

Fish Journal
December 15, 2010

Getting to the Bottom - WA Stream Access Laws

by Dallas Cross

In a previous article, "Watch Where You Step!" I reviewed the rights and prohibitions of citizens to enjoy recreation in the rivers and streams of Washington State.

In summary, folks may recreate in Washington rivers and streams that are officially navigable. This right includes treading on their bottoms but only after access from public property or by permission from the landowner. Recreationists may not use the bottoms of streams and rivers that are not navigable and held in private ownership without landowner permission.

The problem is that navigability was determined by survey before statehood in 1889, drawn on maps as meander lines, and is essentially unchanged. After statehood, Washington sold or granted lands to private interests including the underwater beds. Many such streams have fishing and other recreational opportunities in public water, but with no legal means to enjoy them without owner consent.

Most Western states have a standard to determine if flowing waters are navigable. Washington State does not. To get a stream designated as navigable, and hence available for recreational use, the courts of Washington State must be petitioned. Opposing lobbies from commercial and private land owners plus the legal costs of a court battle have all but prevented any changes from the 1889 determination of navigability.

What have surrounding states done? Recognizing the decision of the U.S. Supreme Court that states must hold in trust all surface waters for the people so that the people will have liberty of fishing therein freed from the obstruction or interferences of private parties; several states have updated their laws and regulations to allow more recreation in public waters.

Idaho law: Any stream which, in its natural state during normal high water, can float cut timber having a diameter in excess of 6 inches or any other commercial or floatable commodity or is capable of being navigated by oar

or motor propelled small craft for pleasure or commercial purposes is navigable.

Most of the riparian land surrounding Silver Creek, a classic fly fishing stream in Idaho, was owned in the 1950's by Union Pacific who also owned the Sun Valley Resort. Traditionally, Silver Creek had been open for fishing, but my family could only gain access after restricted parking, difficult crossing of fences and a slog across swampy surrounding private property.

Sun Valley Resort announced it had decided to deny public access to the legendary rainbow trout fly fishing waters and reserve it solely for its clients and guests.

Local fishermen floated a log down the stream to demonstrate navigability and confirm that the waters were indeed public according to Idaho state law. They were still denied access through the property. The only public access was to unwadable water via a county bridge.

An appeal by a State Senator to the Idaho Fish and Game Department resulted in a notice being sent to Sun Valley Resort. It stated that the Fish and Game Department was preparing to declare that Silver Creek would be classified as trout spawning refuge from which no fish could be caught.

Faced with loss of a major attraction to guests the resort asked what they could do to prevent the closing of Silver Creek. The Fish and Game Department replied: Allow the public to cross Sun Valley properties, put in entrance stiles approximately every half mile along the road and create public parking areas on the property.

Sun Valley Resort balked but eventually complied. Afterwards my friends and family took delight in using the improved facilities, especially because our elderly companions, including the State Senator, could now easily get to the creek to fish with us.

Oregon Law: The Oregon Supreme Court changed the Public Use Doctrine after statehood. Oregon river rights now state that if the bed of a waterway is privately owned, the waterway may be used for public recreation and other purposes if it meets the state test of "floatability." A

waterway is “floatable” if its length, width and depth allows boats—even small boats or canoes—to make successful progress through its waters

Montana Law: With an even broader standard, the more recent 1985 Montana law says that in general, all rivers and streams capable of recreational use may be used by the public without regard to the ownership of the land underlying the waters. The caveat is that public access must be obtained legally.

Washington State has been reluctant to respond to the increasing demand for recreational use of its public streams. Legislation is now needed that creates a uniform standard to determine navigability, or that defines the right for public use such as our sister states have done. The law should be fashioned and administered such that it allows public recreation in streams and rivers while protecting the rights of adjacent property owners.

State officials now simply point to the absence of meander lines drawn on ancient maps by pioneer surveyors when denying our right to fish or recreate in streams over private lands. This state practice, supported by outdated laws, does not hold in trust the right of its citizens to freely use public waters as promised by U.S. law.

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