

# Public Recreational Rights on Virginia's Inland Streams

by William E. Cox\*

## INTRODUCTION

The use of water for recreational and aesthetic enjoyment has grown substantially in recent years and has resulted in an increase in conflicts between the public and the owners of property that borders or in some cases underlies bodies of water. These conflicts are inevitable because most waterfront property is privately owned. In many cases exclusive use of adjoining water is considered to be a major reason for ownership of such property. Thus, the issue of public recreational use is evolving into a major water management issue.

In addition to the general growth in water recreation, several recent developments have heightened interest in the public's right to use Virginia streams. One significant reason for this greater interest is the establishment of a state scenic rivers program to protect certain streams from development, particularly dam construction.<sup>1</sup> *Table 1* lists the stream sections that have been designated by the state legislature as components of the state scenic rivers.<sup>2</sup> However, several streams recommended for designation by the Virginia Commission of Outdoor Recreation on the basis of special studies have not been incorporated into the scenic river system because of local opposition. Landowners have expressed concern over such issues as possible restrictions on land use and property damage from increased recreational activity.<sup>3</sup>

A second development has been the construction of the Gathright Project on the Jackson River above Covington. One of the controversial aspects of the project was the inundation of a state wildlife management area noted for its trout fishery and populations of deer and turkey. To mitigate the loss of fish

and wildlife areas above the dam, the Corps of Engineers has planned a cold water fishery below the dam. But the downstream fishery is not without its opponents; the area in question traditionally has been considered to be private. Thus, development and utilization of the downstream fishery presents a potentially significant conflict between the public and riparian landowners.

The right of the public to use any particular body of water for recreational purposes involves two distinct issues: (1) getting to the shore of the waterbody and (2) actual use of the water for such purposes as boating or fishing. These rights can exist independently of each other. A public highway may provide access to a stream, but the right to float downstream through private property may not exist. On the other hand, the right to float may exist, but access to the stream may be unavailable. Thus, both aspects of the issue are fundamental to the public right.

This report focuses on this latter issue: the extent of the public recreational right in relation to that of the riparian landowner. The issues associated with getting to the water are a separate matter not addressed here. The scope of the work is further limited to Virginia's inland streams.

The law of the Commonwealth of Virginia with regard to public recreational rights has not been fully developed. Direct statutory treatment has been limited, and the issue has been directly considered by the Virginia Supreme Court in only one case. However, legal issues closely related to the public rights question have been shaped by the courts and legislature. Therefore, certain inferences can be drawn that extend the direct legal declarations of public access rights and reveal potential directions that this law may take on further development.

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**SPECIFIC DECLARATIONS  
OF PUBLIC RECREATIONAL RIGHTS**

Public recreational rights have been the subject of three types of explicit declarations: (1) statutory enactments, (2) one decision by the Virginia Supreme Court, and (3) an administrative determination by the Virginia Commission of Game and Inland Fisheries

**Statutory Provisions**

The most direct declaration of public recreational rights in Virginia's waters is the following provision which serves to protect the rights of "fishing and fowling" by reserving ungranted streambeds in public ownership:

All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling...<sup>4</sup>

To evaluate the effect of this provision, consideration must be given to its origin and evolution. The provision can be traced to a statute enacted in 1780 which reserved in public ownership certain ungranted lands in the"...

TABLE 1  
**State Scenic Rivers System**

Stream	Location	Length of Designated Section (mi.)
Rivanna River	Fluvanna County	26
Goose Creek	Loudoun County	28
Appomattox River	Loudoun County	16
	Dinwiddie and Chesterfield counties and City of Petersburg	5
Roanoke R'ver	Campbell and Halifax counties	10.8
Nottoway River	Sussex County	33
Shenandoah R'ver	Clarke County	14
	Augusta County	6

Since the St. Mary's River is on National Forest land, the General Assembly adopted a resolution requesting the U.S. Forest Service to cooperate in protection of river.

granted lands in the "...eastern parts of this Commonwealth" that "... have been used as common to all the good people thereof..."<sup>5</sup> The legislature never specifically designated the eastern and western parts of the state, but it extended the statute to the remainder of the state in 1802.<sup>6</sup> The separate acts applicable to the eastern and western parts of the state were consolidated into a single provision in 1818 which specifically preserved ungranted stream beds.<sup>7</sup> The limitation of the act to lands used as common to all the people was deleted with publication of the Code of 1873.<sup>8</sup> The existence of this language until 1873 indicates that streambeds may have continued to pass into private ownership in locations where public use had not been established. After 1873, the statute appears to have provided blanket authority for retaining in public ownership all streambeds on previously ungranted land.

Even if the 1780 and 1802 dates of enactment of the statute are considered to be its effective dates, the impact of the statute as a mechanism for preserving public ownership is questionable because of the early dates at which much of the land in Virginia passed into private ownership. Information concerning the amount of land transferred to private ownership after enactment of the statute is not readily available, but substantial portions of the state's riparian land may have been granted before the statutory dates. The existence of many small grants with varying dates also poses the potential problem of lack of continuity of stream sections that are public. A situation where small public stream sections are interspersed with private sections may be almost as limiting to public recreational use as total private ownership.

**Virginia Supreme Court Action**

**Boerner v. McCallister:** The right of a member of the public to use inland streams for recreation, in this case fishing, over the objections of a riparian land owner was the primary issue in *Boerner v. McCallister*<sup>9</sup> a 1955 decision of the Virginia Supreme Court. The court's position regarding public rights cause the question has not been directly considered

A landowner sought an injunction to prohibit fishing in the Jackson River at a point above the City of Covington. The landowner's property lay on both sides of the river, but the fisherman avoided crossing land outside the stream channel by wading along the streambed from a point where a railroad right-of-way provided access. The landowner alleged this use to constitute a

trespass; the fisherman maintained that the stream was subject to public use and declared his intention to continue to fish. The alleged right of public use was based on two arguments: (1) that the streambed was owned by the Commonwealth of Virginia and (2) that the stream was navigable, thereby creating public rights of fishing and travel even if the streambed were privately owned.

To resolve the streambed ownership issue, the court considered the original source of the fact, landowner's title and the possible impact of state legislation. Private title to the land in question originally had been established under a land grant from the King of England between 1749 and 1751. The conveyance under the grant specifically included title to 270 acres and ". . . the rivers, waters and water courses therein contained, together with the privilege of hunting, hawking, fishing, fowling...."<sup>10</sup> The court held that the grant conveyed title to the streambed in question since no law existed to prevent such conveyance at the time of the grant. The court cited earlier Virginia decisions for the general proposition that the beds of non-navigable streams (the court's consideration of the navigability issue is discussed below) are owned by the riparian owners. Note was taken of the previously discussed 1780 and 1802 state legislation affecting conveyance of streambeds, but the statute was held not to apply before these dates; therefore, it had no impact on the grant in question.

Consideration of the fisherman's claim that public rights of fishing existed by virtue of the stream's navigability required that the court determine whether the stream was navigable at the point in question. The fisherman asserted that the stream had been used "... commercially for small boats, batteaus, or canoes, by a small steamboat, and for the commercial floating of logs...."<sup>11</sup> The primary evidence of navigability was that several efforts had been made between 1901 and 1907 to float logs down the river to a mill at Covington. The court concluded that this method of transportation was unsatisfactory since further attempts were not made. It stated that "[a] great preponderance of the evidence establishes the fact that the stream at the point in question is neither floatable nor navigable."<sup>12</sup> This determination by the state supreme court was based at least in part on the fact that the finding of nonnavigability by the lower court had been based on conflicting oral testimony. In such a situation, it was noted that the appeals court considers all the conflicts in evidence to be

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*In the Boerner case the Court's language suggests a more restrictive view of public rights than the decision itself.*

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resolved in favor of the prevailing party, in this case the landowner. Having determined the stream to be non-navigable, consideration of the extent of public rights in navigable streams was unnecessary. But after noting this the *Boerner* court stated that ". . . there is persuasive authority to the effect that even though a stream may be floatable, and in some instances navigable, the public interest therein is limited to the right of navigation...."<sup>13</sup> Although this statement reflects the position of the court on the issue at the time of the decision, it has little value as legal precedent because it was unnecessary to the actual decision in the case. Thus, the Court's language suggests a more restrictive view of public rights than is supported by the *Boerner* decision itself.

In a subsequent action not related to the *Boerner* decision, the Corps of Engineers determined that the Jackson River above Covington is a navigable stream. On February 23, 1978, the Division Engineer of the Corps' North Atlantic Division issued the following statement:

[D]ue to the past use and possible future use of the Jackson River as a route for interstate commerce, I hereby determine the Jackson River a navigable water of the United States from its mouth to its confluence with Back Creek at river mile 55 for the purposes of exercising Corps of Engineers regulatory jurisdiction.... This determination is based on [court] decisions . . . which have held that the present or past use of a waterway for interstate commerce renders the waterway a navigable water of the United States.<sup>14</sup>

The basis for this determination was past use of the stream for floating logs. The Division Engineer's statement noted that timber had been floated from the confluence of Back Creek and Jackson River (river mile 55) to a mi 11 at the lower end of Kincaid Gorge (river mile 42). Note was taken of log floating below Kincaid to Covington during 1902 and 1903. This latter activity was apparently considered by the Virginia Supreme Court in *Boerner* and found to be unsatisfactory evidence of navigability because of the limited scope of the operation.

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**Virginia Commission of Game and Inland Fisheries' List of Public Streams**

**UNDERLYING FACTORS AFFECTING PUBLIC RIGHTS**

In an attempt to inform the public, the Virginia Commission of Game and Inland Fisheries (VCGIF) has published a list of streams it considers to be open to public use (see *Table 2*). However, this list does not represent a conclusive legal classification but simply indicates VCGIF's interpretation of the status of Virginia streams. Thus, inclusion on the list does not create public rights; neither does absence of a particular stream from the list constitute a conclusive determination that the stream is not open to public use. Although inclusion on the list does not guarantee public status, the list tends to be conservative and includes only those streams already subjected to substantial public use. Streams of questionable status generally are not included but in some cases ultimately may be determined to be public.

Since these direct declarations of public rights are somewhat restricted in their scope and leave many questions unresolved, consideration of the full extent of these rights requires evaluation of underlying factors affecting public rights. As suggested by the *Boerner* decision, the two primary factors are navigability and bed ownership. These two factors are not independent; the navigability of a stream is one of the factors that determines the ownership of its bed. In the usual case, the beds of navigable streams are publicly owned, with the right of public use well-established, while the beds of non-navigable streams are the property of adjacent landowners, with all recreational rights vested in those landowners. However, a complication in the application of this rule arises because of the fact that bed ownership

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**TABLE 2**  
**Virginia Commission of Game and Inland Fisheries'**  
**Tentative List of Public Streams of Virginia, Exclusive of Tidewater**  
**(Downstream Point Listed First)**

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|---|--|
| 15. New River: West Virginia line to North Carolina line.   | 15. Roanoke: North Carolina line in Gaston Reservoir to, and including, Smith Mountain Reservoir |
| 16. Clinch River: Tennessee line to Carbo, Virginia (Russell County).                             | 16. Dan: Halifax County line (confluence with Roanoke River) to Danville.                        |
| 17. South Holston: South Holston Lake from Tennessee line to Alvarado, Virginia (Washington Count | 17. Meherrin: North Carolina line to Rt. 49 in Lunenburg County.                                 |
| 18. Cowpasture: IronGate, Virginia (Alleghany County), to Rt. 60 bridge.                          | 18. Nottoway: North Carolina line to Rt. 63 in Nottoway County, restricted in Camp Pickett.      |
| 19. Jackson: Iron Gate, Virginia, to Westvaco Dam at Covington.                                   | 19. South Fork Shenandoah: Riverton to Port Republic.  |
| 20. Jackson: 14 miles on state property (Gathright).  | 20. North Fork Shenandoah: Riverton to bridge at Timberville                                     |
| 21. James: Mouth to Iron Gate, Virginia.  | 21. Shenandoah: West Virginia line to Riverton.  |
| 22. Appomattox: Mouth to Rt.15 in Buckingham County.  | 22. North River: Mouth (Port Republic) to Bridgewater Dam.                                       |
| 23. Rivanna: Mouth (confluence with James) to Greene County line.                                 | 23. Rapidan: Mouth (confluence with Rappahannock) to Raccoon Ford in Culpeper County.            |
| 24. Chickahominy: Mouth (confluence with James) to Rt. 60 at Bottoms Ridge                        | 24. Rappahannock: Mouth to Rt. 211 in Fauquier County.   |
| 25. Pamunkey: Mouth (confluence with Mattaponi) to Rt. 360 bridge                                 | 25. Occoquan Creek: Maryland line to Rt.123 bridge.  |
| 26. Mattaponi: Mouth (confluence with Pamunkey) to Rt. 360 bridge.                                | 26. Dragon Run: Mouth (confluence with Piankatank) to Rt.17 in Middlesex County.                 |
| 27. Willis: Mouth (confluence with James) to Rt. 634 Cumberland County.                           | 27. Blackwater: North Carolina line to N&W railroad bridge at Zuni.                              |
| 28. Maury: Mouth (confluence with James) at Glaspow to Lexington                                  | 28. Philpott Lake.   |

on Virginia streams is based on other considerations in addition to the navigability issue, e.g., special statutory enactments. Because of these other factors, it is possible for certain navigable waters to have privately owned beds while certain non-navigable waters may have publicly owned beds.

The relationship between the navigability and bed ownership issues makes it difficult to rank them as to their significance: either can become the dominant factor under specific circumstances. Wherever public proprietorship of the bed can be established, public rights will exist independently of the stream's navigability. But navigability affects bed ownership and is therefore an indirect factor. If the bed of a given stream is determined to be privately owned for whatever reason, the navigability issue is a more direct factor since any public right of use that exists must be based on the right of navigation. Therefore, both the navigability and bed ownership issues are basic to the overall evaluation of the public rights question.

In addition to the navigability and bed ownership issues, other factors may have an impact on public rights. One of the principal issues in this regard is the effect of well-established public use on legal rights. A second consideration is the effect of public actions such as fish stocking on public rights.

### **Navigability**

To assess the impact of navigability on public recreational rights, three issues must be considered: (1) the definition of the word "navigable," (2) the extent to which navigability determinations have been made on Virginia streams, and (3) whether recreational activities are encompassed by the public right of navigation.

**Definition of "Navigable":** The term "navigable" has a variety of meanings, each of which has been developed for application in a particular situation. Among the most prominent are definitions established to define federal regulatory jurisdiction. The traditional federal definition as evolved in the courts has included waters susceptible to use for commercial transport, either in their natural or improved condition, and those whose use or development would affect waters susceptible to commercial use.<sup>15</sup> Although this definition has a potentially broad reach, federal legislation in the form of the Federal Water Pollution Control Act Amendments of 1972 (as amended by the Clean Water Act)<sup>16</sup> has

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*The Corps of Engineers applied the federal test in declaring the Jackson navigable below Gathright dam—a decision which conflicts with the Court's view in the Boerner case.*

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substantially expanded the category of waters to which federal regulatory jurisdiction applies. This must stand legislative definition is not based on physical susceptibility to navigation but encompasses the "waters of the United States", without qualification.<sup>17</sup>

However, the definition of navigable waters for purposes of federal jurisdiction generally does not apply in a determination of waters open to public recreational use. Law defining federal jurisdiction usually is independent of that used to resolve individual property rights conflicts. An exception may exist in the situation where public recreational use of a waterway is related to a federal water resource development project. The previously mentioned Gathright project provides an example. Since development of a cold water fishery downstream of the impoundment has been viewed as a project benefit, the existence of public rights is directly related to the project. The Corps of Engineers has applied the traditional federal test for determining navigability and has declared the stream to be navigable, a determination in conflict with the view of the Virginia Supreme Court in the *Boerner* case. The federal courts will likely provide a forum for resolution of the issues involved in this situation since the affected landowners plan to bring suit to contest the Corps' action.

Aside from special cases such as the Gathright situation, questions of public recreational rights generally are resolved by application of state law. With regard to the state definition of navigability, the Virginia Supreme Court historically has relied on a waterway's susceptibility to commercial use as its navigability test. The basic definition as taken from the case of *Ewell v. Lambert*<sup>18</sup> is as follows:

The question of navigability is one of fact. Its determination must stand on the facts of each case. The test is whether the stream is being used, or is susceptible to being used, in its natural and ordinary condition, as a highway for commerce, on which trade and travel are or may be conducted in the customary modes of trade and travel on water.

This statement is derived from the traditional fed

eral navigability test for defining commerce clause jurisdiction prior to enactment of the Federal Pollution Control Act Amendments of 1972. The court in *Ewell* cited several federal navigability determinations; therefore, it appears that the state court's position is the same as that evolved in the federal courts. Thus, the basic conflict between traditional federal and state navigability standards concerns the interpretation of criteria as they apply to a particular situation rather than with regard to criteria themselves.

The Virginia court has never explicitly considered the recreational standard employed in some states whereby all streams suitable for use by canoes or other recreational boats are considered navigable.<sup>19</sup> When presented with the navigability issue in *Boerner*, the Virginia court said the commercial use test was the appropriate standard. Since the case involved wading rather than recreational boating, the court was not called upon to consider the recreational definition. Thus, the court has never rejected the recreational-use standard but has given no indication that this measure would be acceptable.

#### **Navigability Determinations in Virginia:**

Application of navigability criteria to determine the status of a particular stream normally does not occur in the absence of conflict or proposed governmental control over the waterway in question. The Virginia Supreme Court has made navigability determinations in a few situations. The Jackson River above Covington was determined to be non-navigable in the previously discussed *Boerner* case. The other determinations of navigability have involved water uses not related to recreation. For example, the court's finding of non-navigability of the northwestern branch of Little Creek in the *Ewell* case (also discussed above) was related to the state's right to control use of submerged lands for oyster planting. Determinations of navigability have also been made in connection with the construction of milldams. An example of judicial consideration of navigability in this context is given by the early case of *Mead v. Haynes* 20 in which Goose Creek in Bedford County was found to be non-navigable.

Certain federal determinations of navigability may also be relevant to the public rights issue. As already noted, declarations of navigability under federal pollution control law are not likely to be relevant; however, federal determinations based on the traditional definition developed in the Federal courts are potentially applicable because Virginia has adopted the same navigability criteria.

The case of *United States v. Appalachian Electric Power Co.*<sup>21</sup> provides an example of a federal determination of the navigability of a Virginia stream on the basis of the traditional commercial-use standard. The case involved the authority of the federal government under the Federal Power Act<sup>22</sup> to regulate construction of a hydroelectric project on the New River above the City of Radford. The Court applied the principle that a stream is legally navigable if it can be made suitable for commercial use by means of reasonable improvements. With regard to the New River, the Court held the stream to be navigable to Allisonia, Virginia.

A third type of navigability determination of potential relevance consists of General Assembly actions concerning particular streams. The Virginia legislature has enacted a variety of statutes dealing with navigable waters, particularly during the early history of the state when navigation on the state's internal waterways was a basic form of transportation. Many of these laws apply to individual streams, including declarations that certain streams are navigable, authorizations of navigation improvements, and prohibitions of obstructions to navigation.<sup>23</sup> These last two types of legislative action would appear to be the general susceptibility to navigation of the stream in question. Most of these statutes have not been codified as part of the *Code of Virginia* but continue to exist as law.

The impact of these statutes on the present navigability status of one of the affected streams is not clear. It would appear that the weight to be given a previous legislative pronouncement would depend at least in part on the extent to which the legislation resulted in public use. Many of the early statutes simply appointed a board of trustees to raise funds locally and oversee their expenditure for navigation improvements. Not all such ventures were successful. Thus, it is unlikely that a declaration of navigability or authorization of a navigation improvement alone would be accepted as a conclusive indication that a stream is legally navigable. The extent to which public use actually developed would likely be a significant determinant of the effect to be given the legislative action. In this view, a past legislative pronouncement concerning navigability would constitute but one factor bearing on a current judicial determination of navigability.

Even with the existence of these various navigability determinations, the status of a substantial number of Virginia streams remains unresolved. This fact

is of greatest significance with regard to streams of intermediate size which are suitable for canoeing and other public use at least during certain seasons of the year. Since these streams fall between major rivers generally considered navigable and small streams generally considered non-navigable, considerable confusion concerning the status of such streams often exists. Removal of this uncertainty will likely require judicial consideration on a case-by-case basis.

**What Does Navigation Include?** The *Boerner* court suggested that the public right of navigation did not include recreational activities such as fishing, but it did not specifically make a legal holding on this point since the issue was not presented to the court for resolution. Other Virginia cases do not address this issue, but the concept that the rights of fishing and navigation are separable is supported by an earlier decision of the Virginia court involving injury to fisheries caused by the discharge of sewage into tidal waters.<sup>24</sup> The state maintained that its responsibilities to its citizens included protection of the rights of both navigation and fisheries in like manner, but the court held that the two rights are not of equal standing but are fundamentally different in character. Although the view of the court in this case that discharge of untreated sewage is a valid public use of tidal waters is no longer accepted, the detailed discussions regarding the different nature of the rights concerning fisheries and navigation may still serve as legal precedent on this issue.

One factor that may tend to counter the view that navigation is of a more fundamental nature than the right of fishing consists of the following recent addition to the state constitution:

To the end that the people have clean air, pure water, and the use and enjoyment for *recreation* of adequate public lands, waters, and other natural resources, it shall be the policy as of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings [emphasis added].<sup>25</sup>

This language appears to establish recreation as a valid objective of the Commonwealth's natural resources policy and therefore may enhance the relative standing of public rights concerning a recreational activity such as fishing.

Recreational rights have been recognized as a part of the public right of navigation in some of the other

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*The public's recreational rights—including the right of fish—appear to have been strengthened by the constitutional revisions.*

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states. For example, Wisconsin recognizes public recreational rights in all waters considered navigable, even those having privately owned beds.<sup>26</sup>

### **Streambed Ownership**

Since public recreational rights have not been explicitly recognized with regard to Virginia waters having privately owned beds, streambed ownership acquires important status as a potential determinant of such rights. Streambed ownership has already been discussed with regard to specific actions by the General Assembly to preserve ungranted streambeds in public ownership and thereby protect public rights in such waters. But the general bed ownership issue requires considerations broader in scope since these legislative actions do not apply to streambeds on land granted prior to their effective dates.

When these statutes do not apply, determination of bed ownership depends on interpretation of the common law as it existed in England and was subsequently developed in Virginia. By its action in adopting the statute, the General Assembly implicitly recognized that, at least to some extent, prior land grants had included streambeds. However, the decisions of the courts fail to provide a clear indication of the extent to which streambeds had actually been granted. Where grants contain provisions specifying the extent to which streambeds were included in the conveyance, ownership is a somewhat straightforward issue. For example, the grant covering the land involved in the *Boerner* case explicitly encompassed "rivers, waters and water courses," creating a presumption that streambeds were granted.<sup>27</sup> In most cases, however, grants apparently were silent to whether streambeds were included in the conveyance. In these situations, reliance must be placed on general principles of common law to resolve the question of what was conveyed.

Under the English common law, the Crown held title to the beds of all tidal waters while the beds of all nontidal waters were owned by adjoining land owners.<sup>28</sup> Therefore, English land grants could be assumed to include title to streambeds of all nontidal waters encompassed. The English common law was adopted in part by Virginia upon independence and continues to apply to some extent.<sup>29</sup> With regard to ownership of land

under water, the English rule is still in effect where tidal waters are involved. It is well-established that lands underlying tidal waters generally are publicly owned,<sup>30</sup> with the limits of riparian property established by statute 3' at low water mark. Extension of property boundaries to low water mark creates public beach access problems that will not be considered here due to the focus on inland waters.

Applicability of the English common law to nontidal waters is complicated by the fact that such waters can be either navigable or non-navigable. Where a nontidal stream is not physically navigable, the English rule that its bed is owned by the riparian landowner is well-established in the law of Virginia, provided, of course, that the grant was not subject to the 1780 and 1802 statutory restrictions.<sup>32</sup> Where the stream forms a property boundary, each owner takes to the center of the stream. If one owner holds title to land on both sides of a non-navigable stream, he owns the entire streambed at that point

But ownership of the beds of nontidal streams that are physically navigable is not as well-defined. The existence of many nontidal navigable waters in the United States resulted in application of the public bed ownership rule in some states while others retained the rule that the beds of all freshwater streams are privately owned. A treatise on real property<sup>33</sup> states that the English rule of ownership of the beds of nontidal navigable streams by adjacent riparian landowners currently is in effect in nine states— Illinois, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New York, Ohio, and Wisconsin. The view that such beds are owned by the state is said to be in effect in 16 states— Alaska, Alabama, California, Florida, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas, and Washington. Insufficient information apparently existed for the author to classify the remaining states, a group that includes Virginia.

The ownership of the beds of nontidal navigable streams is an important issue regarding public recreation rights in Virginia. One reason for this significance is the existence of a substantial number of such streams. Secondly, the Virginia Supreme Court has indicated that the right of navigation may not include the right of fishing where beds are privately owned. This question has not been specifically decided, but the possibility of this position's being adopted increases the potential significance of the ownership issue.

The decisions of the Virginia Supreme Court do not definitively resolve the issue of who owns the beds of nontidal waters that are navigable, but its decisions suggest that they are publicly owned. The court generally has referred to the beds of navigable waters as public, and it consistently has relied on susceptibility to commercial use as its standard for determining navigability. Thus, the court does not appear to distinguish between tidal and nontidal waters in determining bed ownership. But the English rule that the beds of all nontidal waters are privately owned has never been explicitly repudiated. In fact, the court in the *Boerner* decision indicated that ". . . the common law of England continues in force . . ." except as modified by the General Assembly.<sup>34</sup> This statement creates at least an implicit contradiction to the court's position on ownership of the beds of navigable freshwater streams as indicated by its decisions. Therefore, a degree of uncertainty continues to exist which will only be resolved by a direct decision by the court on this issue.

Possible exceptions to the court's apparent rule of public bed ownership may exist. Although conveyance of riparian land adjacent to a freshwater navigable stream generally would not include title to the streambed could be transferred to private ownership by explicit conveyance. In a 1924 decision,<sup>35</sup> the court rejected its previous view that such grants could not be made and recognized the right of the state to make such grants subject to the constitutional restriction<sup>36</sup> that natural oyster beds not be granted. However, the court found previous legislative delegations of authority to the state's land office to be inadequate to effect such conveyances. Therefore, doubt exists as to whether the state's authority to convey the beds of navigable streams has even been exercised.

#### **Other Factors**

Another factor that may have an impact on public recreational rights is the past use of the stream in question by the public.<sup>37</sup> The importance of established public use as a determinant of public rights has already been noted in relation to the applicability of early statutes reserving certain streambeds in public ownership. In addition to the significance of public use in determining the scope of this legislation, public use may also operate through common law mechanisms to create public rights not otherwise given legal recognition.

There are several common law mechanisms through which property rights can be lost by the original



holder and acquired by others on the basis of use, including prescription,<sup>38</sup> implied dedication,<sup>39</sup> and custom.<sup>40</sup> The Virginia Supreme Court has never considered these approaches to the creation of a public right with regard to their potential application to recreational use of streams; therefore, it is not possible to draw conclusions as to their likely impact.

The question of whether stocking of fish by public authorities creates public rights in the water involved is another issue of interest. The Virginia Commission of Game and Inland Fisheries carries out an extensive fish-stocking program which involves streams on both public and private lands. Stocking on private lands is based on an agreement with the landowner allowing public use. This agreement normally extends to one fishing season only and therefore does not appear to establish continuing public rights in private waters.<sup>44</sup>

### SUMMARY

The foregoing analysis reveals a complex body of common and statutory law of potential relevance to the issue of public recreational rights. The most direct component of this body of law consists of certain explicit declarations of public rights. These rights exist in at least three forms: (1) statutory enactments protecting public rights of "fishing and fowling" by reserving certain streambeds in public ownership, (2) a decision of the Virginia Supreme Court regarding recreational rights, and (3) a list of public streams prepared by the Virginia Commission of Game and Inland Fisheries.

These explicit declarations of public rights are of limited scope and leave many basic issues unresolved; the applicable body of law, therefore, must be considered to include less direct provisions that appear relevant to resolution of unanswered questions concerning the scope of public rights. As indicated in the *Boerner* decision, the principal factors consist of a stream's navigability and the ownership of its bed. In some states, navigability alone has been accepted as a legal basis for public recreational use. In other cases, bed ownership is the deciding factor. Of course the two criteria coincide to the extent that navigable streams are considered to have publicly owned beds.

In Virginia, these criteria do not always coincide as a result of two factors. The first consists of the state

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*The navigability of many streams has not been officially established. This determination may require a court decision in each case where navigability is in question.*

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Statute reserving certain streambeds in public ownership. If the statute is applicable (i.e., land grant was made after its effective date in 1780, 1802, or 1873), the bed is publicly owned without regard to the navigability of the stream. The second factor is that land grants conceivably may encompass specific portions of the beds of navigable streams either by means of explicit inclusion in a grant of adjacent riparian property or express grants of parcels of land entirely within the bed of a navigable stream.

Aside from these two special cases, however, it appears that the beds of navigable streams are publicly owned in Virginia. The Virginia Supreme Court has relied consistently on the navigability standard based on the susceptibility of a waterway to use as a highway for commerce, with history of past commercial use serving in most instances as the primary evidence of such susceptibility. However, the court has never fully delineated the impact of the English rule that beds of all nontidal waters are privately owned in Virginia law. Patterns of public usage of the major streams of the Commonwealth indicate general acceptance of the concept of public bed ownership, but this assumption of public ownership is not based on a clear pronouncement in the state's law. Some uncertainty will continue to exist until the court is required explicitly to address the issue.

The navigability of many streams has not been officially established. This determination may require a court decision in each case where navigability is a controversial issue. General Assembly actions pertaining to the stream under consideration may become an issue in a court determination of navigability. Many measures, primarily in the form of declarations of navigability and/or authorizations of navigation improvements, have been enacted. The impact of such provisions in the absence of corroborating evidence of actual navigational use has not been addressed by the Virginia court. The party claiming the existence of public rights may attempt to invoke federal or state regulatory jurisdiction in support of public use. Such attempts are likely to be unsuccessful since governmental regulation generally does not create public rights to use the regulated property. The question as to whether public fish-stocking

programs create public rights may arise. In general, such activity does not establish a public right to use private property, although prohibition of public use will result in termination of stocking. Another factor of possible relevance to a determination of public rights involves the extent of past use. Where a substantial history of such use can be established, the creation of public rights through such mechanisms as prescription, custom, or implied dedication is conceivable. But recognition of public rights created through these means is uncommon and apparently has not occurred in Virginia.

The public right of recreational use therefore appears currently to extend in general to (1) those streams that have been used for commercial navigation purposes and (2) those streams whose beds were reserved in public ownership by the statutes enacted in 1780 and 1802. This position recognizes greater public rights than would exist if the state viewed all beds of nontidal waters to be in private ownership and held that, as indicated by the *Boerner* court, that recreation was not part of the navigation right. But the position as to public rights apparently accepted in Virginia is considerably more restrictive than that taken by some states where all waters physically suitable for public use are open to the public. Thus, the existing status of public recreational rights in Virginia represents an intermediate position between the two extremes.

## OUTLOOK

In the absence of direct legislative action, future development of public recreational rights will rest primarily with the Virginia Supreme Court. Due to the incomplete nature of public rights, the court has considerable flexibility in the position ultimately adopted. It appears that the most likely course of action will consist of a confirmation of the view of public rights delineated in the above summary. The court's previous actions point to this conclusion. Broader views of public rights similar to those taken in other states have not been explicitly rejected by the court, but it has given no indication that such views are acceptable.

Since public rights in Virginia's streams have not been recognized to the same extent as has occurred in certain other states, one of the questions that arises is whether existing rights can be better defined or perhaps expanded by legislative action. While a statutory enactment appears to be an expeditious course of action, this approach is constrained by constitutional protection of property rights. Courts in certain states<sup>42</sup> have nullified legislative action to expand public recreational rights in waters.

In addition to possible expansions of public recreational rights through state regulatory action based on the public nature of the water resource, it is also possible for such expansion to occur through a program of public acquisition of related property rights. The property interest to be acquired could vary from acquisition of a limited right for the public to float a stream to acquisition of fee title to streambeds and adjacent uplands. Of course, such programs would be limited by financial constraints, but selected use of this approach where streams of high recreational value exists merits consideration.

Any effort to expand public rights must be accompanied by consideration of necessary actions to protect landowners from potential abuses related to exercise of public rights. Such occurrences as trespassing on riparian land, littering, and other injury to property can result from uncontrolled use of streams for recreational purposes. Thus a public recreational management program should encompass a public education effort designed to prevent such problems and other control mechanisms of a regulatory nature for application as needed. Such measures could include limitations on rate of use and enforcement of restrictions or prohibitions concerning certain activities. Regulatory programs of this type are somewhat incompatible with the natural outdoor recreational experience. It is conceivable that actual initiation of such controls may prove to be unnecessary; however, the potential existence of problems requiring such solutions cannot be ignored but must be evaluated as part of the governmental role in recreational management, particularly if state action to expand public recreational rights is under consideration.

A more detailed discussion of the issues examined in this report may be found in Bulletin 120 of the Virginia Water Resources Research Center, *Public Reaction on Virginia's Inland Streams: Legal Rights and Landowners' Perception* by William E. Cox and Keith A. Argow.

FOOTNOTES

1. Authorized by the Virginia Scenic Rivers Act, *Va. Code Ann.* sec 10-167 *et seq.* (1973).
2. Legislative enactments designating the scenic rivers contained in *Table I* areas follows: Rivanna River—*Va. Acts of Assembly*, ch. 592 (1975); Goose Creek—*Va. Acts of Assembly*, ch. 64 (1977); Appomattox River—*Va. Acts of Assembly*, ch. 75 (1977); Roanoke River—*Va. Acts of Assembly*, ch. 391 (1975) and ch. 313 (1978); Nottoway River—*Va. Acts of Assembly*, ch. 485 (1979); St. Mary's River—*Va. General Assembly H.D.J. Res 178 (Req Ses.1979)*.
3. See, e.g., Virginia Commission of Outdoor Recreation, "Public Record Summary, Dragon Run Scenic River Proposal" (1971); "Public Record Summary Craig Creek Scenic River Proposal" (1971); and "Public Record Summary, the Maury and Its Headwaters, the Calfpasture Scenic River Proposal" (1972).
4. *Va. Code Ann.* sec 62.11 (1973).
5. 10 *Hening Statutes* 226 (1780).
6. *Va. Acts* ch. 8 (1801-02).
7. *Va. Code* ch. 86, sec. 6 (1819).
8. *Id.* ch. 62, sec.1 (1873).
9. *Boerner v. McCallister*, 197 Va. 169, 89 S.E. 2d 23 (1955).
10. *Id.* at 26.
11. *Id.* at 25.
12. *Id.* at 27.
13. *Id.*
14. James A. Johnson, Division Engineer, North Atlantic Division, U.S. Army Corps of Engineers, "Determination of Navigability, Jackson River, Virginia," February 23, 1978.
15. See *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), *United States v. Grand River Dam Authority*, 363 U.S. 229 (1960).
16. Federal Water Pollution Control Act Amendments of 1972 (as amended by the Clean Water Act of 1977), 33 U.S.C.A. 1251 *et seq.* (1978), *as amended (Supp. 1979)*.
17. *Id.* at 1362 (7).
18. *Ewell v. Lambert*, 177 Va. 222, 13 S.E. 2d 333 at 335 (1941).
19. See *Kelley ex rel. MacMullan v. Haliden*, 51 Mich. App. 176, 214 N.W. 2d 856 (1974), which adopts the recreational use test for Michigan and cites decisions accepting this test in nine other states.
20. *Mead v. Haynes*, 24 Va. (3 Rand.)
21. *United States v. Appalachian Electric Power Co.*, *supra* n.15.
22. Federal Power Act, 16 U.S.C.A. 791a *et seq.* (1974), *as amended (Supp.1979)*.
23. Several of these statutes are listed in the *Appendix* to Virginia Water Resources Research Center Bulletin 120, "Public Recreation on Virginia's Inland Streams: Legal Rights and Landowners' Perceptions."
24. *Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932).
25. *Va. Constitution* art XI, sec.1.
26. See *Diana Shooting Club v. Hustings*, 156 Wis.261, 145 N.W. 816 (1914).
27. *Boerner supra* n.9 at 24.
28. See *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 271 (1828).
29. A Virginia statute (*Va. Code Ann.* sec.110 (1973)) provides that the common law of England remains in effect in Virginia except as repugnant to the Bill of Rights or the state constitution or altered by the General Assembly.
30. See, e.g., *City of Hampton v. Watson*, 119 Va. 95, 89 S.E. 81 (1916) and *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904).
31. *Va. Code Ann.* sec. 62.1-2 (1973).
32. See, e.g., *Boerner supra* n .9 and *Mead supra* n. 20.
33. H.T. Tiffany, *The Law of Real Property*, 3d ed., Vol.2, 1939 (updated by 1979 Cum. Supp.), sec.661 at 700-01.
34. *Boerner supra* n.9 at 26.
35. *James River and Kanawha Power Co. v. Old Dominion Iron and Steel Corp.*, 138 Va.461,122 S.E.344 (1924).
36. *Va. Constitution* art. XI, sec. 3.
37. See text at n.8 *supra*.
38. Virginia cases concerning the concept of prescription included *Town of Gordonsville v. Zinn*, 129 Va. 542,106 S E. 508 (1921) and *Robertson v. Robertson*, 214 Va. 76,197 S.E. 2d 183 (1973).
39. See Tiffany *supra* n.33, Vol.4 sec. 1098 *et seq.* (1975).
40. See, e.g., *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P. 2d 677 (1969).
41. See "Annotation: Right of Publicto Fish in Stream Notwithstanding Objection by Riparian Owner," *American Law Reports Annotated, Second*, Vol. 47, pp. 381418 at 417.
42. See, e.g., *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1905).

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