

Watch your step — fishing access rights

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By Dallas Cross

Do I have a right to fish there? That question was recently proposed to me by a reader. This was after he was asked to leave the stream by the owner of property next to the upper Raging River. He was wading upstream and fly fishing after gaining access to the stream with permission of an adjacent property owner.

The answer, Vern, is theoretically “yes” and in practicality “no.” Your right to fish there is tangled in state history, imbedded in private domain rights, and obscured in public use and access laws for lakes and streams.

The fish and water in the Raging River are public, but in this case, the land underneath it is not. Theoretically, you could float and fish, but in the shallow Raging River it is impossible not to touch the bottom or shore and thereby trespass.

The right for the public to fish has been handed down to us from classical Roman times and through the Magna Carta of 1215. The right of the American public to fish lakes and rivers was of such importance it was affirmed in the first laws passed by the U.S. Congress.

The key to the right of the public to use lands below lakes and streams is linked to the navigability of the overlying water. In order to freely fish and tread on the bottom, the body of overlying water must be recognized by the state as navigable for purposes of commerce. Consequently, the beds are recognized as public domain.

How are Washington fresh waters determined to be navigable and therefore available to the public for recreation? If before statehood in 1889 they were surveyed and designated navigable on a map, they usually remain so now. Both these waters and their beds may be used to recreate within the ordinary high water mark on the shore once legal access has been gained.

After statehood, Washington granted or sold its public land with the understanding this included the land under non-navigable waters. Other states have not been so generous and some now apply simple tests that reserve more of their stream and lake beds as public domain.

For land under water not designated navigable at Washington statehood, it falls to citizens to argue before the courts of the state that overlying waters have historically been used or are now usable for commerce. If the court finds them navigable, their beds are thereby eligible for public use, including recreation.

In Washington, the state Department of Natural Resources keeps track of public domains in waterways, but does not designate them; the courts do and the Fish and Wildlife Department is out of the loop.

Bolt judges fishing rights:

State courts have deemed one stream to be navigable because a shingle bolt could be transported down it to supply a shake mill. A shingle bolt is a length of cedar log approximately four and a half feet long. Some states use the simple federal navigability criterion of the passage of a canoe or kayak. Idaho uses a general rule — the ability to float a 6-inch diameter log. Kansas, not having logs, must use other measures.

Hook but do not touch:

Another example of a Washington court determination regards a lake in Eastern Washington. The lake was found not to be historically navigable for commercial purposes, despite early trappers transporting furs over it. The lands under the public waters of this lake were deemed to be private and owned by surrounding landlords.

Although there is public access to the lake for recreational fishing, it was found that trespassing included walking within the high water mark, dropping an anchor or even having a sinker on a fishing line touch the bottom.

Knowing that you have a right to both fish and walk on the bottom within the ordinary high water mark does not necessarily mean you may access public waters. Here is where the state is getting more helpful. They are providing more public access and barrier-free sites. These are marked on fishing maps and will grant you legal access to fishable waters, even though they may be surrounded by private property.

Although unmarked as public access sites on maps, legal entry to all waters may be gained from publicly owned property adjacent to lakes and streams. This includes roads, bridges, parks and other government owned land. The government may restrict use of these lands for public interest or safety. Of course, permission of the property owner is always a legal way to access the water.

Often, adjacent property owners mistakenly think they own the stream or lake beds of waters that run over public domain and will ask you to leave. Simply moving on and later offering the owner relevant information is the best response. Relying on a sheriff's deputy, who has been called after a confrontation, is usually unfruitful, as he or she may be unfamiliar with public domain laws and will then usually side with the owner.

In summary, the waters and fish in them in Washington state are yours to fish, according to rules laid down by the Fish and Wildlife Department, but to also use the bottoms and banks of these waters you must know whether they are public or private before wading, launching a boat or even bouncing your worm on the bottom.

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