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Namen: Riparian Rights on Flathead Lake

Charles K. Sande

NOTES

NAMEN: RIPARIAN RIGHTS ON FLATHEAD LAKE

INTRODUCTION

Do the owners of riparian[1] property, acquired from the United States as trustee for an Indian Tribe, have access and wharfage[2] rights to the navigable waters? This question was considered for the first time in *Confederated Salish and Kootenai Tribes v. Namen*.[3]

The defendants[4] in the case were the owners through successive conveyances of a portion of property fronting Flathead Lake which had originally been allotted to an individual member of one of the Indian tribes occupying the Flathead Indian Reservation.[5] The defendant James M. Namen operated a marina on the land and had erected and maintained docks, wharves, a breakwater, and a storage shed which extended beyond the high-water mark of the lake.[6]

The Tribes[7] instituted an action in trespass and requested the court

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1. "Riparian rights" are the rights of the owners of lands on the banks of watercourses, relating to the water, its use, ownership of soil under the stream, accretions, etc. BLACK'S LAW DICTIONARY 1490 (4th ed. 1951). "Riparian" has been defined as "belonging or relating to the bank of a river; of or on the bank." It is also used coextensively with "littoral," which is the more accurate term when referring to the shore of a lake or shore of the sea or tidal water. BLACK'S LAW DICTIONARY 1490 (4th ed. 1951).

2. "Access" has been defined as an "approach, or the means, power, or opportunity of approaching," and when applied to navigable waters, this means the right of the landowner to enter the water and then return to his property. BLACK'S LAW DICTIONARY 28 (4th ed. 1951). "Wharfage" has been defined as the "right to the exclusive use of submerged lands as by the affixing thereto or the establishment thereon of a permanent structure to some point within the navigable body of water, deep and wide enough to dock . . . vessels." BLACK'S LAW DICTIONARY 1767 (4th ed. 1951). It should be noted that the dispute in this case concerned the rights of such access and wharfage which went beyond and below the high-water mark of the lake. The court had determined as a matter of law that the defendants' property extended only to the high-water mark of the lake. Confederated Salish and Kootenai Tribes v. Namen, 380 F. Supp. 452, 457 (D. Mont. 1974), *aff'd*, 534 F.2d 1376 (9th Cir. 1976), *cert. denied*, 429 U.S. 929 (1976).

3. 380 F. Supp. 452 (D. Mont. 1974), *aff'd*, 534 F.2d 1376 (9th Cir. 1976), *cert. denied*, 429 U.S. 929 (1976).

4. Defendants included James M. Namen, Barbara J. Namen, A.J. Namen, and Kathryn Namen, the owners of the land located in Polson, Montana. The City of Polson was permitted to intervene and filed an answer. The Flathead Lakers, Inc. was granted leave to file a brief as amicus curiae. *Id.* at 455.

5. The original allotment had been made to Antoine Morias (Indian Allotment No. 1378) in 1908 pursuant to the Act of April 23, 1904, 33 Stat. 302. The defendants later acquired a portion of that allotment. *Id.* at 456.

6. The parties were unable to agree upon the actual elevation of the high-water mark, so it was agreed that for the purposes of this action, any reference to a stated elevation "should be considered altered to merely state at the high-water mark at whatever it may be." *Id.* at 455.

7. The plaintiffs included The Confederated Salish and Kootenai Tribes of the Flathead Reservation and Harold W. Mitchell, Jr., chairman of the Tribal Council. *Id.* at 455.

to order the defendants to remove those structures and return the lands below the high-water mark to their original condition. The court reviewed the various acts and treaties of Congress related to the reservation, considered the long established common law principles controlling riparian rights, and concluded that Congress had intended to include riparian rights in the issuance of patents for the allotted lands. The defendants were granted partial summary judgment.[8] The issue of whether the structures maintained by the defendants constituted an excessive exercise of those riparian rights was left to be considered at a later hearing.[9]

The decision does not reflect a change in existing law, but rather the first treatment of this precise question.[10] The case provides a unique and important analysis and integration of three complex legal issues which are of concern in any state containing federally held waters and Indian reservations. The purpose of this note is to reorganize and supplement the court's treatment of these issues: (1) who has jurisdiction over the bed and banks of navigable waters held by the United States in trust for the Indian tribes? (2) what is the federal common law regarding the riparian rights of access and wharfage on navigable waters? and, (3) what Congressional intent concerning riparian rights is manifested by the various treaties and allotment acts affecting the Flathead Indian Reservation?

ORIGIN OF THE ISSUE: TREATIES AND ACTS

As white settlement progressed throughout the West in the 1800's, Congress was forced to impose treaties on various Indian tribes.[11] The Flathead Indian Reservation was created in July 1855, pursuant to the Treaty of Hellgate.[12] Within its boundaries was included the southern half of Flathead Lake.[13] As part of that treaty, the President was given the power to assign lots to individual Indians and sell the remaining land to non-Indians.[14]

The Treaty of the Upper Missouri[15] was signed three months after the Hellgate Treaty. Its terms dealt with the tribes and territory of the Upper Missouri and Yellowstone Rivers, including the Flathead Indian Reservation. Although some mention was made of navigation on lakes

8. *Id.* at 467.
9. *Id.* See note 74 *infra.*
10. *Id.* at 465.
11. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970).
12. Act of June 16, 1855, 12 Stat. 975.
13. *Id.* Art. I.
14. *Id.* Art. VI.
15. Act of Oct. 17, 1855, 11 Stat. 657.

and rivers in the affected territory,[16] neither this treaty nor the Hellgate Treaty contained any express provisions concerning riparian rights.[17]

Starting with the General Allotment Act of 1887[18] and continuing with seven subsequent acts and amendments, Congress implemented the general policy of alloting tribal lands to individual Indians and selling the remainder to non-Indians.[19] In 1934, the allotment policy was terminated by the Indian Reorganization Act,[20] which was enacted to organize the tribes and conserve and develop Indian lands and resources. By then, however, substantial portions of the Flathead Reservation had been allotted to individual Indians and subsequently transferred to non-Indians, thus setting the stage for *Namen*.

APPLICABILITY OF FEDERAL COMMON LAW

Federal, state, and tribal law compete for control on Indian reservations. One of the primary issues in *Namen* was whether tribal or federal law governs the use of the bed and banks of the southern half of Flathead Lake.[21]

The determination of which law applies depends on who holds title to the bed and banks of the waters under dispute. The basic policies controlling passage of title to the bed and banks of navigable waters in a territory as it becomes a state were established in *Shively v. Bowlby*.[22] The fundamental rules are: (1) the United States takes and holds title to lands below the high-water mark for the benefit of the public, and in trust for the future states to be created from a territory, and (2) upon admission of a state to the Union, the state shall gain full title to and control of the bed and banks of its navigable waters.[23] Consequently,

16. *Id.* Art. VIII.

17. Namen, 380 F. Supp. at 459.

18. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

19. The relevant provisions of the acts and amendments are: 1904 Allotment Act, Apr. 23, 1904, ch. 1495, 33 Stat. 302 (General Allotment Act specifically applied to Flathead Reservation); Act of June 21, 1906, ch. 3504, 34 Stat. 325, 354 (generally amended the 1904 Allotment Act to implement policy of allotment); Act of May 29, 1908, ch. 216, 35 Stat. 444 (codified at 25 U.S.C. § 404 (1976)) (allowed Indian allottees to sell their allotments to non-Indians); Villa Sites Act, Apr. 12, 1910, ch. 156, 36 Stat. 296-97 (provided for subdivision and sale of lots fronting on Flathead Lake); Act of Mar. 3, 1911, ch. 210, 36 Stat. 1066, and Act of Aug. 24, 1912, ch. 388, 37 Stat. 527 (patents for tracts of land on Flathead Lake made subject to easements for irrigation); Act of Feb. 28, 1919, ch. 70, 40 Stat. 1203 (provided for designation of surplus land bordering streams within the reservation as valuable for stock watering purposes, and allowed disposal of lands under the terms of the 1904 Act). None of the acts or amendments either grant or reserve riparian rights in regard to lake frontage property. Namen, 380 F. Supp. at 460.

20. Wheeler-Howard (Indian Reorganization) Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79 (1976)).

21. Namen, 380 F. Supp. at 462.

22. 152 U.S. 1 (1894).

23. *Id.* at 48-49.

state law generally controls the nature and extent of riparian rights in the bed and banks of navigable waters within its jurisdiction.[24] *Namen* presents an exception, however, because title to the bed and banks of the southern half of Flathead Lake below the high-water mark is held by the federal government in trust for the Indian tribes.[25] Since title does not rest in the state, it has no jurisdiction and state law does not apply.[26] The question is therefore limited to whether federal or tribal law governs.

Acknowledging the fact that state law did not apply in this case, the Tribes attempted to extend the rule of *Shively* to say that the Tribes stood in the same position as a state with respect to the ownership and control of the bed and banks of the southern half of Flathead Lake.[27] The court was unwilling to accept this analogy, however, primarily because the Tribes did not hold legal title to the bed and banks of navigable waters within the reservation. Rather, it was held by the United States Government in trust for the Tribes.[28] The court said that the absence of legal ownership caused the Tribes' position to be more nearly that of a territory than a state, and federal law should therefore govern the disputed riparian rights.[29]

Two further arguments were offered by the Tribes to support their contention that tribal law applied to their case. First, they offered two letters from the Commission of Indian Affairs concerning the right of the Tribes to grant leases for the use of lands below the high-water mark on the southern half of Flathead Lake.[30] Both letters referred to the Tribes' complete authority to control the use of those lands.[31] The court acknowledged the principle that interpretations of a law by an agency responsible for its enforcement are to be given deference.[32] But since these letters were written nearly fifty years after the original allotments and conveyances of the land and since neither considered the federal common law principles of access and wharfage nor the effect of prior allotments and conveyances, the court decided the letters were not persuasive.[33] Instead, the court stated that the Congressional intent to retain control of the land and grant riparian rights was clearly indicated in the legislative history of the allotment acts, particularly the

24. Namen, 380 F. Supp. at 461.
25. Montana Power Co. v. Rochester, 127 F.2d 189, 191 (9th Cir. 1942).
26. Namen, 380 F. Supp. at 461.
27. *Id.* at 462.
28. *Id.*
29. *Id.*
30. *Id.* at 463.
31. *Id.*
32. *Id.* at 463, citing Udall v. Tallman, 380 U.S. 1, 18 (1965).
33. Namen, 380 F. Supp. at 463.

Villa Sites Act of 1910[34] and a bulletin issued in connection with the sale of the villa sites. The bulletin stated that "the shores [of Flathead Lake] are well adapted for boat landings and the erection of wharves."[35]

The final argument in support of the applicability of tribal law was based on a provision of the Hellgate Treaty which set apart the Flathead Reservation for the "exclusive use and benefit" of the Tribes.[36] Noting the power of Congress to grant titles including riparian rights on trust land, the court stated that the fact that the lands are held in trust for the Tribes did not necessarily compel the conclusion that Indian law, rather than federal common law, was applicable.[37] In support of this position, the court cited two related federal court decisions. In *Dalton v. Hazelez*[38] the court held that the beds of navigable lakes and rivers in the former territory of Alaska were held in trust by the United States for the state of Alaska. Similar rationale was applied in *United States v. Groen*,[39] where the court held that the beds of navigable waters within the District of Columbia were held in trust by the United States "for the benefit of the people."[40] In both cases the courts recognized the private rights of access and wharfage as well as the principle that when the Federal Government holds title, federal law will control.[41]

As a final note, the court cited three additional cases related to the subject of federal grants of Indian land.[42] Although these cases dealt with boundaries and accretion, questions normally governed by federal law even when state law governs riparian rights, the court stated that they further support the proposition that "federal common law is applied to determine the extent of federal grants of Indian land."[43]

FEDERAL COMMON LAW

After the jurisdictional issues were resolved, the court was faced with two remaining questions. First, what is the federal common law with respect to the riparian rights of access and wharfage? Second, did

34. Act of April 12, 1910, ch. 156, 36 Stat. 296-97.
35. Namen, 380 F. Supp. at 463.
36. Act of June 16, 1855, Art. II, 12 Stat. at 975.
37. Namen, 380 F. Supp. at 464.
38. 182 F. 561, 572 (9th Cir. 1910).
39. 72 F. Supp. 713 (D.D.C. 1947).
40. *Id.* at 719.
41. Namen, 380 F. Supp. at 464.
42. Oklahoma v. Texas, 258 U.S. 574 (1922); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970); Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).
43. Namen, 380 F. Supp. at 465.

Congress intend that these particular allotted lands should be subject to that law?

The federal common law case history in this area is extensive and consistent. As early at 1861, the Supreme Court held that the riparian rights of access and wharfage were property rights and were therefore incidental to the ownership of lands riparian to navigable waters.[44] Under common law, the riparian owner had rights superior to the general public in publicly owned submerged land so far as use of the submerged land was necessary to make full use of his riparian rights.[45] This right of access to navigable water eventually developed into a common law right to extend a wharf out to navigable water over submerged land.[46] As stated in *Yates v. Milwaukee*,[47] this right included the riparian owner's "access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf or pier for his use or for the use of the public."[48] In every case in which title to the bed and banks of navigable waters is held by the Federal Government, federal common law has been applied to grant the rights of access and wharfage.[49]

CONGRESSIONAL INTENT

Even after resolving the jurisdictional and federal common law issues, it was still necessary for the court to ascertain whether Congress intended that the allottees and purchasers of the lakeshore property would acquire the riparian rights of access and wharfage.[50] The evaluation of all relevant laws, acts, treaties, and executive orders is essential

44. Dutton v. Strong, 66 U.S. 23 (1861).

45. Burns v. Forbes, 412 F.2d 995 (3rd Cir. 1969); County of St. Clair v. Lovingston, 90 U.S. 46 (1874).

46. United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).

47. 77 U.S. 497 (1861).

48. *Id.* at 504; *See also* Martin v. Standard Oil of New Jersey, 91 U.S. App. D.C. 84, 198 F.2d 523, 526 (1952); United States v. Groen, 72 F. Supp. 713, 720 (D.D.C. 1947); United States v. Belt, 79 U.S. App. D.C. 87, 142 F.2d 761, 767 (1944).

49. Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U.S. 672 (1884); Ketchikan Spruce Mills v. Alaska Concrete Prod. Co., 113 F. Supp. 700 (D. Alaska 1953); Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 F. 966, 970 (9th Cir. 1916); Dalton v. Hazelez, 182 F. 561, 573 (9th Cir. 1910); Decker v. Pacific Coast S.S. Co., 164 F. 974, 976 (9th Cir. 1908); Columbia Canning Co. v. Hampton, 161 F. 60, 64 (9th Cir. 1908). Even though the rights of access and wharfage will normally be incidental to ownership of land riparian to federally held bed and banks of navigable waters, those rights may still be limited by state laws imposed to protect the rights and safety of the public. Yates, 77 U.S. at 504; River Rouge, 269 U.S. at 418. Even when a state does limit those rights by statute, however, federal rules will apply if title can be traced to a federal grant made prior to statehood. Hughes v. Washington, 389 U.S. 290 (1967).

50. Namen, 380 F. Supp. at 465.

to the determination of federal policy toward particular Indian tribes.[51] *Namen* provided the first opportunity to perform this analysis when considering the riparian rights of owners who acquire their property through the United States as trustee for an Indian tribe.[52]

The construction and interpretation of treaties and statutes concerning Indians is guided by a series of cases designed primarily to protect Indian rights.[53] In its analysis of the Congressional history surrounding the creation and management of the Flathead Reservation, the court was required to consider each act and treaty in light of four basic judicial rules of interpretation: (1) ambiguous expressions in treaties must be resolved in favor of the Indians;[54] (2) treaties must be interpreted as the Indians themselves would have foreseen and understood them;[55] (3) Indian treaties must be liberally construed in favor of the Indians;[56] and, (4) Indian treaties must be construed in light of their purpose.[57]

As indicated previously, neither of the treaties affecting the reservation contain any express provisions concerning riparian rights.[58] Although the Hellgate Treaty provides that "free access . . . to the nearest public highway shall be secured to them . . . ,"[59] and navigable rivers have been statutorily "deemed public highways,"[60] the court refused to accept this as an implied grant of riparian rights. Following the above rules of interpretation, the court declined to interpret the word "them" to mean the general public, and in addition, held that the Indians would not have understood "public highway" to mean the southern half of Flathead Lake.[61]

The Hellgate Treaty also states that "the navigation of all lakes and streams shall be forever free to citizens of the United States."[62] The court held that this statement was nothing more than a recognition of the public's right of navigation, and distinguished that right from the

51. Stevens v. Commissioner of Internal Revenue, 452 F.2d 741 (9th Cir. 1971); Kirkwood v. Arenas, 243 F.2d 863, 867 (9th Cir. 1957).

52. Namen, 380 F. Supp. at 465.

53. Wilkinson, *A Summary of the Law of American Indian Treaties*, MANUAL OF INDIAN LAW, J-8 (M. West ed. 1977).

54. Carpenter v. Shaw, 280 U.S. 363 (1930); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).

55. Jones v. Meehan, 175 U.S. 1, 11 (1899); Worcester v. Georgia, 31 U.S. 515 (1832).

56. Choctaw Nation v. United States, 318 U.S. 418 (1943).

57. Winters v. United States, 207 U.S. 564, 571 (1908); Arizona v. California, 373 U.S. 546, 590 (1963).

58. *See* note 15 *supra*.

59. Act of June 16, 1855, Art. III, 12 Stat. at 976.

60. 43 U.S.C. § 931 (1976); 33 U.S.C. § 10 (1976).

61. Namen, 380 F. Supp. at 458.

62. Act of June 16, 1855, Art. VIII., 12 Stat. at 976.

private rights of access and wharfage.[63]

In determining the effect of Congressional acts subsequent to an Indian treaty, a court is constrained by the principle that while the power to abrogate treaty rights exists, "the intention to abrogate or modify a treaty is not to be lighly imputed to the Congress."[64] Despite this rule to narrowly construe such acts, the courts cannot ignore the intention of Congress where it is perfectly plain.[65] As stated previously, none of the allotment acts applicable to the Flathead Reservation either granted or reserved the riparian rights of access and wharfage.[66] The Villa Sites Act of 1910[67] provided for the subdivision and sale of all the unallotted lands fronting Flathead Lake inside the Flathead Reservation. An advertising bulletin issued by the Department of the Interior in connection with those sales stated that "the shores are well adapted for boat landings and the erection of wharves."[68] Although the portion of land owned by Namen had been allotted prior to the Villa Sites Act and the associated bulletin, the patents issued pursuant to the Villa Sites Act contain the same provisions as those under the 1904 Act which governed the original allotment of the Namen property.[69]

The Tribes claimed that because Congress failed to expressly grant riparian rights, they could not be implied, basing their contention on two basic rules of Indian law: (1) only Congress has the power to abrogate Indian property rights,[70] and (2) statutes in derogation of Indian property rights must be narrowly construed.[71] Recognizing these rules, the court nevertheless held that by means of the allotment acts Congress expressed its intent to exercise its dominant power over the Indian lands by allotting them to individual Indians and non-Indians.[72] By virtue of the references to wharves in the Villa Sites Act, the apparent continuity of that act with previous acts, and the consistent federal common law policy of designating the riparian rights of access and wharfage as property rights, the court concluded that Congress intended to include those rights in the patents of the lakeshore allotments.[73]

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63. Namen, 380 F. Supp. at 459.
64. Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 (1934).
65. United States v. Seaton, 101 U.S. App. D.C. 234, 248 F.2d 154, 155 (1957).
66. *See* note 19 *supra.*
67. *Supra.* fn. 34.
68. Namen, 380 F. Supp. at 463.
69. *Id.*
70. Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903).
71. Menominee Tribe v. United States, 391 U.S. 404 (1968).
72. Namen, 380 F. Supp. at 464.
73. *Id.* at 464, 466.

CONCLUSION

The most significant development provided by the *Namen* decision is the rule that federal law will determine the nature and extent of riparian rights, and other federal grants, in all cases in which the national government holds title to the bed and banks of navigable waters in trust for an Indian tribe. This aspect of the decision has already been cited with approval in two subsequent federal appellate court decisions[74] and promises to have a significant impact on future litigation in the area. The court's analysis of federal common law concerning the riparian rights of access and wharfage does not change previous law, but instead provides a comprehensive and conclusive summary of the nature of those rights. The court also indicates that express provisions in patents for trust property or in acts of Congress are not required to grant riparian rights to the owners. This last determination could have major implications in modern litigation based on original Indian treaties and subsequent reservation management legislation. Finally, and most importantly, the decision firmly establishes the principles that will apply when the issues presented in *Namen* are faced simultaneously in future litigation.

C.K.S.

74. United States v. Finch, 548 F.2d 822, 833 (9th Cir. 1976), *rev'g* 395 F. Supp. 205 (D. Mont. 1975); Omaha Indian Tribe v. Wilson, 575 F.2d 620, 630 (8th Cir. 1978), *vacating*, 433 F. Supp. 67 (N.D. Iowa 1977), *rev'd and remanded*, 61 L. Ed. 2d 153 (1979). In Confederated Salish and Kootenai Tribes v. Namen, No. 2343; City of Polson v. Confederated Salish and Kootenai Tribes, No. 75-143-M; *and* United States v. City of Polson, No. 77-70-M, (D. Mont., Sept. 20, 1979), (consolidated for trial), the court reviewed Namen, 380 F. Supp. 452 (Namen I) and considered two new issues. The court adhered to all the findings and conclusions in Namen I, and also concluded that (1) there has been no diminishment or disestablishment of the Flathead Reservation; and (2) the Tribes do not have the authority to regulate the riparian rights of the Namens, the City of Polson, or the State of Montana.