.

146. *Id.*

147. *Id.*

California Oregon appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit, arguing the common law rule gave a riparian owner vested rights on a non-navigable stream to the stream's natural flow.<sup>148</sup> California Oregon argued the common law right to an indefinite quantity of water was a part of Oregon law—and was protected by the federal Constitution—because the lands passed from the government in 1885 to California Oregon's predecessors in interest.<sup>149</sup> Beaver Portland denied the application of the common law rule was proper in vesting claims of continuous flow, because their claims were based on permits under the water code and adjudicated rights.<sup>150</sup> The Ninth Circuit affirmed the district court's decision, concluding the Desert Land Act did not mandate the state to abolish the common law rule of continuous flow, but allowed the rule to be subject to legislative modification.<sup>151</sup> The court stated the Oregon courts interpreted the Desert Land Act to reserve, for the public, all water that had not been appropriated for the landowner's use.<sup>152</sup> The court acknowledged that it was the state's duty to implement policy concerning the water in the public domain.<sup>153</sup>

Tracing the history of the water laws in Oregon and other western states concerning the rights of the riparian owners, the court noted that in 1909, the Supreme Court of Oregon had declared the riparian owner could not object to any appropriations that diminished the stream's flow when there was no infringement of the owner's domestic use.<sup>154</sup> The court noted that the Supreme Court of Oregon had announced, after 1909, that the legislature had abolished the rule of continuous flow in the Oregon Water Code,<sup>155</sup> and only provided for riparian owners the amount needed for domestic uses.<sup>156</sup> The court reasoned the purpose of the Desert Land Act was to provide for reclamation of the land in the western desert states, and Congress had recognized that the only way to reclaim the land was to bring water onto

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148. *Id.* at 555, 557.

149. *Id.* at 557.

150. *Id.*

151. *Id.* at 562, 569.

152. *Id.* at 559.

153. *Id.* at 569. The court allowed the legislature to undertake the policy in the Water Code of 1909, which abrogated the right of riparian owners to unimpeded natural flow. *Id.*

154. *California-Oregon Power*, 73 F.2d at 559-62. See *Hough v. Porter*, 95 P. 732 (Or. 1909) (considering the effect of the Desert Land Act on Oregon water law).

155. 70 OR. REV. STAT. § 47-402 (1930).

156. *California-Oregon Power*, 73 F.2d at 560. The court noted domestic uses included water for livestock as well as other purposes. *Id.* at 560. See *In re Water Rights of Hood River*, 227 P. 1065, 1079 (Or. 1924) (considering the effect of the Desert Land Act on Oregon water law).

the lands.<sup>157</sup> The court determined the means to carry out the goals of the Act was to allow the states to pass legislation concerning the best way to govern the rights to the waters within the states.<sup>158</sup> However, the court declined to consider the ramifications of the Desert Land Act on California Oregon's lands because California Oregon had not suggested the lands passed from the government under the Act.<sup>159</sup> California Oregon filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to consider whether the common law rights of California Oregon as a riparian owner attached to the lands when the United States first issued the federal patents to the land.<sup>160</sup>

The Supreme Court affirmed the decision of the Circuit Court, reasoning the Desert Land Act of 1877 operated to separate the ownership of the lands under the waters from ownership of the waters situated above the lands.<sup>161</sup> Justice George Sutherland, writing for the majority, reasoned that the Act, under a plain language reading, stated all water located in non-navigable rivers, lakes, and other sources were free for appropriation and public use, including manufacturing purposes, irrigation, and mining.<sup>162</sup> The Court observed the conditions in the western states during the early days of settlement were harsh, and that the government, in an attempt to aid the settlers, passed laws to make more resources available to the people, including water resources.<sup>163</sup> The Court stated Congress passed the Desert Land Act to completely subordinate the common law rule of riparian ownership to the rule of appropriation.<sup>164</sup>

Accordingly, the Court reasoned the Act operated to sever the unappropriated waters from the land; and thus, any patents issued after Congress passed the Act did not carry a common law right to the water.<sup>165</sup> The Court stated that the government, as the "owner" of the public domain, had the power to convey land and water either to-

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157. *California-Oregon Power*, 73 F.2d at 560.

158. *Id.* at 561.

159. *Id.*

160. *California Oregon Power*, 295 U.S. at 143, 151-52.

161. *Id.* at 158.

162. *Id.* The relevant portion of the Desert Land Act of 1877 states:

All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and uses of the public for irrigation, mining and manufacturing purposes subject to existing rights.

43 U.S.C. § 321 (2000).

163. *California Oregon Power*, 295 U.S. at 156-57.

164. *Id.* at 158.

165. *Id.*



gether or separately.<sup>166</sup> The Court determined there could be no other interpretation of the language of the Act, stating the waters "shall remain and be held free for the appropriation and the use of the public," and thus Congress intended the patents to convey the water and the land separately.<sup>167</sup> The Court announced the patents conveyed only legal title to the land and that conveyance of the waters was subject to the laws, customs, and judicial decisions of the states.<sup>168</sup> Thus, because California Oregon received land the government issued under the federal homestead patent, the rights to the waters did not pass with the patent and the common law rule of riparian ownership did not operate because the state had the authority, under the Desert Land Act, to regulate use of the waters within the state.<sup>169</sup> Accordingly, the Court affirmed the Circuit Court's ruling.<sup>170</sup>

#### B. THE FEDERAL TEST FOR NAVIGABILITY FOR TITLE AND THE STATE TEST FOR NAVIGABILITY FOR TITLE

In *United States v. Holt State Bank*,<sup>171</sup> the United States Supreme Court concluded that upon admission to the Union, states became the owners of the beds of navigable waters.<sup>172</sup> In *Holt State Bank*, the United States claimed title to a lake bed, underlying Mud Lake, and sued Holt State Bank in the District Court for the District of Minnesota to quiet title to Mud Lake's bed and enjoin the defendants from asserting claims to land.<sup>173</sup> Mud Lake was located in what was formerly the Red Lake Indian Reservation, Minnesota.<sup>174</sup> At the time Minnesota entered the Union, Mud Lake covered approximately five thousand acres and was connected to other navigable streams.<sup>175</sup> The Chippewa of Minnesota ceded and relinquished the lands pursuant to the Act of January 14, 1889.<sup>176</sup> Settling homesteaders purchased the land bordering the lake under federal patents.<sup>177</sup> The

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166. *Id.* at 162.

167. *Id.*

168. *Id.*

169. *Id.* at 151, 162, 165.

170. *Id.* at 165.

171. 270 U.S. 49 (1926)

172. *United States v. Holt State Bank*, 270 U.S. 49, 49, 54, 55 (1926). The Court stated navigable waters referred to waters that were capable of use for carrying out activities relating to commerce. *Holt State Bank*, 270 U.S. at 56.

173. *Id.* at 51; *United States v. Holt State Bank*, 294 F. 161, 162 (8th Cir. 1923).

174. *Holt State Bank*, 270 U.S. at 52.

175. *Id.* at 52, 53.

176. *Id.* at 52. The Act provided that the land should be surveyed and classified as "agricultural lands" and "pine lands." *Id.* Those that were agricultural lands would be priced under the homestead law at \$1.25 per acre. *Id.* The money from the sale would be put into a trust fund that bore interest for the Chippewa to be distributed among them. *Id.*

177. *Holt State Bank*, 270 U.S. at 52.

United States had surveyed the bed for the benefit of the Chippewa after the government drained the lake.<sup>178</sup> A public ditch, which was built pursuant to state law, helped to reclaim swamp lands.<sup>179</sup> Private citizens then purchased portions of the reclaimed land.<sup>180</sup> Congress had previously determined the law of the state applied to the land drainage.<sup>181</sup>

At trial, the district court found for Holt State Bank, finding the lake was navigable and title had passed to the state, and thus the state had the right to pass the title to Holt State Bank.<sup>182</sup> The district court reasoned the navigability of the lake was an issue of local law.<sup>183</sup> The court determined that it should use the rule adopted by Minnesota to determine navigability.<sup>184</sup> The court stated the state law of the location of the beds determined the navigability of the waters, and in Minnesota, waters were navigable if they were capable of domestic and public use.<sup>185</sup>

The United States appealed to the United States Court of Appeals for the Eighth Circuit, arguing the district court erred in finding the lake was navigable and that title had passed to Minnesota upon its entrance into the Union.<sup>186</sup> The Eighth Circuit affirmed the district court's opinion, finding the lake was navigable and that Minnesota had acquired the title and the right to convey the land.<sup>187</sup> Circuit Judge John B. Sanborn, writing for the court, treated the question as one of local law, and applied the navigability test as developed in Minnesota.<sup>188</sup> The court reasoned that the established state test for navigability determined navigability based on whether the public could use the water for sailing, fishing, boating, taking water for domestic use and other purposes; if the waters dried up and could be used for no other beneficial purpose, then the riparian owners took title to the property.<sup>189</sup>

The Eighth Circuit declared the lands and shores of the navigable waters were reserved to the states under the United States Constitution, and once the states were admitted to the Union, the title to those lands rested with the states.<sup>190</sup> The Eighth Circuit determined that

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178. *Id.*

179. *Id.* at 53-54.

180. *Id.* at 53.

181. *Id.*

182. *Id.* at 55, 59.

183. *Id.* at 55.

184. *Id.*

185. *Holt State Bank*, 294 F. at 166.

186. *Holt State Bank*, 270 U.S. at 54.

187. *Id.* at 55, 57, 59.

188. *Holt State Bank*, 294 F. at 162, 165, 166.

189. *Id.* at 165-66.

190. *Id.* at 164.

Mud Lake was navigable before it was drained under the Minnesota test, because the evidence showed that the public had participated in boating, sailing, and like activities in the lake.<sup>191</sup> Thus, the Eighth Circuit concluded that the title to the lake bed passed from the United States to Minnesota when the state entered the Union because it was a navigable body of water.<sup>192</sup> The United States appealed from the Eighth Circuit's conclusion to the Supreme Court of the United States.<sup>193</sup>

The Supreme Court affirmed the decision of the Eighth Circuit, concluding the lake was navigable and the state had gained title to the bed upon its admission to the Union because the lake was navigable.<sup>194</sup> Justice Willis Van Devanter, writing for the majority, reasoned the lower courts had used the wrong standard, but had still arrived at the correct result.<sup>195</sup> The Supreme Court asserted the federal standard was the correct standard for courts to use when determining the navigability for title and those rights arising under the United States Constitution.<sup>196</sup> The United States argued the Eighth Circuit had erred in concluding that the lake was navigable, which gave the United States no right to the waters and the land.<sup>197</sup>

The Supreme Court acknowledged that allowing states to form their own standards about a constitutional issue would create uncertainty and contravene the intention of Congress in promoting a uniform policy regarding constitutional issues.<sup>198</sup> The Court explained the correct standard for determining navigability for title had long been held to be the federal standard.<sup>199</sup> The Court announced that under the federal standard, a body of water was navigable if people could use the body of water as a highway for commerce or to conduct trade and travel, and that it did not matter if there were occasional difficulties in navigation.<sup>200</sup> The Supreme Court further stated the evidence of the depth of Mud Lake and past usage for travel and trade demonstrated the lake was navigable under the federal test.<sup>201</sup> Thus, the Court affirmed the Eighth Circuit's decision and concluded Minne-

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191. *Id.* at 166.

192. *Id.*

193. *Holt State Bank*, 270 U.S. at 50.

194. *Id.* at 57, 59.

195. *Id.* at 51, 55, 57.

196. *Id.* at 55-56.

197. *Id.* at 51, 54.

198. *Id.* at 56.

199. *Id.*

200. *Id.*

201. *Id.* at 57.

sota was the owner of the bed and could dispose of the property by conveyance to Holt State Bank.<sup>202</sup>

Notwithstanding the United States Supreme Court's decision in *Holt State Bank*, in *Flisrand v. Madson*,<sup>203</sup> the Supreme Court of South Dakota announced that the South Dakota Supreme Court would use a state developed test to determine the navigability of waters in the state.<sup>204</sup> In *Flisrand*, Ole N. Flisrand ("Flisrand") sued M. Chris Madson ("Madson") in the Circuit Court, Kingsbury County, to quiet title and to determine ownership rights to an island, which was called "relicted lot No. 21."<sup>205</sup> The island was located in Lake Albert, which was an inland meandered lake.<sup>206</sup> At the time of the litigation, the island did not appear on any of the United States' surveys.<sup>207</sup> Flisrand argued that he was the owner of the island because his land bordered Lake Albert.<sup>208</sup> Madson argued there was no land legally referred to as "relicted lot No. 21," and Flisrand was not the owner of the island because Madson and his successors had been in exclusive and notorious adverse possession of the island for over twenty years, and thus Madson and his successors were the rightful owners.<sup>209</sup>

The circuit court found that Flisrand did not have title to relicted lot No. 21.<sup>210</sup> The court stated Flisrand could not have title to the island within the confines of the meandered lake and that no legal survey had been conducted of the island.<sup>211</sup> The court further stated the land was not relicted land.<sup>212</sup> The court also found Madson and his successors to be the rightful owners of the land because they had been in adverse possession of the land for over twenty years.<sup>213</sup>

Flisrand appealed the decision of the circuit court to the Supreme Court of South Dakota, arguing the circuit court erred in deciding that Madson and his successors were adverse possessors of the land and thus held legal title.<sup>214</sup> Flisrand further argued the court erred be-

202. *Id.* at 59.

203. 152 N.W. 796 (S.D. 1915).

204. *Flisrand v. Madson*, 152 N.W. 796, 796, 799 (S.D. 1915).

205. *Flisrand*, 152 N.W. at 796, 797.

206. *Id.* at 797. The lake had an irregular boundary and was about 5 miles long. *Id.* at 798. During periods of drought, the water recedes from the meandered line and the area is then available for use to cultivate crops. *Id.*

207. *Flisrand*, 152 N.W. at 798.

208. *Id.* at 797. Reliction occurs when land is added to a tract that fronts the waters of a pond, stream, or lake by uncovering the land permanently. *Id.* at 798. Land that is uncovered only seasonally or during drought is not relicted land. *Id.*

209. *Flisrand*, 152 N.W. at 797.

210. *Id.*

211. *Id.*

212. *Id.* Reliction can also occur when waters permanently recede leaving behind a tract of land, and the land left behind is relicted land. *Id.* at 798.

213. *Flisrand*, 152 N.W. at 797.

214. *Id.* at 797-98.

cause the evidence before the court had been insufficient to determine that the land was not formed by reliction.<sup>215</sup> Judge James H. McCoy, writing for the South Dakota Supreme Court, decided the evidence was sufficient to show that reliction had never occurred to form the island, and that Flisrand never held title to any portion of the island.<sup>216</sup> However, the court also acknowledged the title of the lakebed would determine ownership—reliction would be immaterial to decide who owned the island.<sup>217</sup> The court further stated the status of Lake Albert as a meandered lake did not answer the question of which party had title.<sup>218</sup> The court reasoned that the navigability status of the lake would determine who had title.<sup>219</sup>

The court construed sections 192 and 289 of the Civil Code, which controlled ownership of the land under the waters of the State and referred to navigable waters.<sup>220</sup> The court found the necessity for creating a test to determine whether Lake Albert was navigable in deciding if its waters were public or private.<sup>221</sup> The court acknowledged the test commonly used for determining navigability was one that evaluated the waters by determining if they were useful for commerce.<sup>222</sup> The court reasoned, however, that times, as well as public uses for bodies of water, had changed.<sup>223</sup> Using this logic, the court stated there was no reason that it could not formulate a new test taking into account other public uses for the waters in determining navigability.<sup>224</sup>

215. *Id.*

216. *Id.* at 797, 801.

217. *Id.* at 801.

218. *Id.* at 798. The court opined the meandered line was for survey purposes so that the purchasers would know what land was subject to sale. *Id.*

219. *Flisrand*, 152 N.W. at 798.

220. *Id.* at 799. Section 192 stated, in relevant part:

The ownership of land below ordinary highwater mark, and the land below the water of a navigable lake or stream, is regulated by the laws of the United States or by such laws of the state as the legislature may enact.

*Id.*

Section 289 stated:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways. In all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

*Id.*

221. *Flisrand*, 152 N.W. at 800.

222. *Id.* at 799.

223. *Id.* The court acknowledged most courts determined the use of the waters did not always involve the ability for ships and vessels to use the waters, but the use was always more than use for mere pleasure. *Id.*

224. *Flisrand*, 152 N.W. at 799.

The court then reasoned that sailing and boating for pleasure should also be considered navigation.<sup>225</sup> The court adopted a test announced by the Supreme Court of Minnesota, which considered waters navigable if they could be used for public purposes such as sailing and boating.<sup>226</sup> The court further looked to the case law of other states, such as Iowa, for support of a test considering other uses for water.<sup>227</sup> The court noted that the Supreme Court of Iowa had determined the state stocked the inland waters with fish in order to give the public access to cheap and valuable food, and the use of a commerce-based navigability test would render these inland waters non-navigable and out of the reach of the public for use.<sup>228</sup> Considering the decisions of other state supreme courts, the *Flisrand* court expressed its wish to use a test considering other uses for water for determining navigability, because it perceived that the present test did not take into account all uses of the waters and allowed too much of the State's meandered bodies of water to be privately held.<sup>229</sup>

The Supreme Court of South Dakota chose to follow the reasoning of the Minnesota and Iowa Supreme Courts in determining the court would use a new test for navigability that encompassed other public uses for the waters.<sup>230</sup> The court determined Lake Albert was a navigable lake because it was susceptible for public use, and thus, the State held title to the bed in trust for the people of the State.<sup>231</sup> The court stated *Flisrand* had the right to access and use the waters but could not interfere with the public's use of the waters.<sup>232</sup> The court cautioned that its decision did not extend to lakes that were not navigable or those that ceased to be navigable.<sup>233</sup> Thus, using a state test for navigability for title, the court determined the lake was navigable.<sup>234</sup>

### C. THE PUBLIC TRUST DOCTRINE AND ITS EXPANDING SCOPE

In *Illinois Central Railroad Company v. Illinois*,<sup>235</sup> the United States Supreme Court introduced and defined the public trust doctrine.<sup>236</sup> In *Illinois Central*, the people of Illinois, through the Attor-

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225. *Id.*

226. *Id.* (citing *Lamprey v. State*, 53 N.W. 1139 (Minn. 1893)).

227. *Id.* at 800.

228. *Id.* (citing *State v. Jones*, 122 N.W. 241 (Iowa 1909)).

229. *Id.* at 799, 800.

230. *Id.* at 800.

231. *Id.*

232. *Id.* at 801.

233. *Id.*

234. *Id.* at 800.

235. 146 U.S. 387 (1892).

236. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 387 (1892).

ney General of the State (collectively "state"), sued the Illinois Central Railroad Company ("Illinois Central") and the city of Chicago in the Circuit Court of Cook County.<sup>237</sup> Illinois Central filed a motion to remove the suit to the United States for the Northern District of Illinois.<sup>238</sup> The city of Chicago, pursuant to several pieces of legislation granting the state the right to convey land for the purpose of constructing a railroad, had entered into an agreement with Illinois Central for a charter for purchase of land.<sup>239</sup> The agreement gave Illinois Central the sole right to use and control of "lands, streams and material of every kind" in constructing dams, bridges, embankments, and buildings necessary for creating and maintaining the railroad.<sup>240</sup> However, the charter did not give Illinois Central the right to interrupt the navigation of any of the waters.<sup>241</sup> Illinois Central began work on constructing the railroad by straightening portions near the water as well as streets.<sup>242</sup>

In July 1871, the United States began proceedings against Illinois Central.<sup>243</sup> Congress had ordered construction of two piers in Lake Michigan, and Illinois Central had filled in the water with earth, which interfered with the United States War Department's plan for improving the area.<sup>244</sup> The United States and Illinois Central came to an agreement in which Illinois Central would work under the supervision of the Engineer Bureau of the United States.<sup>245</sup> During 1873, Illinois Central, which had ceased work, resumed construction.<sup>246</sup> On April 15, 1873, the Illinois legislature repealed the act that gave Illinois Central the right to the lands for the construction of the railroad.<sup>247</sup>

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237. *Illinois v. Illinois Cent. R.R. Co.*, 33 F. 730, 732 (C.C. Ill. 1888).

238. *Illinois Central*, 33 F. at 730, 732.

239. *Illinois Central*, 146 U.S. at 398. The Illinois legislature passed an act in January 1829 to give permission to construct the Illinois and Michigan canal, which granted parcels of land for sale for the construction. *Id.* at 395.

240. *Illinois Central*, 146 U.S. at 399.

241. *Id.* The charter also required Illinois Central to obtain permission from the city councils of every city in which Illinois Central would construct the railroad. *Id.*

242. *Illinois Central*, 146 U.S. at 403, 404.

243. *Id.* at 409.

244. *Id.*

245. *Id.* at 409, 410. The circuit court for that district granted a temporary injunction against Illinois Central, which ceased work. *Id.* at 409.

246. *Illinois Central*, 146 U.S. at 410.

247. *Id.* The legislation stated: "Be it enacted, et c., That the act entitled 'An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago,' in force April 16, 1869, be and the same is hereby repealed." ILL. LAWS of 1873 (emphasis in original).

The state of Illinois filed suit against Illinois Central, seeking to quiet title to the bed of Lake Michigan.<sup>248</sup> The state argued it had rights to the bed of Lake Michigan because when Michigan joined the Union, title to the bed of the navigable lake passed to the state.<sup>249</sup> Illinois Central argued it had the right to the use of the lake bed for constructing the railroad because it owned the lands adjacent to the water, and was thus a riparian owner, having rights to the middle of the lake bed.<sup>250</sup> The Circuit Court for the Northern District of Illinois noted that Illinois Central's argument was persuasive.<sup>251</sup> The court reasoned Illinois Central was a riparian owner, and as such, had the rights of ownership to construct edifices necessary for the railroad.<sup>252</sup> The court also reasoned the legislature did have the right to regulate Illinois Central's use of the water; the legislature had not merely regulated the use of the water, but instead gave permission to Illinois to construct the railroad.<sup>253</sup>

However, the court determined that the repeal of the act granting the charter was proper.<sup>254</sup> The court stated Illinois Central no longer had a valid claim because Illinois Central had not given compensation for the land and entered into the agreement subject to the condition that Illinois could revoke the charter.<sup>255</sup> Illinois Central and the state filed appeals to the United States Supreme Court, which agreed to hear the appeals to consider who had title to the reclaimed land along the waterfront.<sup>256</sup> The Court also granted the appeals to consider Illinois Central's right to construct the railroad to aid in determining who had the right to title of the lake bed.<sup>257</sup>

The United States Supreme Court affirmed the decision of the circuit court, determining the Illinois legislature had the right to repeal the act, thereby stripping Illinois Central of its rights to the majority of the lands adjacent to Lake Michigan.<sup>258</sup> Justice Stephen Field, writing for the majority, reasoned that repealing the act was proper because the legislature did not have the power to convey the ownership of the Lake Michigan's bed.<sup>259</sup> The Court recognized the state had title to the bed because when the state entered the Union, it took

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248. *Illinois Central*, 146 U.S. at 433, 434.

249. *Illinois Central*, 33 F. at 750.

250. *Id.* at 755.

251. *Id.*

252. *Id.*

253. *Id.* at 756.

254. *Id.* at 775, 776.

255. *Id.*

256. *Illinois Central*, 146 U.S. at 433.

257. *Id.* at 433-34.

258. *Id.* at 453-54, 460-61.

259. *Id.* at 433, 452-53.



title to the beds of all of the navigable waters in the state.<sup>260</sup> The Court stated the title to the beds, and thus the waters overlying the beds, was different from the title the state held for lands that were intended for sale.<sup>261</sup> The Court reasoned the state held the title in trust for the people that lived in the state.<sup>262</sup> The Court further explained the public trust doctrine, stating the purpose of the public trust doctrine was to guarantee the people the right to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."<sup>263</sup>

The Court stated the state legislatures could pursue projects designed to improve the public's interest in the navigable waters.<sup>264</sup> However, the Court further noted that state legislatures did not, and never had, the power to transfer complete ownership of lands under navigable waters to private parties.<sup>265</sup> Thus, the Court reasoned the act seeking to relinquish ownership to Illinois Central, if not simply void on its face, could be and was properly revoked by the Illinois legislature.<sup>266</sup> Therefore, the Court determined the state, not Illinois Central, had title to Lake Michigan's bed, and the state held the title in trust for the people of the state.<sup>267</sup>

In *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*,<sup>268</sup> the Supreme Court of Idaho held an encroachment permit did not violate the public trust doctrine.<sup>269</sup> In *Kootenai*, Kootenai Environmental Alliance ("K.E.A.") requested a hearing concerning an application the Panhandle Yacht Club ("the Panhandle") had submitted requesting permission from the State Board of Land Commissioners ("Board") to have an encroachment on Lake Coeur d'Alene.<sup>270</sup> The application requested the Board give the Panhandle a ten-year lease to the area where the club planned to construct the encroachment.<sup>271</sup> The K.E.A. argued the Board did not have proper authority to grant

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260. *Id.* at 434, 435, 452.

261. *Id.* at 452.

262. *Id.*

263. *Id.*

264. *Id.* The Court stated the legislature could erect docks, piers, wharves, and similar structures as long as no valid objections could be made concerning the grants. *Id.*

265. *Illinois Central*, 146 U.S. at 453.

266. *Id.* at 453, 454, 455.

267. *Id.* at 463-64.

268. 671 P.2d 1085 (Idaho 1983).

269. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1085, 1096 (Idaho 1983).

270. *Kootenai*, 671 P.2d at 1087.

271. *Id.* The encroachment was to be 470 feet in length and 417 feet in width and would have a depth of 68 feet. *Id.* The construction would provide area for sailboat slips with pilings, facilities for the yacht club members' use, and waterways. *Id.* The lease would give the Panhandle to the right to renew for ten-year successive terms. *Id.*

the permit and that granting the permit would violate the public trust doctrine.<sup>272</sup>

Nevertheless, the Board granted the permit to the Panhandle.<sup>273</sup> The Board found that the encroachment would not impair the view from the beach, would only impair use of the facility for fishing to a small degree, and that there was an economic need for moorage for sailboats so that the public would benefit from the encroachment, rather than be harmed by the encroachment.<sup>274</sup> The Board further found the dock would not impair the quality of the water and would not be a hazard to navigation, as long as the Panhandle took safety precautions by lighting and marking the area.<sup>275</sup> The Board concluded that the Panhandle had proven that few adverse effects would occur from the dock.<sup>276</sup> The Board further concluded that an economic and navigational necessity existed and that those necessities would be satisfied by granting the permit.<sup>277</sup>

K.E.A. appealed the decision of the Board to the District Court of the First Judicial District of Idaho, arguing the public trust doctrine removed the right of the Board to grant a permit to a private entity to construct, maintain, and use private docking facilities in a lake that was navigable.<sup>278</sup> The district court affirmed the grant of the permit.<sup>279</sup> The district court reasoned, upon an appellate review of the record of the Board's findings of law and fact, that the grant of the permit was proper.<sup>280</sup> K.E.A. then filed an appeal to the Supreme Court of Idaho.<sup>281</sup>

The Supreme Court of Idaho affirmed the decision of the district court, holding the Board correctly issued the permit to the Panhandle.<sup>282</sup> Judge Robert Huntley, writing for the majority, reasoned the issuance of the permit did not violate the public trust doctrine.<sup>283</sup> The court stated the Department of Lands, acting for the State Land Board, had the authority to dispose of public lands.<sup>284</sup> The court further stated the public trust doctrine formed the boundaries for the Board to exercise its authority.<sup>285</sup> The court announced that Idaho

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272. *Kootenai*, 671 P.2d at 1087, 1094.

273. *Id.* at 1087.

274. *Id.* at 1095.

275. *Id.*

276. *Id.* at 1095-96.

277. *Id.* at 1095.

278. *Id.* at 1085, 1087.

279. *Id.* at 1087.

280. *Id.*

281. *Id.* at 1085, 1087.

282. *Id.* at 1096.

283. *Id.* at 1087, 1096.

284. *Id.* at 1095.

285. *Id.*

would follow the lead of Wisconsin in determining when violations of the public trust doctrine occurred.<sup>286</sup> In evaluating public trust violation claims, the court opined consideration would be given to whether: 1) public bodies would control the use of the area; 2) the area would be open to the public and devoted to public purposes; 3) the diminution of the lake area would be very small in comparison to the whole of the Lake; 4) none of the lake's public uses will be greatly impaired or destroyed; and 5) the disappointment of the public to fish, boat, or swim in the area that will be filled is negligible in comparison to the benefit inured to the people desiring the encroachment.<sup>287</sup>

The court accepted the findings of fact and conclusions made by the Board concerning the Panhandle's reasons for requesting the permit and the impact that the encroachment would have on the area.<sup>288</sup> The court explained the Board's findings stated the water remained subject to control of the Department of Lands, a public body.<sup>289</sup> The court noted the Board found the encroachment would neither impair the navigation if the area were properly marked and lighted, nor impair the quality of the water, or public uses for the water.<sup>290</sup> The court noted that the Board had established an economic necessity existed and there would be little adverse effect to the public.<sup>291</sup> The court concluded the Board did not violate the public trust doctrine when the board decided to issue the permit.<sup>292</sup>

In *Kansas ex rel. Meek v. Hays*,<sup>293</sup> the Supreme Court of Kansas concluded a non-navigable body of water overlying private beds was not subject to the public trust doctrine and therefore the public could not use the water for recreational purposes without the consent of the owner.<sup>294</sup> In *Hays*, the state of Kansas ("Kansas") sued Mr. and Mrs.

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286. *Id.* at 1092 (citing *State v. Public Service Commission* 81 N.W.2d 71, 73 (Wis. 1957)).

287. *Id.* at 1092.

288. *Id.* at 1095-96.

289. *Id.* at 1095.

290. *Id.* The Board stated the public would still be able to fish, and the structure would improve the habitat for the aquatic life because of the overhead cover of the structure. *Id.*

291. *Kootenai*, 671 P.2d at 1095.

292. *Id.* The concurrence by Judge Bistline pointed to a fallacy in the majority opinion concerning the application of the second factor that the area would be "devoted to public purposes and open to the public." *Id.* at 1097 (Bistline, J., concurring). He contended the proposed usage of the area does not serve a public purpose. *Id.* (Bistline, J., concurring). He stated the real public purpose was "that there will be a substantial number of sailboats henceforth missing from their 'moorages' on trailers parked on driveways in the City of Spokane . . . while a commensurate number of Idaho sailboat owners, less affluent perhaps, or not one of the 112 yacht club members, will continue trailering their boats . . . from home to public launching pads." *Id.* at 1096 (Bistline, J., concurring).

293. 785 P.2d 1356 (Kan. 1990).

294. *Kansas ex rel. Meeks v. Hays*, 785 P.2d 1356, 1364-65 (Kan. 1990).

Jasper Hays ("Hays") in the Cherokee District Court seeking a declaratory judgment concerning the use of Shoal Creek for the purpose of recreation.<sup>295</sup> Hays owned land in the southeastern portion of Cherokee County, Kansas, and Shoal Creek ran through that land.<sup>296</sup> Hays had erected a fence across the portion of the creek that flowed through his property to prevent boaters and other persons from using the water.<sup>297</sup> The district court found for Hays, concluding that Shoal Creek was not a navigable stream under either the federal test or state test for navigability because it was of no use for commerce and did not pass the floatable stream test.<sup>298</sup> Thus, the court concluded Hays had the right to control access to the waters.<sup>299</sup>

Kansas appealed the decision of the district court to the Supreme Court of Kansas, arguing Shoal Creek was navigable, the public had the right to use the waters by prescriptive easement, and the public trust doctrine was applicable.<sup>300</sup> The Supreme Court of Kansas affirmed the district court's decision, holding the creek was not navigable, there was no prescriptive easement, and the public had no right to use of the water without permission from the landowner.<sup>301</sup> Judge Tyler Lockett, writing for the court, reasoned that without a change in legislation, the courts could not change the current law concerning navigability, determining use for recreational purposes, and the public trust doctrine.<sup>302</sup> The court further acknowledged Congress had not passed legislation that would allow the court to disregard the navigability tests in determining whether the public can find some beneficial use in the waters and applying the public trust doctrine.<sup>303</sup>

The court recognized that other western states had chosen to extend the scope of the public trust doctrine by disregarding the traditional commercial uses for the waters of the state.<sup>304</sup> The court noted that other courts concluded that public recreational nonconsumptive uses also render waters in the state capable of having a use for the public, regardless of navigability.<sup>305</sup> The court further stated that in

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295. *Hays*, 785 P.2d at 1356, 1358.

296. *Id.* at 1358.

297. *Id.*

298. *Id.* at 1358. *See* *Dougan v. Shawnee County Comm'rs*, 43 P.2d 223 (Kan. 1935) (concluding that if the stream is not navigable the bed and land are held by the same title).

299. *Hays*, 785 P.2d at 1358.

300. *Id.* at 1358.

301. *Id.* at 1358, 1363, 1365.

302. *Id.* at 1356, 1365.

303. *Id.*

304. *Id.* at 1359, 1364.

305. *Id.* at 1364.

order to consider recreational purposes, the legislators would have to pass statutory provisions indicating such an intent.<sup>306</sup>

The court rejected the state's argument that the legislature intended to give control of the water and all waters in the state to the state under the public trust doctrine.<sup>307</sup> The court reasoned Kansas Statute § 82a-702,<sup>308</sup> concerning the use of water pointed to by the state, did not evidence intent from the legislature to extend the scope of the public trust doctrine.<sup>309</sup> The court also reasoned the legislators did not mean to extend the scope of the public trust doctrine.<sup>310</sup> The court noted several bills that were not passed, such as the 1986 Kansas Recreational River Act, which would have given the legislature the right to designate selected rivers as recreational rivers.<sup>311</sup> Therefore, the court affirmed the lower court and maintained the public did not have the right to use waters overlying private beds.<sup>312</sup>

The Supreme Court of Montana reached a different result in *Montana Coalition for Stream Access, Inc. v. Curran*,<sup>313</sup> and decided the navigability of the waters as determined using the federal test for navigability for title was immaterial to determining if the state held the waters in trust for the public.<sup>314</sup> In *Curran*, the Supreme Court of Montana held that under the public trust doctrine and the Montana Constitution, surface waters in the state were for public use when the waters were capable of use for recreational purposes.<sup>315</sup> The Montana Coalition for Stream Access, Inc. ("Coalition"), the Montana Department of State Lands, and the Montana Department of Fish, Wildlife, and Parks (collectively "Montana") sued D. Michael Curran ("Curran") in the First Judicial District Court, Lewis & Clark County, for interference in the public's use of waters in the Dearborn River.<sup>316</sup> Curran

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306. *Id.* at 1365.

307. *Id.*

308. KAN. STAT. ANN. § 82a-702 (2003).

309. *Hays*, 785 P.2d. at 1364. The court noted that KAN. STAT. ANN. § 82a-702, a statute similar to the Montana provision, which provided: "Dedication of use of water. All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed," did not show the legislature's intent to include non-navigable waters for recreational purposes, because the statute addressed consumptive uses only. *Id.* (quoting KAN. ANN. STAT. 82a-702).

310. *Hays*, 785 P.2d. at 1364.

311. *Id.* In addition, in the 1987 sessions, this bill was brought again, and the Senate Energy and Natural Resources Committee rejected the bill. *Id.*

312. *Id.* at 1365.

313. 682 P.2d 163 (Mont. 1984).

314. *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 163-70 (Mont. 1984).

315. *Curran*, 682 P.2d at 163, 172.

316. *Id.* at 163, 165. The Dearborn River has a length of approximately sixty-six miles and originates in west-central Montana, along the continental divide. *Id.* at 165.

claimed title to the bed of the six or seven miles of the river that flowed through his land.<sup>317</sup> Members of the Coalition used the portion of the river flowing through Curran's property for recreation, including floating and fishing.<sup>318</sup> Curran interfered with the use of this water by harassment and interference.<sup>319</sup>

The Coalition and Montana argued the Dearborn River was navigable and the state owned the lake bed; thus, the public had the right to recreational use of the waters.<sup>320</sup> Curran argued that the river was not navigable, and thus he owned the riverbed and could control the use of the riverbed.<sup>321</sup> The district court found for the Coalition and Montana, holding the Dearborn River was navigable for recreational purposes under Montana law, and the only criterion necessary for determining if the water was navigable was that the public must be able to use the water for recreational purposes.<sup>322</sup> The district court reasoned that the federal law did not determine navigability in Montana, because the Montana Constitution stated all the natural waters of the state belonged to the public regardless of bed ownership.<sup>323</sup> Accordingly, the court held that the waters would be open to the public.<sup>324</sup>

Curran appealed the decision of the district court to the Supreme Court of Montana, arguing that the district court erred by holding that water capable of use for recreation makes the water navigable and subject to the public trust doctrine.<sup>325</sup> The Coalition and Montana continued to argue that the possibility for recreational use gave the public the right to use the waters and made the water navigable.<sup>326</sup> The Supreme Court of Montana affirmed the decision of the district court, holding the court was correct in applying the recreational test and concluding that because the water could be used for recreational purposes, the public had a right to use the river.<sup>327</sup>

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317. *Curran*, 682 P.2d at 165.

318. *Id.* The Coalition, a nonprofit Montana corporation, was formed to facilitate the public's access to the rivers in Montana. *Id.*

319. *Curran*, 682 P.2d at 165.

320. *Id.*

321. *Id.* at 165. Curran essentially argued the district court misconstrued the application of the law in determining whether the Dearborn was navigable at the time Montana joined the Union. *Id.* at 166.

322. *Curran*, 682 P.2d at 165.

323. *Id.* at 165, 170.

324. *Id.* at 163. The court held that the water did have some recreational use. *Id.* at 165.

325. *Curran*, 682 P.2d at 164, 165. Curran appealed on other issues including the application of the federal navigability test, granting of summary judgment on the issue of navigability, dismissing Curran's counterclaim, dismissing Curran's motion to dismiss for failure to join a necessary party, lack of standing, and lack of subject matter jurisdiction. *Id.* at 165.

326. *Curran*, 682 P.2d at 165.

327. *Id.* at 170, 172.

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Chief Justice Frank Haswell, writing for the majority, reasoned the Montana Constitution included a provision that made all of the natural waters of the state, whether on the surface or underground as well as flood waters, a part of the public trust to be used for the benefit of the people of the state.<sup>328</sup> The court further reasoned Curran did not have a right to prevent the public from using the waters flowing through his land unless he had appropriated the land for use, which the court noted he had not.<sup>329</sup> The court determined that ownership of the water's bed was not relevant to determine if the public has the right to use the water for recreational purposes.<sup>330</sup> The court also concluded that the public, while possessing the right to the use of the waters, could not cross over private property to access the waters without the permission of the landowner.<sup>331</sup>

Judge L.J. Gulbrandson dissented, reasoning that the court should not have adopted the recreational test for determining whether the waters were held in trust by the state.<sup>332</sup> Judge Gulbrandson noted the court should not decide the issue presented in the case by adopting a new test.<sup>333</sup> The dissent opined that the court was behaving legislatively, rather than judicially, by adopting the test.<sup>334</sup> The dissent further stated the court created an unconstitutional procedure that involved the taking of private property without first giving just compensation for the possible taking.<sup>335</sup>

#### D. LEGISLATIVE PUBLIC USE LIMITATIONS THROUGH THE SOUTH DAKOTA WATER RESOURCES ACT

In *Knight v. Grimes*,<sup>336</sup> the Supreme Court of South Dakota determined that Chapters 430 and 431 of the Session Laws of 1955,<sup>337</sup> which covered ownership and the right to use waters in the state, were constitutional because the legislature had the authority to deter-

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328. *Id.* at 164, 170. "All surface, underground, flood, and atmospheric waters within the boundaries of the state are property of the state for the use of its people and are subject to appropriation for beneficial use as provided by law." MONT. CONST. art. IX, § 3.

329. *Curran*, 682 P.2d at 170.

330. *Id.* at 169-70. See *Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961) (concluding that ownership of a bed and navigability do not ultimately determine whether the public has a right to use the waters).

331. *Curran*, 682 P.2d at 172.

332. *Id.* at 173 (Gulbrandson, J., dissenting).

333. *Id.* (Gulbrandson, J., dissenting).

334. *Id.* (Gulbrandson, J., dissenting).

335. *Id.* (Gulbrandson, J., dissenting).

336. 127 N.W.2d 708 (S.D. 1964).

337. 1955 S.D. LAWS 430; 1955 S.D. LAWS 431.

mine how best the waters of the state could be put to public use.<sup>338</sup> In *Knight*, Knight was an owner of land located over groundwater, and he brought an action for a declaratory judgment in the Circuit Court for Brookings County to test the constitutionality of Chapters 430 and 431.<sup>339</sup> Knight argued that the water laws violated both the Fifth and the Fourteenth Amendments of the United States Constitution as well as the South Dakota Constitution's Article VI,<sup>340</sup> sections 2 and 13. The circuit court dismissed Knight's action, and recognized that Knight had a vested right to irrigate the land because he had appropriated the water for that use.<sup>341</sup>

Knight appealed the circuit court's determination deciding the laws were constitutional to the Supreme Court of South Dakota.<sup>342</sup> The Supreme Court affirmed the circuit court's decision, determining that the legislature was justified in forming regulations to conserve and preserve the water for the public's use.<sup>343</sup> Judge James Bandy, writing for the court, acknowledged that Knight conceded federal law gave him no water rights when the federal patents conveyed the land.<sup>344</sup> The court noted that the only rights to the water Knight could have would be found under state law.<sup>345</sup> The court further stated the South Dakota legislature had enacted the session laws to determine what the rights to water in the State were.<sup>346</sup>

The court stated that the statute invaded a preexisting right because the landowners would not be able to use their lands completely without state regulation.<sup>347</sup> The court reasoned this invasion was constitutional because the legislature had the authority to protect the welfare of the public and their ability to access and use the limited supply of water present in the State.<sup>348</sup> The court determined the legislature took reasonable measures to achieve a legitimate end to pro-

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338. *Knight v. Grimes*, 127 N.W.2d 708, 708, 709, 711, 714 (S.D. 1964). The legislature modified the two sections in 1955 through a series of amendments to become what is now S.D.C. Supp. 61.0101, which states that the conditions in the state require the water resources to be put to the fullest extent to beneficial uses, that all the water in the state is the property of the people of the state, the state would determine how the people will use the water, and the highest and best use for the water was domestic use. *Id.* at 708, 709, 710.

339. *Knight*, 127 N.W.2d at 708.

340. S.D. CONST. art. VI.

341. *Knight*, 127 N.W.2d at 708.

342. *Id.*

343. *Id.* at 714.

344. *Id.* at 708.

345. *Id.*

346. *Id.* at 710-11.

347. *Id.* at 711.

348. *Id.* The court opined that South Dakota's status as a semi-arid state, a state that has limited sources of water, factored largely in this decision. *Id.*



tect the domestic use of the water supply for all people of the State.<sup>349</sup> The court was convinced that the circuit court was correct in dismissing the action and in reasoning the session laws were constitutional, because the legislature was justified in attempting to conserve water resources for public use.<sup>350</sup> Therefore, the court affirmed the circuit court's determination of the laws constitutionality and the legislature had the authority to determine how the public would be able to use the waters in the state.<sup>351</sup>

#### E. THE PUBLIC'S RIGHT TO RECREATIONAL USES UNDER THE PUBLIC TRUST DOCTRINE

In *J.J.N.P. Company v. State*,<sup>352</sup> the Supreme Court of Utah declared the people of the state owned bodies of water in the form of a public easement over the water, which existed regardless of the ownership of the bed under the water.<sup>353</sup> In *J.J.N.P. Company, J.J.N.P. Company* ("J.J.N.P.") sued the state of Utah through the Division of Wildlife Resources ("Utah"), challenging the validity of a Utah statute, *Utah Code Annotated* 1953, Section 23-15-10 and the denial of a permit to construct a private fish installation in the third District Court, Salt Lake County.<sup>354</sup> Utah brought a counterclaim for a declaratory judgment that gave the public rights to use the waters for recreation, although J.J.N.P.'s lands completely surrounded Lake Canyon Lake.<sup>355</sup> J.J.N.P. owned approximately twelve thousand acres in Lake Canyon that surrounded Lake Canyon Lake.<sup>356</sup> Before 1978, Utah and the predecessor's to J.J.N.P.'s interest in the land had an agreement that allowed the public access to the lake across the land.<sup>357</sup> After the expiration of the agreement, J.J.N.P. submitted an application to the Division of Wildlife Resources to install a private fish installation.<sup>358</sup> The Division denied J.J.N.P.'s application because it stated the legislature passed regulations providing that the

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349. *Knight*, 127 N.W.2d at 713-14.

350. *Id.* at 714.

351. *Id.*

352. 655 P.2d 1133 (Utah 1982).

353. *J.J.N.P. Co. v. State*, 655 P.2d 1133, 1133, 1136 (Utah 1982).

354. *J.J.N.P. Co.*, 655 P.2d at 1133, 1135. *J.J.N.P.* also challenged the trial court's determination that a dirt road crossing the company's property was public. *Id.* at 1135.

355. *Id.*

356. *Id.* Lake Canyon Lake was 800 yards long and 200 yards wide, with a depth of thirty-three feet at its deepest point and an average depth of seventeen feet. *Id.*

357. *Id.* Under the agreement, Utah managed the lake, stocked the lake with trout, kept the lake free of trash fish, and regulated fishing seasons and limits. *Id.*

358. *J.J.N.P. Co.*, 655 P.2d at 1135-36.

private installation could not be developed.<sup>359</sup> The district court found for Utah on all issues.<sup>360</sup>

J.J.N.P. appealed the decision of the district court to the Supreme Court of Utah, arguing it had rights to Lake Canyon Lake because its lands surrounded the lake.<sup>361</sup> Utah argued the public had rights to recreational use of the waters because the lake was navigable and subject to a recreational use servitude.<sup>362</sup> The court affirmed the decision of the district court, declaring Utah had the right to regulate the use of water for the well being and benefit of the people, the people had rights to recreational uses in the waters, and private ownership of the lands under the waters did not trump the state's right to regulate the water.<sup>363</sup> Judge Daniel Stewart, writing for the majority, reasoned the Utah legislature declared all waters in the state were property of the state.<sup>364</sup> The court determined the federal test for navigability was a test only to determine title to the beds of waters and did not establish the interest of the state in the waters.<sup>365</sup> The court maintained that because the legislature intended all waters to be subject to the state's ownership in trust for the people, private citizens could only have interests to put the water to certain uses but could not have ownership interests.<sup>366</sup> The court also maintained that private citizens' appropriation of the water for use did not give the citizens ownership interests in the water.<sup>367</sup>

The court noted the state regulated the water for the people's benefit as a trustee.<sup>368</sup> The court reasoned the state, as trustee, held the water for the people because water was a scarce and essential resource for the people's welfare.<sup>369</sup> The court determined the legislature intended the people to have a right to recreational uses in the state's waters because the State Engineer must consider public recreational uses of the waters before granting any permits or appropriations applications.<sup>370</sup> Further, the court reasoned the ownership of the beds

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359. *Id.* The court noted the relevant portions of section 23-15-10 were "no such [private fish] installation shall be developed on natural waters or natural flowing streams, or reservoirs constructed on natural stream channels." *Id.*

360. *J.J.N.P. Co.*, 655 P.2d at 1135.

361. *Id.* at 1133, 1137.

362. *Id.* at 1136.

363. *Id.* at 1135, 1136-37.

364. *Id.* at 1135, 1136. The court noted section 73-1 provided: "All waters in the state, whether above or under the ground are *hereby declared to be property of the public*, subject to all existing rights to the use thereof." (emphasis in original) *Id.*

365. *J.J.N.P. Co.*, 655 P.2d at 1136.

366. *Id.* The court noted section 73-1-3 stated: "Beneficial use shall be the basis, the measure and the limit of all rights to use the water of this state." *Id.*

367. *J.J.N.P. Co.*, 655 P.2d at 1136.

368. *Id.*

369. *Id.*

370. *Id.*

under the waters had not defeated the state's power to regulate the public's use of the waters.<sup>371</sup> The court declared the ownership of the lands under the bed did not hamper the public's rights to recreational uses, including boating, floating, and fishing, on and in the waters.<sup>372</sup> Thus, the court decided J.J.N.P. had neither ownership rights to Lake Canyon Lake nor appropriation rights, because it had not made an application to the State Engineer.<sup>373</sup> As such, the court affirmed the district court's determination that Lake Canyon Lake's waters were open for the public's recreational use.<sup>374</sup>

## ANALYSIS

In *Parks v. Cooper*,<sup>375</sup> the Supreme Court of South Dakota determined the federal test for navigability for title was the appropriate test in determining title to lake beds because the government had issued the land using federal patents.<sup>376</sup> In *Parks*, Parks sought declaratory judgment to determine ownership of the waters and to enjoin the public access and use of the waters located on his land.<sup>377</sup> The court concluded, after applying the federal navigability test, that the landowners held title to the lake beds of Parks Slough, Long Lake, and Schiley Slough, because the waters were not susceptible to use for commerce at the time South Dakota joined the Union.<sup>378</sup> The court further concluded the public trust doctrine operated to give the legislature the right to control all of the waters in South Dakota for the public's use.<sup>379</sup> The court maintained the legislature evidenced an intent for all the waters of the State, whether navigable or non-navigable, to be subject to the public trust doctrine because the legislature amended the code provisions relating to waters to include "all waters."<sup>380</sup>

The jurisdictions across the western section the United States are split on decisions regarding the expanding scope of the public trust doctrine.<sup>381</sup> Idaho, Minnesota, Iowa, Montana, New Mexico, North Dakota, Oregon, Wyoming and Utah have elected to expand the scope of the public trust doctrine to include all waters—regardless of ownership of the lake bed—thereby no longer considering whether the wa-

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371. *Id.* at 1137.

372. *Id.*

373. *Id.*

374. *Id.* at 1135, 1139.

375. 676 N.W.2d 823 (S.D. 2004).

376. *Parks v. Cooper*, 676 N.W.2d 823, 831 (S.D. 2004).

377. *Parks*, 676 N.W.2d at 825.

378. *Id.* at 831.

379. *Id.* at 838.

380. *Id.* at 833.

381. *Id.* at 836, 837, 838.

ters are navigable under the federal test for navigability for title.<sup>382</sup> However, other western states have determined the public trust doctrine operates to include only those waters that are navigable as determined under the federal test for navigability.<sup>383</sup> Those states have ascertained their legislatures have evidenced an intent to expand the public trust doctrine's application to non-navigable waters.<sup>384</sup> Montana, Idaho, Washington, and Utah have also elected to expand upon the scope of public uses of waters from the traditional view that public uses included irrigation and other agricultural uses to the modern view that includes fishing, bathing, boating, and other recreational activities.<sup>385</sup> The *Parks* court canvassed the case law of these jurisdictions impacted by the Desert Land Act to survey how those jurisdictions adjudicated disputes concerning riparian water rights and the interplay of those rights with the public trust doctrine.<sup>386</sup> The court also considered previous decisions by the Supreme Court of South Dakota concerning interpretations of the water laws of the State.<sup>387</sup>

The *Parks* court determined the South Dakota legislature intended the State to join with the other states that elected to expand the scope of the public trust doctrine.<sup>388</sup> The court noted the ownership rights of lands and waters were separate and the State controlled ownership rights of non-navigable waters, which gave the legislature the authority to determine what uses would best serve the public's needs.<sup>389</sup> While the court determined the scope of the doctrine would expand, the court refused to follow the jurisdictions that expanded the public uses in non-navigable waters, which had beds subject to private ownership.<sup>390</sup> The court stated the legislature had determined the public could use all waters in the state for domestic purposes—not for recreational purposes.<sup>391</sup>

This Analysis will argue the *Parks* court reached the correct decision in determining the waters were subject to the public trust doctrine, and the public uses must be limited pending action by the legislation because of the private nature of the lands underlying the waters.<sup>392</sup> This Analysis will begin by demonstrating the court cor-

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382. *Id.* at 838.

383. *Id.*

384. *Id.*

385. *Id.* at 839.

386. *Id.* at 836-39.

387. *Id.* at 832-35.

388. *Id.* at 838.

389. *Id.* at 832.

390. *Id.* at 840.

391. *Id.* at 840, 841.

392. See *infra* notes 396-556 and accompanying text.

rectly determined the test for navigability for title was the federal test.<sup>393</sup> Next, this Analysis will show the court correctly decided the waters involved in the case, although non-navigable and nonmeandered, were subject to the public trust doctrine.<sup>394</sup> Finally, this Analysis will illustrate that the court correctly refused to acknowledge public recreational uses in the non-navigable, nonmeandered waters and correctly placed the duty to determine public uses with the legislature.<sup>395</sup>

A. THE SUPREME COURT OF SOUTH DAKOTA CORRECTLY SELECTED AND APPLIED THE FEDERAL TEST FOR NAVIGABILITY TO DETERMINE OWNERSHIP OF THE LAKE BEDS

The Supreme Court of South Dakota correctly reasoned the federal test for navigability was the proper test for determining navigability of waters.<sup>396</sup> In addition, after reasoning the federal test for navigability was the correct test for determining navigability, the *Parks* court correctly applied the test.<sup>397</sup> The Supreme Court of the United States, in *United States v. Holt State Bank*,<sup>398</sup> held the states do not have the authority to construct individual tests to determine navigability of their waters.<sup>399</sup> The *Holt State Bank* Court determined the federal test for navigability states that a body of water is navigable if the water is susceptible of being used as a highway for commerce.<sup>400</sup> The Court reasoned if the body of water is considered navigable, the title to the bed passed to the state when the state joined the Union.<sup>401</sup> The Court explained, however, if under the federal test the body of water was considered non-navigable, then the title to the bed did not pass to the state.<sup>402</sup> The Court further explained if the body of water was non-navigable, the United States retained title to the bed.<sup>403</sup>

However, as the *Parks* court explained, South Dakota had constructed its own test for determining navigability for title.<sup>404</sup> In *Flis-*

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393. See *infra* notes 400-48 and accompanying text.

394. See *infra* notes 450-518 and accompanying text.

395. See *infra* notes 519-56 and accompanying text.

396. See *infra* notes 403-33 and accompanying text.

397. See *infra* notes 434-48 and accompanying text.

398. 270 U.S. 49 (1926).

399. See *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926) (stating that states have no authority to formulate their own tests and that the federal test is the proper means to determine navigability of waters for title).

400. *Holt State Bank*, 270 U.S. at 56.

401. *Id.* at 54, 55, 57, 59.

402. *Id.*

403. *Id.*

404. *Parks*, 676 N.W.2d at 830.

*rand v. Madson*,<sup>405</sup> the Supreme Court of South Dakota determined it had the authority to construct a state test that would consider other ways that the public could use water that could not be used for commerce.<sup>406</sup> However, unlike the federal test, the state test considered whether the waters were susceptible for public use for purposes such as fishing and boating.<sup>407</sup> The *Parks* court reasoned because the Supreme Court of the United States in *Holt State Bank* stated the question of navigability for title was a federal question, the court could not apply the state test to determine whether the waters were navigable.<sup>408</sup> The *Parks* court decided the state test did not apply to determine whether the waters were navigable because the Supreme Court had held—in *Holt State Bank*—that states did not have the authority to develop a different test.<sup>409</sup> Accordingly, the *Parks* court correctly determined the state test did not apply to determine the navigability of Parks Slough, Schiley Slough, and Long Lake, because the Supreme Court of South Dakota did not have the authority to construct a state test under the decision in *Holt State Bank*.<sup>410</sup>

The Supreme Court of South Dakota correctly relied on *United States v. Holt State Bank*<sup>411</sup> in selecting the correct test to determine navigability of Parks Slough, Schiley Slough, and Long Lake.<sup>412</sup> The *Parks* court correctly determined the proper test was the federal test and the previous Supreme Court of South Dakota decisions implementing a state test did not apply to waters.<sup>413</sup> In *Holt State Bank*, the Supreme Court of the United States stated the correct means for determining navigability for title was the federal test.<sup>414</sup> The Supreme Court upheld the ruling of the United States Court of Appeals for the Eighth Circuit, but stated the Eighth Circuit had used the wrong standard to arrive at its determination.<sup>415</sup> The Court asserted the federal standard was the correct standard to determine navigability for title and the rights that arose under the United States Consti-

405. 152 N.W. 796 (S.D. 1915).

406. *Flisrand v. Madson*, 152 N.W. 796, 796, 799 (S.D. 1915).

407. Compare *Holt State Bank*, 270 U.S. at 56 (announcing the federal test considered whether waters were capable of use for commerce when the state entered the Union), with *Flisrand*, 152 N.W. at 799-800 (announcing the state would follow other western states such as Minnesota and Iowa and formulate its own test for navigability, which would consider whether the waters were capable of use for recreational activities).

408. *Parks*, 676 N.W.2d at 830 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926)).

409. *Id.* at 831.

410. See *supra* 403-09 and accompanying text.

411. 270 U.S. 49 (1926).

412. See *infra* notes 417-48 and accompanying text.

413. See *supra* notes 403-12 and accompanying text.

414. *Holt State Bank*, 270 U.S. at 56.

415. *Id.* at 51, 55, 57.

tution.<sup>416</sup> The Court reasoned allowing states to form their own standards about a constitutional issue would create uncertainty and contravene the intention of Congress in promoting a uniform policy regarding constitutional issues.<sup>417</sup> The Court announced if the public would be able to use a body of water as a highway for commerce and to conduct trade and travel, the body of water would be classified as navigable.<sup>418</sup>

Relying on the Supreme Court's decision in *Holt State Bank*, the *Parks* court concluded the correct test for determining navigability of the waters was the federal test—not the test used by the state courts.<sup>419</sup> In *Holt State Bank*, the Supreme Court of the United States determined the lands surrounding Mud Lake were granted under federal patents and held the only the federal test for determining navigability of waters to determine title was applicable.<sup>420</sup> The Supreme Court of South Dakota reasoned that because the owners received the lands under federal patents the federal test should be used to determine whether the waters were navigable, and who retained title to the beds.<sup>421</sup> Similar to the lands surrounding Mud Lake in *Holt State Bank*, the beds of Parks Slough, Schiley Slough, and Long Lake, were passed under federal patents.<sup>422</sup>

Parks Slough, Schiley Slough, and Long Lake and their lake beds are similar to Mud Lake and its bed because the United States government granted the patents to the lands.<sup>423</sup> The United States Surveyor General's Office commissioned surveyors to survey the lands at issue in *Parks*, and as early as 1888, the United States issued patents to the land.<sup>424</sup> The United States also surveyed Mud Lake after the government drained the lake, and homesteaders took title to the land bordering the lake under federal patents.<sup>425</sup> Thus, the rights to the lands in both *Parks* and *Holt State Bank* arose under federal patents.<sup>426</sup> The Court in *Holt State Bank* stated rights arising under the Constitution

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416. *Id.* at 55-56.

417. *Id.* at 56.

418. *Id.*

419. *Parks*, 676 N.W.2d at 830, 831.

420. *Holt State Bank*, 270 U.S. at 52, 55-56.

421. *Parks*, 676 N.W.2d at 831.

422. *Compare Parks*, 676 N.W.2d at 831 (stating the United States conveyed the lands with federal patents), *with Holt State Bank*, 270 U.S. at 52 (stating the United States conveyed the lands with federal homestead patents).

423. *Compare Parks*, 676 N.W. 2d at 831 (stating the United States conveyed Parks Slough, Schiley Slough, and Long Lake with federal patents), *with Holt State Bank*, 270 U.S. at 52 (stating the United States conveyed the area surrounding Mud Lake as well as the bed of the lake with federal patents).

424. *Id.* at 831.

425. *Holt State Bank*, 270 U.S. at 52.

426. *See supra* notes 423-25 and accompanying text.

of the United States should be determined using a uniform standard or test.<sup>427</sup> Therefore, the *Parks* court properly stated the correct means for determining the rights contained in the government's grant in the federal patents was the uniform federal test of *Holt State Bank*.<sup>428</sup> Thus, the Court correctly interpreted and relied on *Holt State Bank* because the bodies of water in *Parks* are similar the body of water at issue in *Holt State Bank*.<sup>429</sup>

1. *The Supreme Court of South Dakota Correctly Applied the Federal Test for Navigability for Title to Determine Parks Slough, Schiley Slough, and Long Lake Were Non-navigable Waters.*

In *Holt State Bank*, the United States Supreme Court stated the federal test for navigability for title was whether people could use the body of water as a highway for commerce and to conduct trade and travel.<sup>430</sup> The *Holt State Bank* court explained the water's classification as navigable or non-navigable at the time the state entered the Union determined whether the United States retained title to the water's bed or whether the state took title upon entrance to the Union.<sup>431</sup> The Court further explained the United States retained title to the beds of non-navigable waters, while the state took title to the beds of navigable waters.<sup>432</sup> The Court reasoned Mud Lake could have been used for commerce and to conduct trade and travel because the lake's past depth and past usage for trade and travel demonstrated the lake was navigable under the federal test.<sup>433</sup> The Court noted that at the time Minnesota entered the Union, Mud Lake covered approximately five thousand acres and was connected to other navigable streams.<sup>434</sup> The Court opined that because Mud Lake was navigable, the state received title to the bed upon the state's entrance to the Union.<sup>435</sup>

Unlike the body of water in *Holt State Bank*, however, the waters in *Parks* were declared non-navigable under the federal test.<sup>436</sup> The

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427. *Holt State Bank*, 270 U.S. at 56.

428. See *supra* note 427 and accompanying text.

429. See *supra* notes 403-28 and accompanying text.

430. *Holt State Bank*, 270 U.S. at 56. The Court also stated that it did not matter if there were occasional difficulties in navigation. *Id.*

431. *Id.* at 54, 55.

432. *Id.*

433. *Id.* at 57.

434. *Id.* at 52, 53.

435. *Id.* at 59.

436. Compare *Parks*, 676 N.W.2d at 831 (declaring the waters were non-navigable under the federal navigability for title test), with *Holt State Bank*, 270 U.S. at 57 (stating Mud Lake was navigable under the federal navigability for title test).



*Parks* court determined that under the federal test, people would not have been able to use the waters as highways for commerce or to conduct commerce or trade.<sup>437</sup> The South Dakota Supreme Court noted there was no evidence of commercial use of the waters at the time South Dakota joined the Union.<sup>438</sup> The court explained the Parks Slough, Schiley Slough, and Long Lake's past depth and past usage did not demonstrate the waters were navigable.<sup>439</sup>

The court stated *Parks* used the land in the past for activities such as grazing, farming, and haying, but not for activities that required the water be navigable.<sup>440</sup> The court also stated there was never a solid body of water located on the lands in the past as shown by surveys in the 1870s when the federal government plotted and conveyed the lands.<sup>441</sup> While a culvert currently connected Long Lake to Horseshoe Lake, a meandered body of water, the two bodies of water were not connected at the time South Dakota entered the Union.<sup>442</sup> The court reasoned because the waters were non-navigable, title to the waters' beds did not pass to South Dakota upon the State's entry to the Union; thus, *Parks* had title to the beds.<sup>443</sup> Therefore, because Long Lake, Parks Slough, and Schiley Slough were not capable of use for commerce or to conduct commerce or trade when South Dakota joined the Union, the *Parks* court correctly determined the waters were not navigable and title to the beds did not pass to the State.<sup>444</sup>

B. THE SUPREME COURT OF SOUTH DAKOTA CORRECTLY DECIDED THE DESERT LAND ACT OPERATED TO SEPARATE OWNERSHIP OF THE BEDS UNDER THE WATERS FROM THE WATERS OVERLAYING THE BEDS

The Supreme Court of South Dakota correctly reasoned the Desert Land Act<sup>445</sup> separated ownership of the beds from the waters located over the beds.<sup>446</sup> In *California Oregon Power Co. v. Beaver Portland Cement Co.*,<sup>447</sup> the Supreme Court of the United States determined that the Desert Land Act separated the ownership rights of the waters from the land when the government conveyed land to set-

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437. *Parks*, 676 N.W.2d at 831.

438. *Id.* at 831.

439. *Id.*

440. *Id.* at 826, 827, 828.

441. *Id.* at 825, 826, 831.

442. *Id.* at 826.

443. *Id.* at 831.

444. See *supra* notes 440-43 and accompanying text.

445. 43 U.S.C. §§ 321-339 (2000).

446. See *infra* notes 452-66 and accompanying text.

447. 295 U.S. 142 (1935).

tlers under federal patents.<sup>448</sup> The Court stated these lands were located within the public domain and the waters in non-navigable bodies of waters were separated under conveyances under the patents to be governed by the laws of the states.<sup>449</sup> Owners receiving title to land through federal patents received the land subject to the Desert Land Act and only received title to the beds with the states governing control and use of the waters.<sup>450</sup>

The Supreme Court of South Dakota relied on *California Oregon Power* in deciding the rights to the waters in Parks Slough, Schiley Slough, and Long Lake did not pass to Parks when the federal government issued the patents conveying the land.<sup>451</sup> The *Parks* court determined the Desert Land Act operated to separate the waters and the land into two separate interests.<sup>452</sup> In *California Oregon Power*, the Supreme Court of the United States noted the conditions in the western states necessitated allowing all water to be freely available to all people for reclamation of the land.<sup>453</sup> The Court asserted that Congress intended the Act to separate waters from the land in the government's conveyances of the land so that the states' legislatures could best decide how the water resources could best be used for the well-being of the people.<sup>454</sup> The Court stated that because the company received rights to the land under a patent issued by the federal government, the rights to the water did not pass with the rights to the land.<sup>455</sup>

The *Parks* court acknowledged the Desert Land Act of 1877 separated the ownership of water rights from the ownership of the land beneath the waters.<sup>456</sup> The Court noted the Supreme Court of the United States construed the provisions in the Act to declare non-navigable waters, which were a part of the public domain, subject to the states' control.<sup>457</sup> The *Parks* court reasoned South Dakota law applied to the waters and the law in South Dakota was that riparian owners had rights only to the waters they appropriated for use and all other waters were free for public use.<sup>458</sup>

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448. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935).

449. *California Oregon Power*, 295 U.S. at 158, 162.

450. *Id.* at 165.

451. *Parks*, 676 N.W.2d at 832.

452. *Id.* at 832.

453. *California Oregon Power*, 295 U.S. at 156-57.

454. *Id.* at 158, 162, 165.

455. *Id.* at 162, 165.

456. *Parks*, 676 N.W.2d at 832.

457. *Id.* at 832.

458. *Id.*

Like California Oregon in *California Oregon Power*, Parks took title to the land from the federal government under a federal patent.<sup>459</sup> The Supreme Court of the United States decided California Oregon took title to the land under a federal patent, which, therefore did not convey rights to the waters.<sup>460</sup> The Court reasoned the conveyance separated the water and the land into two separate assets with the water controlled by state law.<sup>461</sup> Similarly, the patents to Parks Slough, Long Lake, and Schiley Slough also separated the water and land into two separate assets, and South Dakota Law, therefore, controlled the use of the waters.<sup>462</sup> Thus, the *Parks* court correctly analyzed the rights to the land and the rights to the water separately, and the Court properly stated the Desert Land Act allowed the State's legislature to control the proper uses for the waters in Parks Slough, Schiley Slough, and Long Lake.<sup>463</sup>

C. THE SUPREME COURT OF SOUTH DAKOTA CORRECTLY  
DETERMINED THE SOUTH DAKOTA LEGISLATURE INTENDED  
THE STATE SHOULD FOLLOW THE TREND OF  
JURISDICTIONS EXPANDING THE SCOPE OF  
THE PUBLIC TRUST DOCTRINE

In *Parks*, the Supreme Court of South Dakota noted the western states of the United States were applying the public trust doctrine in a non-uniform manner.<sup>464</sup> The court relied on case law of the states that have expanded the scope of the doctrine to include waters regardless of navigability, rather than those states that have refused to expand the scope of the doctrine.<sup>465</sup> As the Supreme Court of the United States initially articulated in *Illinois Central Railroad v. Illinois*,<sup>466</sup> under the public trust doctrine, a state held title to waters that were navigable when the state entered the Union.<sup>467</sup> The Court stated the state held a title that was different from the titles the state held for lands that were intended for sale.<sup>468</sup> The Court explained the state

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459. Compare *Parks*, 676 N.W.2d at 831 (stating the federal government under federal patents conveyed the lands), with *California Oregon Power*, 295 U.S. at 151 (stating the federal government under federal homestead patents conveyed the land).

460. *California Oregon Power*, 295 U.S. at 151, 162, 165.

461. *Id.* at 162.

462. Compare *Parks*, 676 N.W.2d at 832 (noting the Desert Land Act separated ownership of waters from ownership of the land beneath the waters), with *California Oregon Power*, 295 U.S. at 162 (construing the Desert Land Act to separate ownership of the lands from ownership of the waters, which was subject to the laws of the states).

463. See *supra* notes 452-62 and accompanying text.

464. *Parks*, 676 N.W.2d at 836.

465. *Id.* at 838.

466. 146 U.S. 387 (1892).

467. See *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 434, 435, 452 (1892).

468. *Illinois Central*, 146 U.S. at 452.

held the title in trust for the people that lived in the state, so that the people had a guaranteed right to use the waters for navigation, commerce, and fishing without interference from private parties.<sup>469</sup> The public trust doctrine was not absolute, however, as courts allowed some interference from private parties in the waters the state held in trust for the people.<sup>470</sup> For example, the Supreme Court of Idaho in *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*,<sup>471</sup> evaluated several factors, including the impairment of the intended private party's interference to the public's use of the waters.<sup>472</sup> The *Kootenai* court allowed the Panhandle Yacht Club to build a structure which limited the access the public had to all of the waters in Lake Coeur d'Alene, but did not amount to a violation of the public trust doctrine.<sup>473</sup>

As with the changing view of violations of the public trust doctrine, the scope of the waters included within the purview of the doctrine has changed as well.<sup>474</sup> In *Kansas ex rel. Meek v. Hays*,<sup>475</sup> the Supreme Court of Kansas the Kansas legislature did not intend to extend the scope of the doctrine under § 8a-702,<sup>476</sup> which stated all water within Kansas was dedicated to the use of people of the state.<sup>477</sup> The court reasoned that without a change in legislation, the courts could not change the current law concerning navigability determining the use for recreational purposes and the public trust doctrine, and the court further reasoned that change had not occurred.<sup>478</sup> However, the Supreme Court of Montana reached a different conclusion and determined the Montana legislature evidenced the intent to expand the scope of the doctrine.<sup>479</sup> In *Montana Coalition for Stream Access, Inc.*

469. *Id.*

470. *Compare Illinois Central*, 146 U.S. at 452 (stating the public trust doctrine would give the people a right to the waters with no interference from private parties), *with Kootenai Env'tl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1092 (Idaho 1983) (stating the court would use a list of criteria to determine when private parties interference violated the public trust doctrine).

471. 671 P.2d 1085 (Idaho 1983).

472. *See Kootenai*, 671 P.2d at 1092.

473. *Kootenai*, 671 P.2d at 1096.

474. *Compare Kansas ex rel. Meek v. Hays*, 785 P.2d 1356, 1364 (Kan. 1990) (reasoning the legislature did not show an intent to expand the scope of the public trust doctrine), *with Montana Coalition for Stream Access, Inc. v. Curran*, 689 P.2d 163, 164, 170 (Mont. 1984) (reasoning the legislature did show an intent to expand the scope of the public trust doctrine to include waters whether the waters were navigable or non-navigable under the federal test for navigability).

475. 785 P.2d 1356 (Kan. 1990).

476. KAN. STAT. ANN. § 82a-702 (1997 & Cuml. Supp. 2004).

477. *Hays*, 785 P.2d at 1364 (citing KAN. STAT. ANN. § 82a-702).

478. *Id.* at 1364, 1365.

479. *Compare Hays*, 785 P.2d 1356, 1364 (reasoning the legislature did not show an intent to expand the scope of the public trust doctrine), *with Curran*, 689 P.2d 170 (rea-

*v. Curran*,<sup>480</sup> the court determined the Montana Constitution included a provision that made all waters of the state, whether surface or underground as well as flood waters, a part of the public trust to be used for the benefit of the people.<sup>481</sup> The constitutional provision was similar to the statutory provision in *Hays* in that both stated all the waters within the state were for use of the people of the state.<sup>482</sup>

The *Hays* court contended the difference in the outcomes was because the legislature in the states evidenced a different intent, although the words in the provisions were similar.<sup>483</sup> The *Hays* court stated the legislature did not have the intent to expand the scope because the legislature struck down several bills, which would have given the legislature the right to designate selected rivers as recreational rivers.<sup>484</sup> The *Curran* court found the constitutional provision dispositive on the subject and determined the provision operated to include all waters, regardless of navigability, included for state ownership under the public trust doctrine.<sup>485</sup>

In *Parks*, the Supreme Court of South Dakota considered the reasoning of the courts that expanded the scope of the doctrine and those that refused to expand the scope of the doctrine, as dictated by legislative provisions.<sup>486</sup> The court determined the South Dakota legislature evidenced its intent to expand the scope of the doctrine because it amended several pieces of legislation concerning water rights and repealed a previous section granting common law rights of ownership of waters standing on lands.<sup>487</sup> The court noted the Civil Code of Dakota Territory<sup>488</sup> gave the owner of lands the ownership of the waters standing on the lands.<sup>489</sup> The court stated the South Dakota Code of 1939 also gave owners the rights to the waters standing on their lands as well.<sup>490</sup> However, the court explained the legislature had repealed these statutes giving owners ownership of the waters on their lands,

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soning the legislature did show an intent to expand the scope of the public trust doctrine to include waters whether the waters were navigable or non-navigable).

480. 682 P.2d 163 (Mont. 1984).

481. *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 169 (Mont. 1984).

482. Compare MONT. CONST. art IX, § 3 (1972) (stating all waters were property of the state for the use of the people), with KAN. STAT. ANN. § 82a-702 (1997 & Cuml. Supp. 2004) (stating all water in the state was dedicated to the use of the people of the state subject to state control).

483. *Hays*, 785 P.2d at 1364.

484. *Id.* at 1364.

485. *Curran*, 682 P.2d at 163, 170.

486. *Parks*, 676 N.W.2d at 836.

487. *Id.* at 833, 834.

488. CIVIL CODE OF DAKOTA TERRITORY § 256 (1866).

489. *Parks*, 676 N.W.2d at 832.

490. *Id.* at 833.

and replaced the statutes with the current statutes that provide that all non-navigable waters in the State belong to the public.<sup>491</sup>

The court determined the legislature intended to extend the scope of the public trust doctrine through its legislative acts to include all waters in the State for use for all people in the State.<sup>492</sup> In *Parks*, the court maintained the legislature intended all waters to be included within the scope of the public trust doctrine and followed the trend set by other western states expanding the scope of the doctrine.<sup>493</sup> The *Parks* court concluded that all water in the State was subject to the control of the State—for the benefit of the people—and aligned South Dakota with a number of states that have reached the same conclusion.<sup>494</sup> The court acknowledged that the Supreme Court of Montana, in *Curran*, reasoned the Montana Constitution and the public doctrine made the ownership of the bed of the waters unimportant in determining whether the state can control the waters for use by the public.<sup>495</sup> In *Curran*, the court decided that the state constitution made all of the waters of the state available for use by the public to be regulated and developed by the state for uses that included recreation.<sup>496</sup> The court decided that the provision showed that the waters of the state were intended to be subject to use by the public despite the owner of the bed.<sup>497</sup> The decision reflected the trend of the western states in construing the provisions to mean that all of the water in the state belongs to the people, and the state holds the water in trust for their use.<sup>498</sup>

The *Parks* court noted the South Dakota Constitution, unlike the Montana Constitution, did not have a provision that clearly stated all the waters were meant to be held in trust.<sup>499</sup> However, the court fol-

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491. *Id.* The current provisions within the Water Resources Act state that all water within the State belong to the people of the State. See S.D. CODIFIED LAWS §§ 46-1-1 to 46-1-16 (2004).

492. *Parks*, 676 N.W.2d at 834.

493. Compare *Parks*, 676 N.W.2d at 834 (claiming the legislature intended to expand the scope of the doctrine), with *Curran*, 682 P.2d at 164, 170 (claiming the legislature, as shown by the Montana Constitution, intended to expand the scope of the doctrine).

494. Compare *Parks*, 676 N.W.2d at 835 (stating the waters, regardless of navigability of the beds, were subject to the public trust doctrine), with *Curran*, 682 P.2d at 163, 170 (stating the waters, regardless of navigability of the beds, were subject to recreational public uses and the public trust doctrine).

495. *Parks*, 676 N.W.2d at 836.

496. *Curran*, 682 P.2d at 169-70.

497. *Id.*

498. See *supra* notes 481-97 and accompanying text.

499. Compare *Parks*, 676 N.W.2d at 836 (noting the South Dakota Constitution did not have a provision providing that all water was dedicated for public use), with *Curran*, 682 P.2d at 169 (noting the Montana Constitution included a provision which provided that all natural waters from any natural source were subject to the public trust doctrine).

lowed the view that if the legislature shows the intent to extend the scope of the doctrine, then the court will construe the provisions to reflect that intent.<sup>500</sup> In *Parks*, the Supreme Court of South Dakota correctly determined that the waters were public waters because the legislature did enact statutes stating all waters in the State belonged to the people and repealed legislation that allowed for private ownership of waters to show the intent to expand the public trust doctrine to non-navigable waters.<sup>501</sup>

Moreover, the Supreme Court of Kansas' decision in *Hays* is distinguishable from *Parks*.<sup>502</sup> In *Hays*, the court based its decision that the legislature did not intend to expand the scope of the public trust doctrine on the legislature's failure to pass legislation that would give the legislature the right to include all waters for other public purposes within the doctrine.<sup>503</sup> However, unlike *Hays*, the *Parks* court noted that the South Dakota legislature modified its code provisions through the years to include all waters within the State's ownership and control were for public use.<sup>504</sup> The court further noted the Desert Land Act<sup>505</sup> separated the ownership of water rights from the ownership of the lands beneath the waters, thus the waters became subject to the states' control.<sup>506</sup>

Unlike the Kansas legislature, the South Dakota legislature's history of its treatment of ownership rights to waters within the State under the South Dakota code shows the legislature's intent to include all waters within the scope of the public trust doctrine regardless of whether the waters were navigable or non-navigable.<sup>507</sup> The *Parks* court contrasted *Hays* with *Parks*, stating that the legislature in South Dakota had shown the courts that the intention was to include waters flowing over privately owned land in the public trust because the legislative history of the water laws expanded the waters consid-

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500. *Parks*, 676 N.W.2d at 838.

501. See *supra* notes 481-500 and accompanying text.

502. See *infra* notes 507-14 and accompanying text.

503. *Hays*, 785 P.2d at 1364.

504. Compare *Parks*, 676 N.W.2d at 833 (noting the legislature had repealed legislation giving landowners the right to control everything situated above their lands and had enacted legislation declaring all waters belonging to the public), with *Hays*, 785 P.2d at 1364 (stating the history of legislation in Kansas did not show the legislature's intention to subject all waters in the state to public ownership).

505. 43 U.S.C. §§ 321-323 (2000).

506. *Parks*, 676 N.W.2d at 832.

507. Compare *Parks*, 676 N.W.2d at 833, 834 (stating the history of the legislature was unlike that of the Kansas legislature's treatment of Kansas water laws because the legislature repealed legislation stating a landowner owned everything situated above his land and replaced the legislation with provisions stating all water in the state belonged to the people of the state), with *Hays*, 785 P.2d at 1364 (stating the legislature refused to pass legislation that would expand the scope of the public trust doctrine).

ered subject to public ownership.<sup>508</sup> The court maintained the Water Resources Act illustrated the legislature intended to change the scope of the doctrine in South Dakota.<sup>509</sup> The court also stated that the existence of this act did not supplant the effect of the public trust doctrine, but did show that the legislature wanted to reconfirm the idea that all the water in the State is public and did not distinguish between navigable or non-navigable waters.<sup>510</sup>

The *Parks* court correctly reasoned the South Dakota legislature intended to expand the scope of the public trust doctrine to include all waters within the State.<sup>511</sup> The court distinguished the approach of the South Dakota legislature to water laws from the approach of the Kansas legislature.<sup>512</sup> The court determined the legislature intended the court should follow the trend of other western states that have expanded the scope of the public trust doctrine so that scarce water resources would be open for the public to use.<sup>513</sup> Because the court correctly interpreted the legislature's intention regarding the waters in South Dakota, the court correctly held all waters in South Dakota were subject to the public trust doctrine.<sup>514</sup>

#### D. LEGISLATIVE LIMITATIONS ON THE PUBLIC TRUST DOCTRINE

While the Supreme Court of South Dakota correctly determined all of the waters in the State were subject to the public trust doctrine, the court also correctly declared the people did not have an unqualified right to use the resources in any manner, such as for recreational purposes.<sup>515</sup> The *Parks* court explained that some states were expanding the public uses of waters to include recreational uses, such as boating, fishing, and other leisure activities.<sup>516</sup> The *Parks* court stated the South Dakota legislature did not intend to include recreational uses for non-navigable waters as public uses.<sup>517</sup> The court stated the legislature considered domestic uses, which uses were re-

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508. Compare *Parks*, 676 N.W.2d at 833, 834 (stating that the South Dakota legislature repealed legislative sections giving private owners ownership of the waters on their lands and enacted legislation evidencing its intent that all waters be subject to the public trust doctrine for public uses), with *Hays*, 785 P.2d at 1364 (stating KAN. STAT. ANN. § 82a-702 was a statute concerning consumptive uses which did not evidence the legislature's intent was not to subject "all waters" to the public trust doctrine and the legislative history showed the legislature did not intend to expand the scope of the doctrine).

509. *Parks*, 676 N.W.2d at 838.

510. *Id.* at 838.

511. See *supra* notes 490-510 and accompanying text.

512. See *supra* notes 506-10 and accompanying text.

513. See *supra* notes 491-504 and accompanying text.

514. See *supra* notes 490-513 and accompanying text.

515. See *infra* notes 520-56 and accompanying text.

516. *Parks*, 676 N.W.2d at 839.

517. *Id.* at 840.



lating to the household or family, the highest use for waters in the State.<sup>518</sup> The court refused to follow the trend of those states that expanded the public uses of the water.<sup>519</sup> Unlike those states, the court determined the South Dakota legislature had not enacted legislation showing an intent to include recreational uses within the public's right to use the water.<sup>520</sup> The *Parks* court noted the State's legislature had the duty to determine the best uses the water for the well being and benefit of the people and that the court would not make the determination without a legislative mandate.<sup>521</sup>

For example, the Supreme Court of Utah in *J.J.N.P. Company v. State*<sup>522</sup> construed provisions similar to South Dakota's Water Resources Act and determined the legislature gave rights to the people to use waters for recreational uses.<sup>523</sup> The *J.J.N.P.* court determined the state's citizens could not privately own or control waters because the legislative mandate declared all waters, whether the waters were below or above the ground, subject to public use rights.<sup>524</sup> The court stated the public had a right to use the waters for recreational uses regardless of bed ownership.<sup>525</sup> The court reasoned the legislature gave the court the justification for considering recreation incident to the public's ownership of the water.<sup>526</sup> The *J.J.N.P.* court noted the State Engineer was required to consider public recreational uses of the waters before granting any permits or appropriations applications.<sup>527</sup>

518. *Id.* The Court held in previous decisions domestic use included watering livestock as a proper domestic use. See *Romey v. Landers*, 392 N.W.2d 414, 422 (S.D. 1986).

519. *Parks*, 676 N.W.2d at 839-40.

520. Compare *Parks*, 676 N.W.2d at 840, 841 (stating the court would not follow the trend of states expanding the legitimate public use of waters to include recreational uses without legislative mandate), with *J.J.N.P. Co.*, 655 P.2d at 1136 (stating Utah would include recreational uses in the domain of proper public uses because the State Engineer had to consider impacts on the public's right to recreational uses in water before issuing any permits or granting any applications) and *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984) (construing the Montana constitution allowed the public to use waters when the waters were capable of used for recreational uses).

521. See *J.J.N.P. Co.*, 655 P.2d at 1136 (stating the state regulated the uses of the water as a trustee for the people's benefit).

522. 655 P.2d 1133 (Utah 1982).

523. Compare *J.J.N.P. Co.*, 655 P.2d at 1136 (construing the legislature intended the people to have recreational rights in the waters because the State Engineer had to evaluate recreational uses before granting any permits or applications concerning the state's waters), with *Parks*, 676 N.W.2d at 841 (construing the Waters Resources Act to illustrate the legislature's intention to preserve all waters in the state for the highest and best use of the people, which was domestic use not recreational use).

524. *J.J.N.P. Co.*, 655 P.2d at 1136.

525. *Id.* at 1137.

526. *Id.* at 1136.

527. *Id.* at 1135, 1136, 1137.

However, the *Parks* court correctly refused to extend recreational rights to the public in waters where the beds were privately owned because the legislature had not mandated the Court to consider recreational uses incident to the public trust doctrine.<sup>528</sup> The *Parks* court explained the Water Resources Act<sup>529</sup> and the Water Resources Management Act<sup>530</sup> codified the public trust doctrine, as the South Dakota legislature defined the doctrine previously in Chapters 430 and 431 of the Session Laws of 1955.<sup>531</sup> In *Knight v. Grimes*,<sup>532</sup> the Supreme Court of South Dakota remarked that the legislature enacted Chapters 430 and 431 to determine what the water rights in the State were.<sup>533</sup> The *Knight* court also noted the legislature enacted the session laws in order to constitutionally achieve a legitimate end to protect the water supply for all people of the State.<sup>534</sup> The *Knight* court further remarked the session laws stated the semi-arid conditions in the State required the State to put water resources to beneficial uses for the people of the State.<sup>535</sup> The *Parks* court declared the session laws, as well as the Water Resources Act<sup>536</sup> stated the highest use for water was domestic use.<sup>537</sup>

Unlike the Utah legislature, the South Dakota legislature has not shown an intent to include recreational uses, those uses including boating, sailing, and floating, as public uses.<sup>538</sup> The *Parks* court noted the legislature had only determined the waters in the State to be put to use for domestic purposes for the people.<sup>539</sup> The court remarked the legislature did not consider recreational uses the highest and best use for the waters.<sup>540</sup> The court determined the judiciary could not consider recreational uses under the public trust doctrine for waters overlying privately-owned water beds until the legislature expressed the intent to expand the type of public uses to include recreational uses.<sup>541</sup> Therefore, the *Parks* court correctly determined the public

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528. See *infra* notes 532-45 and accompanying text.

529. S.D. CODIFIED LAWS §§ 46-1-1 to 46-1-16 (2004).

530. S.D. CODIFIED LAWS §§ 46A-1-1 to 46A-1-106 (2004).

531. *Parks*, 676 N.W.2d at 838.

532. 127 N.W.2d 708 (S.D. 1964).

533. *Knight v. Grimes*, 127 N.W.2d 708, 709, 711, 713, 714 (S.D. 1964).

534. *Id.* at 713-14.

535. 1955 S.D. LAWS 430 (outlining the necessity for protecting water resources and how those resources should be used).

536. S.D. CODIFIED LAWS § 46-1-1 (2004).

537. *Id.*

538. Compare *Parks*, 676 N.W.2d at 840 (stating the legislature had determined the highest and best use for the water in the state was domestic use), with *J.J.N.P. Co.*, 655 P.2d at 1136 (stating the State Engineer had to consider any recreational uses the public had in the water before issuing any permits or applications for appropriations).

539. *Parks*, 676 N.W.2d at 840.

540. *Id.*

541. *Id.*

trust doctrine only provided for domestic uses of water overlying privately-owned beds because the legislature had not evidenced an intention to include recreational uses for these types of waters.<sup>542</sup>

States that have determined that recreational uses fall within the purview of the public trust doctrine may face a potential problem concerning the constitutionality of allowing the public to use the waters overlying privately owned lands.<sup>543</sup> In *Montana Coalition for Stream Access, Inc. v. Curran*,<sup>544</sup> Judge Gulbrandson, in a dissenting opinion, stated the adoption of a recreational test for determining use of waters within the state could amount to an unconstitutional taking of private property without first giving just compensation for the taking.<sup>545</sup> The dissent inferred the private nature of the rights of the title to the bed, though separate from the title to the waters, would be impacted by the public's use of the waters overlying the bed.<sup>546</sup> However, the *Parks* court avoided the potential issue of judicially mandating an improper taking because the court stated the waters could not be used merely for recreational purposes without an express legislative mandate.<sup>547</sup> The court reasoned the legislature did not evidence an intent to include recreational uses because it stated the highest use for water was "domestic use" under the Water Resources Act and made no intention to include recreational use.<sup>548</sup> The court opined the legislature must decide whether the public would have a right to use the waters for recreational purposes; therefore the judiciary should not decide the issue.<sup>549</sup>

The *Parks* court correctly determined recreational use did not fall within the public use recognized by the public trust doctrine.<sup>550</sup> The *Parks* court reasoned the legislature had not extended the highest use of waters within the State to include recreational uses, rather, the legislature had consistently stated in the statutory provisions concerning water usage and rights that the highest use was domestic use.<sup>551</sup> The *Parks* court correctly interpreted the statutory provisions to deter-

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542. See *supra* 532-41 and accompanying text.

543. *Curran*, 682 P.2d at 173.

544. 682 P.2d 163 (Mont. 1984).

545. *Curran*, 682 P.2d at 173.

546. *Id.*

547. Compare *Curran*, 682 P.2d at 173 (dissenting from the majority opinion mandating a recreational use test), with *Parks*, 676 N.W.2d at 840-841 (refusing to follow the trend of those states considering recreational use to fall within the purview of the public trust doctrine).

548. *Parks*, 676 N.W.2d at 841.

549. *Id.* at 841.

550. See *supra* notes 520-49 and accompanying text.

551. See *supra* notes 535-50 and accompanying text.

mine the statutes did not include recreational public uses for the non-navigable, nonmeandered waters in the State.<sup>552</sup>

In *Parks*, the Supreme Court of South Dakota court correctly determined the federal test for navigability for title was the correct test to determine ownership of the beds underlying the waters.<sup>553</sup> The *Parks* court also correctly applied the federal test for navigability to determine Parks Slough, Schiley Slough, and Long Lake had not been susceptible for use as highways for commerce when South Dakota joined the Union; thus the waters were non-navigable and title rested with Parks.<sup>554</sup> Although the beds were privately owned, the *Parks* court correctly construed legislative intent to include all waters, regardless of bed ownership, within the public trust doctrine for use of the people of the State.<sup>555</sup> Finally, the court correctly reasoned that the legislative intent to include all waters within the scope of the public trust doctrine did not extend to include recreational uses for waters overlying privately owned beds.<sup>556</sup>

## CONCLUSION

In *Parks v. Cooper*,<sup>557</sup> the Supreme Court of South Dakota held that the water overlying privately owned lake beds were public waters.<sup>558</sup> The court reversed the holding of the district court on the issue of ownership of the waters and remanded the case for further findings concerning the issue of appropriate use of the waters for the public.<sup>559</sup> The court correctly determined the federal test was the appropriate test for navigability.<sup>560</sup> The court correctly interpreted the statutes and statutory history as well as the case law from jurisdictions in the western states to conclude that the waters were publicly owned.<sup>561</sup> The court relied on the case law from other jurisdictions that have already addressed the issue of expanding the scope of the public trust doctrine.<sup>562</sup> The court determined South Dakota would follow the trend of expanding the scope of the doctrine to include non-navigable waters.<sup>563</sup> The court correctly reasoned the public trust

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552. See *supra* notes 520-51 and accompanying text.

553. See *supra* notes 403-33 and accompanying text.

554. See *supra* notes 435-47 and accompanying text.

555. See *supra* notes 471-517 and accompanying text.

556. See *supra* notes 520-55 and accompanying text.

557. 676 N.W.2d 823 (S.D. 2004).

558. *Parks v. Cooper*, 676 N.W.2d 823, 838, 839 (S.D. 2004).

559. *Parks*, 676 N.W.2d. at 841.

560. See *supra* notes 403-33 and accompanying text.

561. See *supra* notes 435-47 and accompanying text.

562. See *supra* notes 471-517 and accompanying text.

563. See *supra* notes 471-517 and accompanying text.

doctrine did not incorporate recreational uses for non-navigable waters within its scope for public uses.<sup>564</sup>

The *Parks* decision may have a major impact on the issue of water rights in South Dakota, now that legislation has been construed to give the public the right to access all of the water resources. Until the South Dakota legislature decides recreational use of waters within the State amounts to a paramount use of the State's water resources, non-navigable waters lying over privately owned beds will be safe from complete public usage. The split among the jurisdictions illustrates that the issue of private water rights versus public water rights will continue to be hotly debated because the United States Supreme Court has not spoken directly about the constitutionality of using new criteria for deciding uses for the waters that would not amount to a taking of property without just compensation.

Lawyers practicing in the area concerning water law in the western states will have to determine whether the legislation in their jurisdictions evidences an intention by the legislature to expand the application of the public trust doctrine to all waters in the state regardless of navigability. Even in those states where the courts have spoken on issues regarding the public trust doctrine's application to non-navigable waters, the cautious practitioner must still research legislation pertaining to water rights for any indication that a court would be able to expand the scope of the public trust doctrine in that jurisdiction—and identify what uses the legislature identifies as beneficial public uses.

*Janice Holmes—'06*

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564. See *supra* notes 520-55 and accompanying text.