American Whitewater

Idaho Navigability Report

Summary

Idaho has one of the most boater-friendly rights of passage in the nation. Streams that can be floated by a kayak in Idaho are open to the public for any recreational purpose. Boaters may lawfully scout within ordinary high-water marks and portage around obstructions so long as they return to the river at the first safe spot.

State Test of Navigability

Idaho has adopted a recreational boating test to determine which streams are navigable, and therefore subject to a public easement. Consequently, the public can use more streams in Idaho than just those streams that pass the federal navigability tests.[1)] For purposes of recreational use, Idaho statute defines navigable streams as "[a]ny stream which, in its natural state, during normal high water, will float cut timber having a diameter in excess of six (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."[2)] A list of streams considered to be navigable is also available from the Idaho Department of Water Resources.[3)]

Extent of Public Rights in Navigable and Non-Navigable Rivers

Navigable streams are "highways for recreation."[4)] Recreational use of navigable streams is authorized "within the meander lines or, when not meandered, between the flow lines of ordinary high water thereof, and all rivers, sloughs and streams flowing through any public lands of the state shall be open to public use as a highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation - boating, swimming, fishing, hunting, and all recreational purposes."[5)] This statute passed shortly after a case in which Silver Creek in Blaine County was deemed navigable for all recreational purposes because it had been used for floating timber.[6)]

A more recent case highlights that the ordinary high-water mark may be open to interpretation. In the Sanders Beach case, the Idaho Supreme Court's findings as to the ordinary high-water mark eliminated public access to a beach that has been used by swimmers for a century.[7)]

Portaging over private land and around irrigation dams or other obstructions that interfere with the navigability of the stream is expressly permitted by statute.[8)] The boater must reenter the stream immediately below the obstruction at the nearest point where it is safe to do so.[9)]

Trespassing on property that is posted against trespassers with signs or painted fence posts, or where oral or written personal communication to leave the property is given by the owner or lessee, is a misdemeanor.[10)]

Miscellaneous

Legislative amendments passed in 1996 in response to agricultural, timber and mining interests limit the applicability of the public trust doctrine in Idaho. Specifically, the statute provides that land use and water management decisions are to be made without reference to the public trust. Although the statute does not directly impact the public's recreational use of streams, decisions that consistently put business interests first could negatively impact the public's ability to enjoy streams for recreational purposes over time.[11)]

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1) Idaho Code § 58-1201(a) (2006) (expressly recognizes that Idaho holds the beds of streams navigable under the federal title test in trust for the public). See Selkirk-Priest Basin Association, Inc. v. State, 899 P.2d 949 (Idaho 1995) for a recent application of the public trust doctrine for navigability purposes in Idaho, but note that this decision was before the legislative amendments discussed in the Miscellaneous section. See also Fishing From the Bank: Public Recreational Rights Along Idaho's Rivers and Lakes, 21 Idaho L. Rev. 275 (1985).

2), 4) Idaho Code § 36-1601(a) (2006).

3) The listing is included in the Attachments to 2007 Idaho Department of Water Resources Recreational Dredging Application. A copy is on file with AWA.

5) Idaho Code § 36-1601(b) (2006).

6) Southern Idaho Fish and Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974).

7) City of Coeur D'Alene v. Michael L. and Jeannette G. Mackin, et al. and State Board of Land Commissioners, et al., 147 P.3d 75 (Idaho 2006). See also Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District, 17 P.3d 260 (Idaho 2000) for a discussion of the determination of the "ordinary high-water mark."

8), 9) Idaho Code § 36-1601 (2006).

10) Idaho Code § 18-7008 (2006).

11) Idaho Code § 58-1203 (2006) (enacted through House Bill No. 794 of 1996). See Closing the Floodgates? Idaho's Statutory Limitation on the Public Trust Doctrine, 34 Idaho L. Rev. 91 (1997) for further background and analysis.

American Whitewater

Oregon Navigability Report

Summary

In Oregon, the public has a right to float, wade, and fish in navigable streams up to the ordinary high water mark. The public also has a right to float, fish, and swim in certain smaller non-navigable streams that have public use rights. The law, however, remains unclear as to whether the public can touch the streambed or banks of smaller non-navigable streams while floating.

State Test of Navigability

In Oregon, state-owned waterways generally are available to the public for any legal[1)] use, such as navigation, commerce, fisheries and recreation.[2)] Waterways are considered state-owned if they are title-navigable.[3)] A waterway is considered title-navigable if, at the time of statehood, the waterway in its natural and ordinary condition was capable of being used as a highway of commerce for trade and travel by a customary mode of water transportation.[4)] This test for title-navigability is based on federal law.

The Oregon State Land Board is authorized by statute to make determinations of title-navigability under the federal title test and has adopted several regulations concerning navigability determinations.[5)] The Oregon State Land Board also has compiled a list of streams that are navigable based on federal judicial decisions, State Land Board policy or rules, meandering characteristics, or tidal influences.[6)] However, the navigable status of many other streams in Oregon has not yet been decided.[7)] No comparable mechanism has been established to determine whether a waterway is subject to the public use doctrine, discussed below, for smaller waterways.

Another source of public rights to use waterways in Oregon derives from state common law definition of navigable waters and is referred to by the state as the "floatage easement" or "public use" doctrine. This doctrine gives the public the right to make certain uses of a waterway whose bed is privately owned if the waterway has the capacity, in terms of length, width and depth, to enable boats to make successful progress, even for recreational use, through the waters.[8)]

One case defined streams subject to public use for a passageway as those streams "capable of being commonly and generally useful for floating boats, rafts, logs, for any useful purpose of agriculture or trade."[9)] Another case concluded that such trade and commerce should include "the use of boats and vessels for the purposes of pleasure," or "for the purpose of fishing."[10)] Consequently, the public use doctrine extends beyond strict commerce for pecuniary benefit to include activities such as fishing and pleasure boating.[11)]

In 2005, the Oregon State Attorney General advised that public uses also extend to bathing, hunting, and other things

incidental to public use of water.[12] It would seem, therefore, that the capacity to float a kayak would qualify as a public use benefiting from the floatage easement.

The Oregon State Attorney General has opined that it "believe[s] it remains a valid basis for public use of certain waterways that meet the public use test developed in a series of Oregon Supreme Court decisions." [13]

Waterways are also state-owned if they are tidally-influenced.[14] A waterway is tidally-influenced if it is affected by the ebb and flow of the tide. A tidally-influenced waterway is considered state-owned, even if it is not used or not susceptible of use for commerce.[15] Thus, the public also has a right to float, wade, fish, swim, and so forth, in tidally-influenced streams and rivers.

Extent of Public Rights in Navigable & Non-navigable Rivers

Oregon owns the beds of navigable rivers. The public has the right to boat, fish, swim, etc. in these rivers to the ordinary high water mark.[16] The ordinary high water mark is determined by "ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of a bed a characteristic mark distinct from that of the banks in respect to vegetation and the nature of the soil itself."[17]

In privately-owned river and stream-beds, which are subject to the public's floatage easement, the extent of public rights is still uncertain. The public clearly has the right to float these streams, but the courts have not confirmed that the floatage easement includes other rights incidental to boating, such as wading, fishing, and portaging that involve the use of privately-owned stream banks. One older case involving a river with a floatage easement allowed the attachment of a log boom to a privately-owned island because attachment was necessary to exercise the right of driving logs on the river and the impact was minimal.[18] Other cases indicate that "necessity" may be limited to a need to enter upon the land of a streambed owner to reclaim stranded property or by reason of avoiding danger.[19]

In contrast, entering upon an upland, when unnecessary, likely is a trespass.[20] It is unclear at this time whether portage or other activities incidental to kayaking are allowed on private property. In some instances, district attorneys have dismissed trespass cases that occur on rivers that have not been subject to a determination of navigability, although some individuals nonetheless have been arrested.[21]

Trespass in Oregon is entering on premises that are not open to the public.[22] Premises that are open to the public, by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances that would cause a reasonable person to believe that no permission to enter or remain is necessary.[23] While the public may not trespass upon a privately-owned upland, a streambed owner likewise may not construct a fence or other obstruction blocking travel along a waterway.[24]

Miscellaneous

In 2005, Senate Bill 1028 (SB1028) would have required comprehensive rules governing public rights to Oregon's waterways. In particular, section 5(1) of the bill expressly allowed travel by the public on upland property adjacent to the waterway for emergency use or to portage if the person takes the most reasonably direct and least intrusive path, as well

as taking reasonable steps to avoid damaging the property and to repair any damage the person may have caused to the property. Further, section 5(2) provided a defense to a charge of criminal trespass under OR 164.245, 164.255, or 164.265 that a person making recreational use of a class 1 waterway entered the property adjacent to a waterway for emergency use or to portage and complied with the requirements of section 5. Under section 5(3), a person using private property adjacent to a waterway for emergency use or to portage is liable for actual damage caused to the property.

SB1028 was heavily criticized by both landowners and public use advocates.[25] In particular, some public use advocates believed that certain provisions of the SB1028 actually eroded public use by allowing those uses to be regulated or restricted. The bill ultimately died in committee in August 2005. The full text of SB1028 can be found at http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1028.intro.pdf [http://www.leg.state.or.us/05reg/measpdf/sb1000.dir/sb1028.intro.pdf]

For further information, Oregon State maintains a detailed website detailing navigability issues. http://www.oregon.gov/DSL/NAV [https://www.oregon.gov/DSL/NAV]

Common Waters of Oregon is a membership-based, public benefit, nonprofit organization dedicated to preserving Oregon rivers as common highways and forever free. This organization maintains an informational website covering water use issues. http://www.oregonriverrights.com [http://www.oregonriverrights.com]

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1) In general, any act that is illegal on land also is illegal on a pubic waterway. The State of Oregon provides a non-exclusive list of such acts. http://www.oregon.gov/DSL/NAV/yourrights.shtml [https://www.oregon.gov/DSL/NAV/yourrights.shtml]

2) 2005 WL 1079391 (Or.A.G.).

3) , 14) Phillips Petroleum Co. v. Mississippi, 484 US 469, 476, 108 S. Ct. 791, 98 L Ed.2d 877 (1988); United States v. Holt, 270 US at 56; 45 Op Atty. Gen 1 (1985).

4) 2005 WL 1079391 at 10.

5) Or. Rev. Stat. § 274.404 (1997). Or. Admin Rules § 141-121-0000 et seq. (1997). In addition, 37 Op. Or. Att'y Gen. 1342 (1976), the criteria for the federal navigability test are discussed.

6) http://www.oregon.gov/DSL/NAV/navigwaterways.shtml [https://www.oregon.gov/DSL/NAV/navigwaterways.shtml]

7) The State maintains a table showing the current status of the eight navigability study requests submitted to the Department since the legislation requiring such studies was passed in 1995. http://www.oregon.gov/DSL/NAV/studyrequests.shtml [https://www.oregon.gov/DSL/NAV/studyrequests.shtml]

8) The State maintains a list of Oregon waterways meeting the federal test of navigability for purposes of State ownership of the underlying submerged and submersible land. http://www.oregon.gov/DSL/NAV/cases.shtml [https://www.oregon.gov/DSL/NAV/cases.shtml]

9) Weise v. Smith, 3 Or. 445, 451 (1869).

10) Gulliams et al. v. Beaver Lake Club, 90 Or. 13, 27 (1918).

11) See also Luscher v. Reynolds et al., 153 Or. 625, 635 (1936).

12) 29 Op Atty Gen 296, 296-297 (1959); 29 Op Atty Gen 311, 312 (1959).

13) 2005 WL 1079391, 16-17 and 24 (Or.A.G.). Read full opinion at http://www.doj.state.or.us/releases/pdf/op_8281.pdf [http://www.doj.state.or.us/releases/pdf/op_8281.pdf]

15) Phillips at 478-81.

16) Memorandum entitled State Ownership of Navigable Waterways, issued by the Director of the Oregon Division of State Lands, May 24, 1996.

17) Op. Or. Att'y Gen. 7692 (December 8, 1978).
18), 20) Weise at 451.
19) Lebanon Lumber Co. v. Leonard, 68 OR 147, 150 (1913).
21) Letters from David T. McDonald to Captain Lindsey Ball, Oregon State Police dated August 16, 1996, and September 26, 1996.
22) Or. Rev. Stat. § 164.245 (1997).
23) Or. Rev. Stat. § 164.205 (1997).
24) Guilliams at 27.
25) News article entitled Surf, Turf, Oppose Rivers Bill, Willamette Week Online, June 8, 2005.

American Whitewater

Utah Navigability Report

Summary

In Utah, the public owns the water and has the right to use any surface water for which legal access exists. The public has the right to use the surface water for recreation, including boating. Currently, Utah law is silent on whether streambeds of non-navigable waters can be used or touched by boaters.

State Test of Navigability

Utah law has not adopted a state test of navigability. The streambeds of navigable waters under the federal title test are held in trust for the public by the state.[1)] However, all waters of the state are the property of the public, including water in non-navigable streams that do not pass the federal tests of navigability. The public's right to use the water is subject only to the existing rights of appropriators to the beneficial use of the water.[2)] This provides the public with rights to recreate on streams that do not pass the federal tests of navigability, i.e., non-navigable waters.

Extent of Public Rights in Navigable and Non-Navigable Rivers

Although navigability is the standard used to determine title to water beds, it does not establish the extent of Utah's interests in the waters of the state.[3)] The state regulates the water as trustee for the benefit of the people.[4)] This is exemplified in state policy, which recognizes a public interest in the use of the state waters for recreational purposes by requiring that recreational uses be considered by the State Engineer before he approves an application for appropriation[5)] or permits the relocation of a stream.[6)]

A corollary to the rule that all waters of the state are the property of the public is the rule that where there is public access to a body of water, there is a public easement over the water, regardless of who owns the water, and the public is not trespassing when upon such waters.[7)] The public easement includes the right to use the water to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing the water.[8)] But the public easement is not well defined, and the Utah Supreme Court has expressly not answered the question of whether the easement includes use of the streambed.[9)] Thus, although the Utah Supreme Court seems to be following Wyoming's generous rule of permitting incidental contact, Utah law remains unclear as to whether a boater, floating down a stream whose beds are privately owned, is trespassing if his paddle strikes a rock in the streambed.

Perhaps Utah will be inclined to follow the rule in neighboring Wyoming, another appropriation state, but the answer cannot be predicted with any accuracy. One strong argument in favor of allowing incidental use of privately-owned streambeds is that the public owns the water and, therefore, has a stronger right than that provided by a navigational servitude. Not allowing incidental use of the streambed would render the public's ownership of water less valuable. The

right of portage in non-navigable rivers is an open question in Utah as well.

Miscellaneous

Entry upon property that is posted, fenced, or after personal communication that the property is private is a trespass infraction.[10)]

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1) Utah Div. of State lands v. United States, 482 U.S. 193 (1987).
2) J.J.N.P Co. v. Division of Wildlife Resources, 655 P.2d 1133, 1136 (Utah 1982).
3) United States v. State of Utah, 283 U.S. 64 (1931
4) Id. Public ownership of water is founded on principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all people and the state must therefore assume responsibility of allocating use of water. See also Tanner v. Bacon, 103 Utah 494, 516, 136 P.2d 957, 966-967 (1943).
5) Utah Code 73-3-8(1)(e).
6) Utah Code 73-3-29(4)(a)(ii).
7) J.J.N.P Co., 665 P.2d at 1137.
8) Id. at 1136. See also Day v. Armstrong, Wyo., 362 P.2d 137 (1961); Southern Idaho Fish and Game Association v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974). See also Colman v. Utah State Land Bd., 795 P.2d 622 (1990).
9) Id. at 1137.
10) Utah Stat. § 76-6-206 (1997).

AMERICAN Whitewater

American Whitewater
Washington Navigability Report

Summary

In Washington, the public has a right to use streams that are capable of floating a "bolt of shingles" during high flows. While a bolt of shingles is not large, this test does eliminate some smaller streams capable of being floated in a kayak. Washington does not recognize a right to portage across private land.

State Test of Navigability

Washington generally uses the federal test of navigability to determine all navigable waters within the state because the state owns the beds of all navigable rivers.[1)] Navigable waters include only such waters capable of navigation for general commercial purposes.[2)] Commercial purposes include floating shingle bolts[3)] down the river, but do not include "every small creek in which a fishing skiff or gunning canoe can be made to float at high water."[4)] A stream that had only been used for transportation by small boats for pleasure was determined to be non-navigable.[5)] Since shingle bolts are smaller than saw logs, the required capacity of the water under Washington's test is somewhere between the log test and the recreational boating test.

Washington courts have interpreted this test fairly liberally in other ways. For instance, the Washington Supreme Court has held that the quality of navigability of a watercourse need not be continuous, but the seasons of navigability must occur regularly and be of sufficient duration to serve a useful purpose for commercial intercourse.[6)] Under this test, streams in their natural state, capable of floating shingle bolts after heavy rains and during the spring freshets, are

navigable streams.[7] The term "natural state" precludes streams that only can be made floatable by artificial means.[8] Natural obstructions or portages apparently do not destroy navigability.[9] Historical evidence of use of a stream for commercial transport purposes is persuasive evidence that the stream is navigable if the stream is in the same condition that it was in during the days of commercial use.[10] In addition, navigability is not destroyed by disuse.[11]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The public has the right to fish in navigable streams up to the high water mark, and presumably also has the right to wade because the state owns the stream bed.[12] The public has no rights in non-navigable streams, and the owner of a non-navigable stream can fence the stream.[13]

Washington does not recognize a right of portage. The Washington Supreme Court overruled a lower court's finding that log drivers could go upon privately-owned banks of navigable streams to free logjams.[14] The court held that the log driver "must confine himself and his operations to the highway itself – the bed of the stream, until the land owner consents to the use of the banks . . . . The driver must know from the beginning that he must, in no event, go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided."[15]

Miscellaneous

Criminal trespass on private property occurs when a person trespasses and the land is posted or notice is given in some other manner.[16]

Washington State recognizes sections of the following rivers as whitewater river sections: Green, Klickitat, Methow, Sauk, Skagit, Suiattle, Tieton, Skykomish, Wenatchee, White Salmon.[17] In addition, Washington recognizes all sections of rivers with at least one class III rapid or greater, as described in the American Whitewater Affiliation's whitewater safety code, as whitewater river sections.[18]

The State Scenic River system was established to recognize that many rivers

possess outstanding natural, scenic, historic, ecological, and recreational values of present and future benefit to the public, and that a need exists to protect and preserve the natural character of such rivers and to fulfill other conservation purposes.[19] Rivers within the State Scenic River system include specified sections of the Skykomish, Beckler, Tye, and Little Spokane.[20] Declaration of a Green River Gorge Conservation Area[21] and Yakima River Conservation Area[22] recognize a need to conserve these areas for the recreational needs of the region.

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1) Kemp v. Putnam, 288 P.2d 837, 839 (Wash. 1955), overruled on other grounds by Save a Valuable Environment v. City of Bothell, 576 P. 2d 401 (Wash. 1978). See also Wash. Const. Art. XVII, § 1. The federal title test is the test that determines which beds to which states retained title at statehood.

2) **10)** , Kemp, 288 P.2d at 839.

3) Monroe Mill Co. v. Menzel, 77 P. 813, 815 (Wash. 1904). A shingle bolt is a bundle of wooden shingles.

4) Griffith v. Holman, 63 P. 239, 241 (Wash. 1900), citing Rowe v. Granite Bridge Corp., 21 Pick. 344 (38 Mass. 344 (Mass. 1838).

5) Griffith, 63 P. at 240.

6) Kemp, 288 P.2d at 840.

7) Kemp, 288 P.2d at 840, citing Monroe Mill Co., 77 P. at 815.

8) Sumner Lumber & Shingle Co. v. Pacific Coast Power Co., 131 P. 220, 222 (Wash. 1913).

9) Kemp, 288 P.2d at 840, citing favorably New York ex rel. Erie R. Co. v. State Tax Com., 266 A.D. 452 (N.Y. App. Div. 1943).

11) Id. at 841.

12) Id. See also Monroe Mill Co., 77 P. at 816.

13) Griffith, 63 P. at 244.

14) Monroe Mill Co., 77 P. at 816.

15) Id. See also Sumner Lumber & Shingle Co., 131 P. at 223.

16) Wash. Rev. Code § 9A.52.010 (2007).
17) Wash. Rev. Code § 79A.60.470 (2007).
18) Wash. Rev. Code § 79A.60.495 (2007).
19) Wash. Rev. Code § 79A.55.005 (2007).
20) Wash. Rev. Code § 79A.55.070 (2007).
21) Wash. Rev. Code § 79A.05.700 (2007).
22) Wash. Rev. Code § 79A.05.750 (2007).