Deadmans Lake
School No 62
Stanley Lake
Indian Jack Lake
1197
MISSIS
School No 53
STE M
BM
1217
RABBIT LAKE
1198
1206
1228
Clinker Lake
1197
Mud Lake
1198
1216
Cuyuna
MINNEAP
1252
BM
1212
1231
Y K E
R

The Rabbit Lake Cases

Minnesota Grapples with Questions of Shoreland, Lake, and Mineral Ownership

Paul Kilgore

Henry Schoolcraft, leader of the expedition identifying Lake Itasca as the headwaters of the Mississippi River, was the first person to refer to Minnesota as a land of ten thousand lakes. He made this observation in 1851, and the nickname "Land of 10,000 Lakes" grew into common usage during the first decades of the twentieth century. The prominent number is surely one of the reasons the slogan stuck, but so is the nature of what is being counted. Proclaiming Minnesota the land of 10,000 lakes is different from saying it is, for example, the land of 51 million acres. Individuals and organizations are capable of owning land to the exclusion of others, but Minnesota's lakes are understood to be, in varying degrees, for the enjoyment of all. Citizens "not fortunate enough to be able to acquire the advantages of ownership of lake shore properties," the Minnesota Supreme Court remarked in 1942, "should not be deprived of these benefits."[1]

How did this arrangement come to be? Why are lakes not bought, owned, and sold as land is? If lakes are to be treated differently, what about the land *beneath* the water: Who owns *that*? Does ownership of the bed determine who has the right to use a lake, whatever "use" might mean? These are the questions courts began to grapple with soon after Minnesota attained statehood, gaining their most concentrated scrutiny in a pair of cases arising from a single small lake in Crow Wing County.

Property law in nineteenth-century America depended heavily (as it does today) on a European understanding of ownership and rights of occupancy and use. But before delving into the importation of this worldview to the new country, one must acknowledge that the history of relations between the United States and Indigenous peoples looms over any discussion of land, water, and mineral ownership. A prominent history of early Minnesota calls our attention to a painting, displayed in the state capitol building, that honors the treaty that facilitated the transfer of a large portion of present-day Minnesota from the Dakota to the federal government. As the author of that history notes, "Any sustained examination of the Treaty of Traverse des Sioux, wrought with such dignity and ceremony in the painting that graces the governor's reception room, or any of the other treaties that followed, starkly reveal[s] that fraud and bad faith played an equal role with axe and the plough in making Minnesota." No honest discussion of land and water "ownership" can stray far from this history.[2]

Judicial engagement with water title issues began early in Minnesota. In an 1868 decision, the US Supreme Court settled a dispute between Casper Schurmeier, a German immigrant and blacksmith by trade, and the St. Paul & Pacific Railroad Company regarding rights to a Mississippi River landing at the confluence of present-day Shepard and Warner Roads in St. Paul. Two foundational issues were resolved by the court. First, the court addressed ownership of land that is submerged, even if only seasonally, beneath a body of water. In its analysis, the court drew a distinction between navigable and non-navigable waters. The beds of non-navigable waters are, the court stated, to be considered titled with the owners of the shoreland. The beds of *navigable* waters, however, are not available for private ownership, allowing affected streams and rivers to "remain public highways."[3]

But if a body of water is navigable, as the Mississippi undoubtedly was, and the bed therefore free from any ownership claim by the landowners bordering the river, are there *any* rights in the water surface to which those landowners are entitled? In the second major principle

FACING: *Crow Wing County's Rabbit Lake, as depicted in a trial exhibit in* State v. Adams

Why are lakes not bought, owned, and sold as land is? If lakes are to be treated differently, what about the land *beneath* the water: Who owns *that*? Does ownership of the bed determine who has the right to use a lake, whatever "use" might mean?

born of *St. Paul & Pacific R Co. v. Schurmeier*, the Supreme Court acknowledged the existence of *riparian* rights, a concept Congress had only recognized as affecting tidal waters. Riparian rights are rights of usage and include, the court opined, the "right to construct landings and wharves, for the convenience of commerce and navigation."[4]

Over the next 75 years, the courts refined the principles set out by *St. Paul Pacific R Co. v. Schurmeier*. In *US v. Holt State Bank* (1926), a case involving a seasonal lake in far northwestern Minnesota, the US Supreme Court emphasized that a lake's navigability depends on it being susceptible to use as a "highway for commerce." In *State v. Longyear Holding Co.* (1947), the Minnesota Supreme Court declared that Minnesota's 1858 admission to the Union must be the operative date in determining whether a lake is navigable. But an earlier line of cases began to question whether *commerce* should have exclusive importance in determining navigability. "The division of waters into navigable and non-navigable is but a way of dividing them into public and private waters," Minnesota's high court commented in *Lamprey v. Metcalf* (1893). "Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit."[5]

Petraborg v. Zontelli (1944): Who May Use the Lake, and How?

In 1943, the state district court in Crow Wing County received a petition on behalf of William Petraborg and six others, five of them family members. Petraborg owned land on Rabbit Lake, three miles north of the small mining community of Crosby, founded as a result of the discovery of the Cuyuna Iron Range. In the late nineteenth century, a surveyor named Cuyler Adams had noticed strange compass readings while working north of Deerwood. During the years that followed, Adams surreptitiously investigated before approaching lawyer William C. White in 1902, introducing himself by saying, in the recollection of White's nephew, that "he was going to tell him something he had never even told his wife." Virginia Adams did, however, play a role in developing the new range: It was upon her suggestion that Cuyler christened the discovery by marrying the first syllable of his name with the name of his trusted St. Bernard, Una. Within a decade ore was being shipped from the Cuyuna Range.[6]

Measuring the elevations of Rabbit Lake and surrounding land to build the record supporting the Minnesota Supreme Court's 1944 decision in Petraborg v. Zontelli

The 1,500-acre surface of Rabbit Lake was shaped like a pair of spectacles, oval eastern and western sections connected by a channel known locally as the Narrows. The lake was part of a drainage system leading to the Mississippi River, approximately eight miles to the southwest. Around 1930, William Petraborg purchased 80 acres on the north shore of Rabbit Lake's western section, near the Narrows. There he established a fox farm and small resort.[7]

Half a dozen years earlier, an affiliate of Youngstown Mines Corporation had procured a 50-year state lease for the bed of the eastern portion of the lake. Winter drilling through the ice on Rabbit Lake had revealed a substantial ore body. Youngstown's lease authorized it to drain the waters and mine beneath the lake for iron ore. Shortly after obtaining the 1924 lease, Youngstown began to purchase drainage rights from the owners along the easterly

Cuyler Adams, whose unexpected compass readings led to the discovery of the Cuyuna Iron Range

shore of Rabbit Lake. The process advanced slowly, but Youngstown's interest in draining the lake was rekindled by the demand for steel precipitated by the onset of the Second World War. Youngstown hired the construction firm Zontelli Brothers to build an earthen dam across the Narrows and thus facilitate the drainage of approximately three billion gallons of water from the eastern section of the lake to the western section via discharge pipes and mechanical pumps to be built at the Narrows. Once drained, the eastern section of Rabbit Lake would then be stripped of topsoil down to the iron ore vein.[8]

Petraborg's 1943 court action prompted a flurry of support for Youngstown's plan to drain Rabbit Lake. Resolutions (each dated during the second week of July 1943) were issued by area townships, villages, and business organizations, as well as a school district and the local American Legion post. Most reflected the concerns expressed by the Village of Cuyuna: Mining Rabbit Lake would provide needed employment and assist the war effort; and "damages resulting from draining of this part of the lake would be so small as to have little consideration as compared with the great benefits to be derived."[9]

The Petraborgs, however, persuaded the district court in Brainerd that drainage of the eastern section of Rabbit Lake would violate their riparian rights. Thus, they were able to obtain an order enjoining Youngstown Mines and Zontelli Brothers, which to that point had invested $600,000 in the work, from proceeding further. Youngstown appealed this injunction to the Minnesota Supreme Court, arguing, among other things, that Rabbit Lake was in reality two lakes, one of which—the side on which the Petraborg property was located—would be unaffected by drainage of the other. The supreme court made short work of this argument:

> Among the 10,000 lakes for which Minnesota is justly famous, there are many with similar shore lines, resulting in distinct sections connected by narrows. Red Lake, Gull Lake, Lake Minnetonka, and many others have such a conformation. In Lake Minnetonka there are several distinctly formed sections connected by narrow passages. It would be shocking, indeed, for the riparian owners and the public to learn that a lake of such a character is comprised of as many lakes as it has distinct sections connected by narrows, and that therefore one of those sections could be completely drained and closed off without damaging the riparian rights of those situated on other like sections of the lake.[10]

Be that as it may, Youngstown argued, the riparian rights held by Petraborg were limited rights. As described in the 1868 *Schurmeier* decision, the rights consisted of wharving rights; furthermore, *Schurmeier* held that riparian rights were "for the convenience of commerce and navigation." According to Youngstown, Petraborg's riparian rights consisted of nothing more than the right to access the water, which Petraborg would still be able to do following construction of the dam and drainage of the easterly portion of the lake.[11]

The supreme court found this to be a cramped understanding of riparian rights. The court's opinion noted that

> in nearly every instance, lake property is purchased because of the additional advantages and benefits arising from the nearness of the lake, its size, general character, a consideration for nature's generosity in affording sandy beaches for swimming and outdoor recreation, its attractiveness for fishing and hunting, together with its natural beauty and scenery.[12]

An owner's enjoyment of the lake was not a right exclusive to that owner, of course, but one to be shared with all other owners and, to the extent the public is able to access the lake, with the public generally. Youngstown Mines was one of those owners, having bought up the rights of other owners. But any one riparian owner's rights must be exercised reasonably. Far from being reasonable, the use proposed by Youngstown would, according to the court, amount to a "complete dissipation of the waters

for a long period of time." A use that will "cause substantial damage to the property of other riparian owners, or materially interferes with public right"—that will, indeed, amount to "a destruction of one-half of the lake"—is, the court concluded, by definition unreasonable.[13]

US Supreme Court justice Oliver Wendell Holmes famously wrote in 1881 that law does not derive from logic, but from experience. The dry precepts of legal theory cannot survive unaffected their encounter with real-life people, places, and events. The Minnesota Supreme Court could not help noting:

> Our North Star state has been called the Land of 10,000 Lakes. It has a remarkable natural endowment of lakes, rivers, waterfalls, and woodlands. This Fisherman's Paradise has made Minnesota famous far and wide. . . . In addition to its more than 10,000 lakes of all sizes, it has one of the most interesting systems of rivers in the country. . . . A beneficent Creator has made these streams and lakes for all His people. . . .
>
> Rabbit Lake may not be one of the most beautiful or valuable of Minnesota's 10,000 lakes, and its shore line may not compare favorably with many others in natural beauty, yet it is a member of Minnesota's great family of lakes, abounding in sunfish, crappies, and pickerel, and noted as one of the best bass lakes in that section of the state.

Youngtown's plan would convert Rabbit Lake's "eastern section, once the source of excellent bass fishing . . . into an industrial enterprise." The destruction of half the lake, the court concluded, "should not be tolerated except upon a clear showing of public necessity," and only then upon payment of compensation through eminent domain. The district court's injunction against the damming and draining of Rabbit Lake was upheld. Riparian rights, far from being limited to commercial wharving rights, had been found broad enough to encompass recreational and


CROSBY COURIER

CROSBY, CROW WING COUNTY, MINNESOTA THURSDAY, JUNE 15, 1944

Blood Donor Group Goes To St Cloud June 23

Supreme Court Restrains Mining Co. From Draining Rabbit Lake

TRIBUTE TO OUR FIGHTING DADS

RIGHT: *The* Crosby Courier*'s headline from June 1944, announcing the supreme court's short-lived injunction against the draining of Rabbit Lake.*
BELOW: *The Minnesota Supreme Court in 1944, when it released its decision in* Petraborg v. Zontelli

> Youngtown's plan would convert Rabbit Lake's "eastern section, once the source of excellent bass fishing . . . into an industrial enterprise." The destruction of half the lake, the court concluded, "should not be tolerated except upon a clear showing of public necessity," and only then upon payment of compensation through eminent domain.

even aesthetic rights. This was a major step forward in the development of the law.[14]

And yet the saga of Rabbit Lake, already 20 years along, had only begun. Youngstown Mines sought an extension of the October 7, 1943, permit it had obtained from the commissioner of conservation to drain Rabbit Lake, arguing, "In spite of Youngtown's constant and diligent efforts it has been unable to complete the negotiations for the purchase of all necessary rights with respect to riparian property on the West Bowl. Among the property which it has not been able to purchase is that owned by the Petraborgs." But less than nine months later, the Petraborgs acquiesced in the dissolution of their injunction; the court's judgment of dismissal makes no mention of the handsome compensation that was undoubtably paid to resolve the dispute. Drainage began in the fall of 1945 and was completed the following March. The first ore was removed from beneath Rabbit Lake in 1949.[15]

State v. Adams (1957–58): Who Owns the Lake?

Petraborg v. Zontelli had resolved the riparian claims of the landowners surrounding Rabbit Lake. Now, however, a different issue presented itself. Who owned the bed of Rabbit Lake and, by extension, the valuable ores beneath? To obtain judicial confirmation of its ownership of the bed of not only Rabbit Lake but also the entire chain of lakes and streams leading to the Mississippi River, the State of Minnesota commenced six actions against defendants who were described by the *Brainerd Daily Dispatch* as including "several hundred individuals and corporations, among the latter mostly mining companies and banks." The principal defendant was the son of Cuyler Adams. Twenty-one law firms represented the various defendants, and the litigation eventually spanned 14 years.[16]

By the time of the trial, the parties and the court had agreed that the case would be focused on a single issue: whether the Rabbit Lake chain consisted of navigable waters. The defendants, who were owners of property along the various lakes and streams in the chain, argued that Rabbit Lake and the downstream waters were non-navigable; the owners of the shore, therefore, were the owners of the beds. If this argument were correct, boundary lines would need to be stitched across the beds, but this was an issue to be decided on a later day, if at all. The state, for its part, claimed the entire chain was navigable, the result being that the state owned the beds. But, of course, the chain's bed wasn't the real issue: "The importance of these cases," the Minnesota Supreme Court commented when the dispute reached its docket, "lies in the fact that the lake and streambeds involved are underlaid with valuable iron ore deposits."[17]

The Rabbit Lake chain consisted of six lakes, beginning at the northeasterly end with Rabbit Lake and ending, shortly before entry into the Mississippi, with Little Rabbit Lake. The lakes were connected by streams and channels of various widths and lengths, collectively known as the Rabbit River. "Because of the importance of this litigation," the supreme court explained, "it has been deemed desirable and probably necessary to set out the facts more in detail than in the average case." With that, the court unfurled a historian's delight: a meticulous analysis of the history of each of the six lakes and their connecting streams.[18]

That history long predated statehood. The Ojibwe had known Rabbit Lake as *Wabozowakaiiguni sagaiigun*, or Rabbit's-House Lake. In an 1862 report, Indian agent A. C. Morrill claimed that the Indians of Rabbit Lake, comprising three bands, consisted of 84 males and 78 females. A small reservation—25 miles long and five miles wide—was established by the 1855 Treaty of Washington, but the reservation land was ceded to the federal government by the Rabbit Lake Indians on May 7, 1864.[19]

The court's task was difficult. Of course, no witness appearing before the district court, where the trial presided over by Judge Arnold Forbes ran for nine weeks through the winter of 1950–51, was able to provide firsthand testimony about what the chain had been like in 1858. But witnesses testified about memories from their youth in the late nineteenth century. These memories could be hazy: The court found one witness to be "thoroughly discredited" when he testified about seeing a mining trestle

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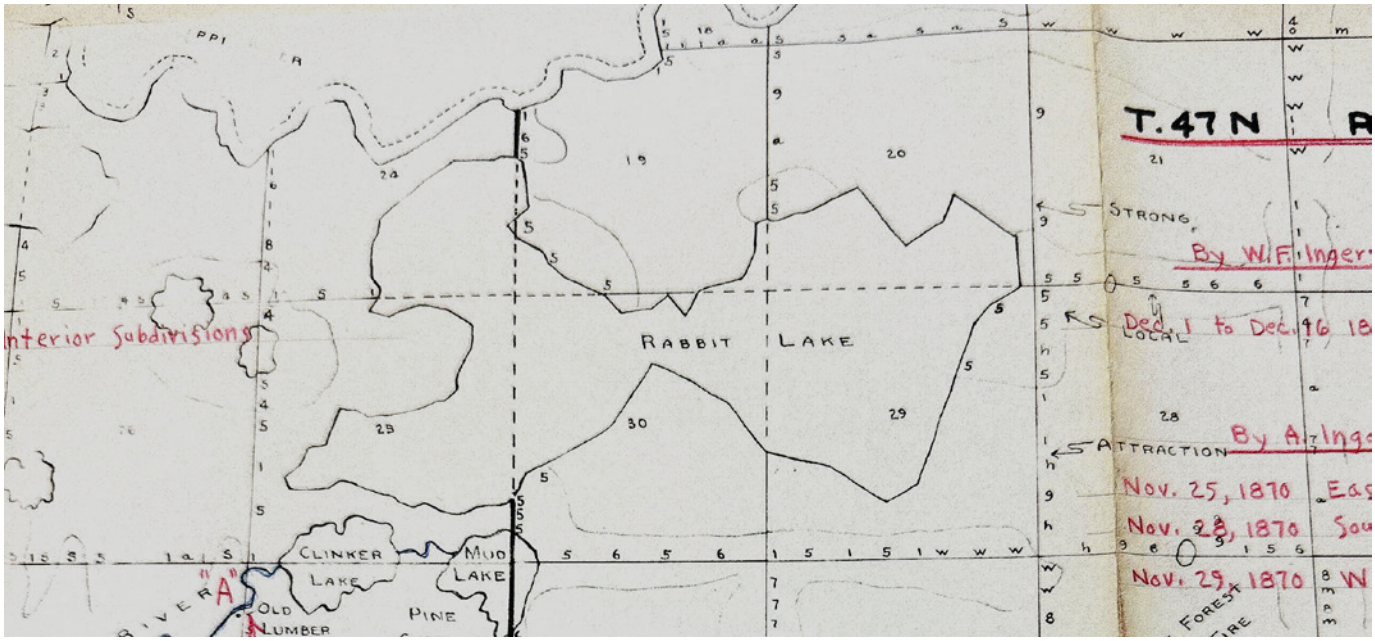
in 1898. Noting that the Cuyuna Range's first mine did not open until 1911, the court drily commented, "Because of old age and illness, [the witness] may be excused from testifying as he did, but being thus charitable to him adds no weight to his testimony."[20]

The court was also bedeviled by the fact that immense changes had occurred in the Rabbit Lake chain over the years. Sixteen mines had operated along the water course, many of them pumping water out of their pits and into the stream. On Rabbit Lake alone, the permit granted Youngstown Mines in 1944 to drain the eastern bowl of the lake had resulted in five years during which at least 15,000 gallons of water had been pumped every minute, all of it carried away through the chain of lakes. Further, the state had constructed two dams in the chain.

Establishing the navigability of streams was relatively straightforward, since a stream can be a highway from one point to another. But the court decided that a lake, especially if landlocked or nearly so, must demonstrate "commercial potentialities" to be considered navigable. Equating commerce with navigability may strike us as strange: Couldn't a body of water just as easily be navigable for noncommercial reasons, such as recreation?

But the law had developed during an earlier age, when navigation had a pecuniary purpose, the court explained: "The significant and all-important thread which runs through all the cases dealing with the navigability of a stream or lake is that of commerce, either actual commerce or suitability and susceptibility for use in commerce. The commerce may be large or small, depending on the area furnishing it, but still it must be commerce." With this yardstick in hand, the court on June 28, 1957, affirmed the judgments that had been reached at trial. Little Rabbit Lake and its channel to the Mississippi consisted of navigable waters. But none of the upstream channels or lakes, including Rabbit Lake, were navigable. Ownership



A surveyor's late 1950s reconstruction, based on "Gov't. Plats and Notes," of the boundaries of Rabbit Lake at the time of statehood. Such a determination was needed for the historical analysis that was integral to the decision in State v. Adams *(1957–58). Just 10 years earlier,* State v. Longyear Holding Co. *had established the date of Minnesota's admission to the union as the relevant marker in ascertaining whether a body of water is navigable, and the underlying bed therefore owned by the public rather than the owners of the adjoining shoreland.*

of these beds was therefore held by the shoreland owners, not the state.[21]

The state immediately petitioned the supreme court for a rehearing. Attorney General Miles Lord believed the case should turn on something more than a reconstruction of Crow Wing County history. At stake were the enormous royalties—more than $15 million, according to Lord—paid or potentially owed to the state. Was there not a public policy argument that revenues from ores existing from time immemorial should benefit the citizens of the state rather than individual landowners such as the descendants of Cuyler Adams? After all, by law, as well as by the terms of the lease, royalties from the mining companies were earmarked for the "state school trust fund." The supreme court did not appreciate such a framing of the dispute:

Attorney General Miles Lord, whose characterization of State v. Adams *as "a contest between certain mining companies and the school children of the state" was not appreciated by the court*

> Contrary to the claim of the attorney general stated in his petition for reargument, this litigation is not a contest between certain mining companies and the school children of the state. It is concerned solely with the ownership of certain lake property, as between the state and the riparian owners thereof, most of whom are private citizens. As such, it is governed by legal principles and applicable laws to the same extent as it would be if it concerned any two individuals. . . . [W]hen we divorce ourselves from any desire to give these lake beds to the state simply because they contain valuable iron-ore deposits, and apply the legal principles applicable in litigation between private citizens under our constitution and laws, the issues become clearly defined and readily determinable.[22]

But Lord was not alone in attempting to reorient the dispute. Nonlitigants had been permitted to submit their own briefs, which the court characterized as dealing

> mainly with the importance of the lakes and streams to the people of the state from a recreational and tourist standpoint. We are not unmindful of this, but we are not dealing with the rights of the state to exercise control over its waters. . . . [I]n the instant case the state is not seeking to protect its lake and waters for recreational purposes or to encourage tourists. As a matter of fact, it is seeking the right to drain certain lakes.

Fully cognizant of the public interest in the case, the court took the unusual step of granting the parties "unlimited time for oral argument," the result being that "an entire day was consumed." The case's record, the court noted, consisted of "over 2,000 pages in 5 volumes."[23]

The supreme court, in an opinion authored by Justice Thomas Gallagher and released on March 14, 1958, once again affirmed the decisions of the trial court. The US Supreme Court then denied the state's petition for further review, bringing a close to the litigation. Questions of a water body's navigability had been before Minnesota courts since the earliest days of statehood, but *State v. Adams* stands out as a demonstration of the historical eye that must be brought to the analysis. Ownership of Minnesota's lake and riverbeds, *Adams* tells us, was irrevocably determined by a past that can never be changed, only ascertained.

It is surely evidence of political health that judicial decisions, controversial when made, are accepted, and even come to appear predestined, with the passage of time. For better or worse, the Rabbit Lake cases could have led to different conclusions. Wisconsin's high court had ruled in 1877 that the beds of even non-navigable waters were the property of the state. South Dakota's supreme court had found pleasure boating sufficient to establish navigability. Indeed, the Minnesota Supreme Court itself had in earlier decisions departed from an exclusive reliance on commercial travel in determining the ownership of lakebeds.

State v. Adams descended deeply into questions of federal versus state jurisdiction and whether navigability required that Rabbit Lake be actually used for commerce at statehood, as opposed to being merely *susceptible* to such a use. When one emerges into the daylight it is difficult to escape the suspicion that the case was wrongly decided. The root of the problem may have been inadvertently expressed by Judge Forbes in his trial court decision: "[S]uch Indian travel as existed upon Rabbit Lake [in 1858] was not for commercial purposes but was only such as the Indians habitually did in their wanderings for hunting, fishing and

The law has always understood minerals to be property in the same way that land is property. Land and minerals have been considered two classes of property, one might say, existing in parallel planes. A mineral estate may be severed from, and exist independent of, a surface estate.

visiting." It is difficult to imagine a better demonstration of the dissonance between European and Indigenous ideas about the nature of economic, indeed human, activity.[24]

The *St. Paul Pioneer Press* was satisfied with Youngstown's victory. Quoting Justice Gallagher's conclusion that "[t]he laws of Minnesota are intended to protect the property rights of its citizens as well as to preserve the rights of the state." The newspaper opined that "public officials occasionally need to be reminded of this basic principle of our form of government." Across the river, the *Minneapolis Star* declined to print a letter from a Chaska man incensed that the state's judges "gave away a whole Rabbit Lake chain of lakes with valuble iorn ore at the bottom estimated value fifty five million dollars." Elected officials, the writer continued, must "stop what may develope into leagalized stealing of owr public lakes from this comming generation the same as owr valuble state timber and forests were stolen from the past generation."[25]

The state, which had over many years been paid apparently millions of dollars in royalties, turned out to have never held title to the bed of Rabbit Lake, and thus to the underlying ore. This awkward fact gave rise to a third Rabbit Lake case, *Youngstown Mines Corporation v. Prout*. The named defendant was Clarence Prout, the commissioner of conservation of Minnesota. It was to his department that Youngstown had paid years of royalties under its state mineral lease. Youngstown Mines Corporation wanted its money back, and in 1963 the Minnesota Supreme Court agreed that it was entitled to reimbursement.[26]

Who Owns the Minerals?

Thirty-nine years had passed since the state had first offered a lease for the ore beneath Rabbit Lake. The decades-old saga was a room with a large elephant in the corner. How had it come about that ownership of a valuable, nonrenewable ore body depended on, of all things, whether Rabbit Lake was a "highway for commerce" on May 11, 1858? What distinguished the iron ore beneath Rabbit Lake—or for that matter, any of the state's iron ore—from Minnesota's thousands of lakes, understood without dissent to be a state resource? Both the minerals and water bodies of the state had been created long before statehood—before, of course, the arrival of humans. Both had been created by geologic forces, not the ingenuity or industry of humans.

The law has always understood minerals to be property in the same way that land is property. Land and minerals have been considered two classes of property, one might say, existing in parallel planes. A mineral estate may be severed from, and exist independent of, a surface estate. Title to the surface may be held by one owner while title to the minerals below held by another. Both estates may be bought, sold, leased, and mortgaged of their own right.[27]

At the time of the Declaration of Independence, European governments, not private owners, retained minerals. In its fledgling years, the United States adopted this practice. Congress established the government's authority to lease its mineral lands and collect royalties for the public coffers, but implementation was haphazard. Fraud resulted in mineral tracts falling into the hands of private parties. The disposition of mineral rights began to be governed by miners, not the government. Federal leasing of mineral rights, which had been profitable in the early decades of the nineteenth century, saw a decline in revenue. States began to object to federal ownership and the leasing of minerals they believed to be theirs.[28]

Two nails sealed the coffin of public mineral ownership. The first involved the federal government's plans to grant permits for the mining of copper at the western end of Michigan's Upper Peninsula in the 1840s. Miners rushed in so quickly that the government could not complete the surveys necessary to begin leasing. Hurrying to catch up, the government inadvertently leased the same tracts to multiple parties and followed conflicting standards in determining the size of the tracts being leased and the length of the lease terms. Within five years, Congress walked away from the government's chaotic management by opening the copper lands to purchase.[29]

Then came the 1849 discovery of gold in California. The United States, as successor to the property rights previously claimed by Spain and Mexico, held the mineral interests by law. This made no impression on the California mining communities that were rapidly being

assembled. These communities adopted their own mineral regulations, based primarily on the consent of the miners. Courts began to recognize these ad hoc regulations in settling disputes, and soon the state and territorial legislatures began to codify the regulations as law. Within two years, President Millard Fillmore was weighing in on the federal government's experience in leasing mineral interests:

> I was at first inclined to favor the system of leasing as it seems to promise the largest revenue to the government and to afford the best security against monopolies; but further reflection and our experience in leasing the lead lands . . . have brought my mind to the conclusion that there would be great difficulties in collecting the rents. . . . I therefore recommend that instead of retaining the mineral lands under permanent control of government, they be divided into small parcels and sold under such restrictions as to quantity and time, as will ensure the best price and guard most effectually against combinations of capitalists to obtain monopolies.[30]

Miners seemingly had the federal government on the run. Many chose to occupy and mine mineral lands, foregoing the expense of actually becoming owners. In selling the mineral tracts the government had placed on prospective buyers the cost of surveying the land to be purchased. The burden of this additional expense further discouraged miners from paying to acquire mineral lands to which they already had access. After two decades, Congress tinkered with and finally adopted the various customs, codes, and laws devised by miners, resulting in the Mining Law of 1872. The purpose of the Mining Law was not primarily to assert federal control over the country's minerals. The purpose was to facilitate settlement of the West.[31]

The states, including Minnesota, had little or no role in the formulation of mineral policy. Upon its admission to the Union, Minnesota received approximately 7.6 million acres of trust fund lands from the federal government. These federal grants comprised a small minority of all land within the new state's borders. The remaining land was open for direct purchase from the federal government by private parties. Because mineral estates, though severable, were considered to be paired with their surface estates, Minnesota was in the position of the second son who watches helplessly as the entire family farm is handed to his older brother. Minnesota's mineral estates passed into the hands of private buyers. This practice was in sharp contrast to the practice governing the state's navigable waters, the title to whose beds resided with the state and was not for sale.[32]

William Braden during the Civil War. In 1888, Braden, as state auditor, refused to sell state lands suspected of holding iron deposits, resulting in legislation directing the state to reserve for the public all mineral rights beneath state-owned lands.

This state of affairs did not strike most as being odd. As the Minnesota Supreme Court later pointed out, there is a "difference between standing timber and the proper method of disposing of it, and iron ore and the disposition of it. Standing timber is upon the surface of the earth. It may be accurately scaled, and the quantity and value thereof readily ascertained. A sale of standing timber at public auction, unlike the sale of supposed ore hidden in the interior of the earth, is not a lottery, but a certainty." The existence of minerals, in other words, was too speculative for a mineral interest to be considered of sufficient value to be worth retaining.[33]

Not everyone was so accepting of the federal government's wholesale delivery of minerals into private hands. In 1888, William Braden, the state auditor, reported to the legislature that he had refused to sell state lands in the vicinity of suspected iron deposits; any such sale would have necessarily included the state's underlying mineral rights. Braden admitted he had no legal authority for refusing these sales, and he advocated for legislation allowing the state to reserve minerals in its land conveyances. The state should be permitted, Braden argued, to then lease the reserved minerals so that the public could receive royalties from the ores mined by private operators.[34]

The legislature, in fits and starts, came around to Braden's view. Legislation passed in 1889 authorized the

leasing of state mineral lands, and further permitted the land commissioner to reserve for the state's benefit all mineral rights upon the sale of state-owned lands in three northeastern counties where ore was most likely to be extracted. Twelve years later the legislature extended the state's mineral reservation rights to cover virtually all of Minnesota. The state's obligation to reserve mineral rights when transferring land is now embedded in the state constitution.[35]

State acquisition of lands increased markedly during the first half of the twentieth century, due in large part to tax forfeitures resulting from the departure of timber companies and then the Great Depression. Up to eight million acres of land were forfeited between 1926 and 1950. The state was able to sell most of these acres, in each case reserving the minerals from the sale. By 2016, as much as (or, depending on one's point of view, merely) one-quarter of Minnesota's mineral interests were owned by the state.[36]

Rabbit Lake, little more than two square miles in size, epitomizes Minnesota's struggle to reconcile public and private rights to the state's water bodies and minerals. Driving Crow Wing County Highway 31 as it bridges the Narrows, few would guess at Rabbit Lake's convulsive history. By the time mining ended in 1973, more than 4.6 million tons of ore had been removed from beneath the lake. Once again filled with water, but now 337 feet deep rather than 40, Rabbit Lake is today available for boating, fishing, and hunting, the very activities Minnesota's courts had found insufficient to render the lake navigable. Even the bridge spanning the Narrows, constructed by Youngstown's successor to fulfill a requirement of its state mining permit, is, like the water's surface on either side, in all senses public.[37] ⊡

Notes

1. Warren Upham, *Minnesota Place Names: A Geographical Encyclopedia*, 3rd ed. (St. Paul: MNHS Press, 2001), ix; *In re Krebs*, 6 N.W. 2d 803, 805 (Minn. 1942). The Minnesota Department of Natural Resources puts the number of lakes in the state at 11,842: see "Lakes, Rivers, and Wetlands Facts," Minnesota Department of Natural Resources, reviewed 2013, dnr.state.mn.us/faq/mnfacts/water.html. Minnesota's lakes, however, are not universally available for use by the public. A lake without public access—for example, one that lacks a public right-of-way to the shoreline or that is not touched by publicly owned land—may be closed to those not owning property on that lake: see *Flynn v. Beisel*, 102 N.W. 2d 284, 289 (Minn. 1960).

2. Mary Lethert Wingerd, *North Country: The Making of Minnesota* (Minneapolis: University of Minnesota Press, 2010), 358. The English jurist William Blackstone, writing in the late eighteenth century, noted, "The law of real property in this country, wherever its materials were gathered, is now formed into a fine artificial system, full of unseen connexions and nice dependencies; and he that breaks one link of the chain, endangers the dissolution of the whole": Jesse Dukeminier and James E. Krier, *Property* (Boston and Toronto: Little, Brown and Co., 1981).

3. *St. Paul & Pacific R Co. v. Schurmeier*, 74 US 272 (1868). See Acts of May 18, 1796, c. 29, §§ 2, 9. As one commentator has explained, "one of the incidents of sovereignty is control of navigable waters and ownership of the land under the waters": Joyce Palomar, *Patton and Palomar on Land Titles*, 3rd ed. (St. Paul, MN: Thomson West, 2003), § 131.

4. *St. Paul & Pacific R Co. v. Schurmeier* at 289.

5. *United States v. Holt State Bank*, 270 US 49 (1926); *State v. Longyear Holding Co.*, 29 N.W. 2d 657 (Minn. 1947); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893).

6. US Works Progress Administration (Division of Professional and Service Projects), *The Cuyuna Range: A History of a Minnesota Iron Mining District* (St. Paul: Minnesota Historical Records Survey Project, 1940), 11–13; William E. Lass, *Minnesota: A History*, 2nd ed. (New York: W. W. Norton & Co., 1998), 253–54; Arvy Hansen, *Cuy-Una!: A Chronicle of the Cuyuna Range* (privately published, 1976), 5.

7. *Petraborg v. Zontelli*, 15 N.W. 2d 174 (Minn. 1944); "Supreme Court Restrains Mining Co. from Draining Rabbit Lake," *Crosby Courier*, June 15, 1944, 1; Hansen, *Cuy-Una!*, 72.

8. *Petraborg v. Zontelli*, 15 N.W. 2d 174 (Minn. 1944); June 4, 1924, indenture between the State of Minnesota and Rogers-Brown Ore Company, Minnesota Attorney General case files concerning Rabbit Lake, 1948–1960 (hereafter cited as AG Files), Gale Family Library, Minnesota History Center, St. Paul.

9. See AG Files for resolutions of Irondale Township (July 9, 1943), Village of Cuyuna (July 13), Common School District No. 104 (July 15), Crosby Commercial Club (July 13), Clarence A. Nelson Post No. 154 of the American Legion (July 12), and Rabbit Lake Township (July 8).

10. *Petraborg* at 179.

11. *Schurmeier* at 289.

12. *Petraborg* at 181–83.

13. *Petraborg* at 181–83.

14. Oliver Wendell Holmes Jr., *The Common Law* (1881), in *The Collected Works of Justice Holmes*, ed. Sheldon M. Novick, vol. 3 (Chicago: University of Chicago Press, 1995), 115; *Petraborg* at 182–83. The scope of riparian rights and the test to determine whether a lake is navigable are two different concepts, but their shared evolution is striking: a nineteenth-century emphasis on commerce is giving way to a twentieth-century appreciation of noncommercial usage of natural resources: see *State v. Korrer*, 148 N.W. 617 (Minn. 1914).

15. *In the Matter of the Establishment of Natural Ordinary High Water Level in Rabbit Lake, Crow Wing County, and the Issuance of a Permit to Dyke off and Partially Drain the Same*, permit ext. application, Minnesota Department of Conservation, Sept. 8, 1944, AG Files; *Petraborg v. Zontelli*, judgment of dismissal, Crow Wing County (MN) Dist. Court, Apr. 21, 1945; "E. Rabbit Lake Drainage Job Near Completion," *Brainerd Daily Dispatch*, Mar. 4, 1946; Hansen, *Cuy-Una!*, 72. Another source cites 1952, rather than 1945, as the year Rabbit Lake mining began: Frederick E. Sutherland, "The Cuyuna Iron Range: Legacy of a 20th Century Industrial Community" (Ph.D. diss., Michigan Technological University, 2016), 150.

16. "Court Rules Rabbit Lake Chain Near Crosby Not State Owned," *Brainerd Daily Dispatch*, June 28, 1957, 1, 7.

17. *State v. Adams*, 89 N.W. 2d 661 (Minn. 1957), *cert. denied*, 358 US 826 (1958). In a footnote, the court cited a number of cases for the proposition that "the owners of land bordering on the shore of a meandered *non-navigable* lake own the bed of the lake in severalty"—together, in other words, each owning his or her own portion—"the boundary lines of each abutting tract being fixed by extending from the meander line on each side of the tract lines converging to a point in the center of the lake": *Adams* at 687–88, n. 18 (emphasis added). If we imagine a circular lake, the boundaries would resemble the spokes of a wheel.

18. *Adams* at 665.

19. Rev. Joseph A. Gilfillan, "Minnesota Geographical Names Derived from the Chippewa Language," *Fifteenth Annual Report of the Geological and Natural History Survey of Minnesota* (1886), 451–77, in Upham, *Minnesota Place Names*, xi, 162; N. H. Winchell, ed., *The Aborigines of Minnesota* (St. Paul: MNHS, 1911), 150–52; Report of Clark W. Thompson, supt. Ind. Affairs to Hon. Wm. F. Doyle, commr. Ind. Affairs, May 9, 1862; Report of Lucius C. Walker to Hon. C. W. Thompson, supt. of Indian Aff., Mar. 22, 1862—both AG Files.

20. *Adams* at 667; Victor J. Michaelson, special assistant attorney general, to Chaska, Minnesota, constituent W. H. Pagelkopf, Aug. 29, 1958, AG Files.

21. *Adams* at 676. Despite earlier cases deemphasizing the importance of commercial transport in determining navigability, e.g., *Lamprey v. Metcalf* and *State v. Korrer*, the supreme court and the district court were of one mind in requiring evidence of commerce. The breadth and inevitable contradictions of the historical record apparently troubled Judge Arnold Forbes, who appears to have been greatly reluctant to decide the district court case. The judge held the parties' briefs for two years before calling the lawyers back to court to make oral arguments. In the meantime, the Minnesota Supreme Court had released *Bingenheimer v. Diamond Iron Co.*, 54 N.W. 2d 912 (Minn. 1952), an unrelated case dealing with water rights. Judge Forbes attached to his order a one-sentence memorandum claiming that *Bingenheimer* rendered issues of navigability "so moot that in the interest of economy and to save a terrific amount of work I have eliminated a 37-page memo which I have been a long time preparing": Findings of fact, conclusions of law and order for judgment, *State of Minnesota v. Robert Morford Adams*, Apr. 17, 1954 ("Forbes Order"). Perhaps Chief Justice Roger L. Dell was also reluctant; once the high court was ready to render a decision, Dell summoned home Clarence R. Magney, who had retired as a justice of the supreme court five years earlier and was now in Europe, to write the court's opinion: Michaelson to Pagelkopf, Aug. 29, 1958, AG Files.

22. *Adams* at 679.

23. *Adams* at 680.

24. Palomar, *Patton and Palomar on Land Titles*, §§ 347–48, 352, citing *Diedrich v. Northwestern Union R. Co.*, 42 Wis. 248 (1877) and *Flisrand v. Madson*, 152 N.W. 796 (S.D. 1915); see *Lamprey* and *Korrer*; Forbes Order.

25. "The Rabbit Lake Case," *St. Paul Pioneer Press*, Mar. 15, 1958, p. 4; Pagelkopf to *Minneapolis Star* editor Jack Connor, undated (misspellings in original), and Michaelson to Pagelkopf, Aug. 29, 1958—both AG Files.

26. *Youngstown Mines Corporation v. Prout*, 124 N.W. 2d 328 (Minn. 1963). Curiously, the reimbursement claimed by Youngtown was slightly less than $600,000, a far cry from the $15 million the state had earlier claimed hung in the balance. Although a few possibilities suggest themselves—perhaps the state had received royalties from other mining companies, or perhaps the state had been anticipating that the entire chain of lakes would be mined and generate royalties—the question had puzzled the supreme court, which noted that an "answer to an inquiry from this court on oral argument, reveals that between June 4, 1924, and the date of entry of judgment in the Adams case Youngstown paid more to the fee owners than it paid to the state": *Prout* at 343. This answer, though, sheds little light on the apparent inconsistency.

27. *Wichelman v. Messner*, 83 N.W. 2d 800, 814 (Minn. 1957); *Carlson v. Minnesota Land of Colonization Co.*, 129 N.W. 768 (Minn. 1911); *Washburn v. Gregory Co.*, 147 N.W. 706 (Minn. 1914); Minn. Stat. § 507.36. If surface and mineral estates are independent of one another, which one will predominate if a conflict exists? The construction of improvements on the surface is likely to make minerals less accessible and mining more disruptive and expensive. Similarly, development of the mineral estate may damage or even wholly destroy the value of the surface. Remarkably, no Minnesota appellate court decision has tackled this issue, likely because rarely has a court been asked to do so. It is not difficult to imagine that during development of the Mesabi and Cuyuna Ranges mining companies were wary of the treatment well-financed eastern interests might receive from Minnesota courts. The closest this issue has come to resolution appears to be a 1954 case in which the Minnesota Supreme Court declined to address on the facts presented the superiority of one estate over the other. When the Minnesota judiciary does eventually address the issue, the court noted, the opinion will be of "far-reaching importance": *Kangas-Jacobsen Dairy, Inc. v. Lloyd-Smith*, 62 N.W. 2d 915 (Minn. 1954).

28. G. O. Virtue, "Public Ownership of Mineral Lands in the United States," *Journal of Political Economy* 3, no. 2 (1895): 185, 192–98.

29. Virtue, "Public Ownership of Mineral Lands in the United States," 198–99. Douglass Houghton, who was in charge of the surveying, drowned in the late fall of 1845, before his work was completed. Though the project was then finished by others, in fact mining had begun as early as 1844: Grace Lee Nute, *Lake Superior* (1944; reprint, Minneapolis: University of Minnesota Press, 2000), 165.

30. Virtue, "Public Ownership of Mineral Lands in the United States," 200. In bemoaning "our experience in leasing the lead lands," President Millard Fillmore was referring to the debacle that developed in the late 1820s and early 1830s when lessees of Missouri and Illinois land containing valuable lead rebelled against the rent being charged by the federal government. In response, the government determined that lead lands would in the future only be sold if a purchaser was able to declare on oath that the land had been examined and no evidence of mineral deposits found. Congress later learned that when promising mineral lands in southwestern Wisconsin were listed for sale "it was the practice for applicants and their witnesses to be led blindfolded over the tract applied for, and then swear at the land office that they had seen no indication of minerals": Virtue, "Public Ownership of Mineral Lands in the United States," 193–94.

31. Virtue, "Public Ownership of Mineral Lands in the United States," 198–201; David Gerard, "The Mining Law of 1872: Digging a Little Deeper," PERC Policy Series (Dec. 1, 1997).

32. Gregory Kinney and Lydia Lucas, "A Guide to the Records of Minnesota's Public Lands" (MNHS, Division of Archives and Manuscripts, 1985), 1–3; *Longyear* at 665.

33. *State v. Evans*, 108 N.W. 958, 961 (Minn. 1906).

34. Julius A. Schmahl, *The Trust Funds of Minnesota: A Heritage to Protect* (report of the Minnesota State Treasurer, 1942), 8.

35. Minnesota Laws 1889, ch. 22, sec. 9 (Apr. 24, 1889); Minnesota Laws 1901, ch. 104 (Apr. 2, 1901); see Minn. Stat. § 282.12; Minn. Const. art. XI, § 10; Kinney and Lucas, "A Guide to the Records of Minnesota's Public Lands," 119.

36. *Public Land and Mineral Ownership in Minnesota* (St. Paul: Minnesota Department of Natural Resources, Division of Lands and Minerals, 2016), 21.

37. *Skillings Minnesota Mining Directory* (Duluth, MN: DN Skillings Inc., 1999), 78; "Rabbit (East Portion)," Minnesota Department of Natural Resources LakeFinder, dnr.state.mn.us/lakefind/lake.html?id=18009301.

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