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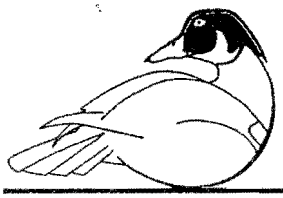
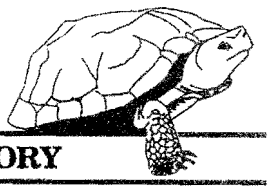


Cacapon



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Public Access and Riparian Rights

by Larry W. George

Editor's note — It's not unusual for us to get phone queries like, "Can I walk down the stream and fish?", "Can we picnic on the riverbank?", and "Do I own the streambed?" Since we ourselves have been unable to get clear answers, we sought help from one of West Virginia's prominent environmental lawyers, Larry George. As you'll see, the Cacapon River basin is smack in the middle of disputed terrain.

West Virginians have historically enjoyed unqualified access to the state's rivers and streams for fishing, boating, and other recreational pursuits. Such uses are premised on the common belief that the state's streambeds are public property. But this belief is not necessarily fact because some 18th century land grants conveyed rivers and streams, including their beds, to riparian landowners. This has left today's landowners and recreational users with uncertain rights.

Look at what's happening in Virginia. In recent years, riparian landowners have claimed title to streambeds under the provisions of colonial and early commonwealth land grants. In the most celebrated situation, landowners along the Jackson River have caused fishermen, canoeists, and commercial rafters to be cited for trespassing. Virginia courts have upheld the right of riparian landowners, under certain land grants, to post streams against trespassing. Consequently, both the rights of riparian landowners and the public's opportunities to enjoy many Virginia streams are in disarray.

Virginia and West Virginia share a common heritage of real property law and land grants. Thus, it's not surprising that a few stream ownership conflicts have occurred in West Virginia's eastern panhandle.

Historically, how did we get into this problem? Prior to 1776, land grants issued by the King of England or the Colonial Council of Virginia typically conveyed ownership of the "land and rivers, waters and water courses" (which included streambeds). After independence, the Commonwealth of Virginia's Land Office was established to market public lands and encourage settlement of western Virginia. Through the 1790s the Land Office conveyed lands with "senior patents", which continued the colonial practice of passing title to streams and their beds.

Growing concerns for free navigation and fishing caused Virginia to review the issue of streambed titles. In this period, the

INSIDE

Is this person trespassing?

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Cacapon

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Land Office increasingly reserved public ownership of riverbeds when issuing patents. In 1792, the Virginia General Assembly reserved for the public all streams remaining in public ownership east of the Allegheny Front, an area that includes the Cacapon River basin. Finally in 1802, the General Assembly prohibited further conveyances to private landowners of the "beds of the rivers and creeks in the western part of this commonwealth". By then, however, nearly all the land and many river sections had already been conveyed to private owners.

The next half century saw most western Virginia lands forfeited due to unpaid property taxes and title disputes. The Virginia Land Office again conveyed these lands with "junior patents" which reserved public ownership of all waters, although the upper limits of public ownership remains undefined to this day. Little public land remained when West Virginia was created in 1863.

A complex mosaic

This evolution of real property transactions left West Virginia a complex mosaic of over 45,000 King's grants, colonial grants, and commonwealth senior and junior patents. These parcels range in size from a few dozen to tens of thousands of acres. **A significant number of these grants and patents convey streambed ownership to present riparian landowners.** All other streambeds are public, administered by the Public Land Corporation (PLC), a unit of the WV Division of Natural Resources.

As if a mix of private and public streambed ownership wasn't complicated enough, another problem lies in the definition of "navigable". Under the "Federal navigational servitude" derived from the commerce clause of the U.S. Constitution, both federal and state court decisions provide public access to certain rivers suitable for navigation, regardless of ownership. These decisions cite 19th century log drives and seasonal use by frontier barges as evidence such waters are "navigable-in-fact". Several West Virginia Supreme Court decisions also affirm that original grants or patents determine ownership of non-navigable streams, but do not resolve questions of riparian rights or public access.

Where streambeds are in public ownership, the riparian landowner holds title to those lands above the "low water mark". The WV Supreme Court has defined this boundary as that point to which a stream recedes at its lowest normal level. However, along navigable rivers, the Court has held that the Federal navigational servitude creates a public easement across riparian lands up to the "ordinary high water mark." This easement boundary is defined as that level on a stream bank where the presence of water is so common as to cause distinctive vegetation and soil conditions.

Uncertain rights

In sum, the undetermined ownership of the beds of non-navigable streams plus the vague delineation of navigable rivers leave riparian landowners and the recreating public with uncertain rights. These waters provide much of the state's fishing, whitewater boating, and other recreational opportunities. Such streams are also subject to expanding recreational property development and the implicit expectations of privacy and dominion.

Although determining streambed ownership on the basis of ancient land grants may be technically correct, it is problematic. West Virginia's erratic patterns of public/private streambed ownership mean that public access and riparian rights will vary greatly depending on the specific facts of each situation. Further, a routine title examination may offer little insight because the grant or patent which is the source of title must be carefully examined in the context of Virginia statutes, Land Office administrative practices at the time of the original conveyance, and subsequent judicial decisions. At best, a reliable determination of streambed title can be burdensome; at worst, determination is impossible if pertinent public records have been lost.

And there's even one more complication: West Virginia's trespass laws do not expressly incorporate rivers and streams. Restricting access or obtaining trespass warrants may subject a riparian landowner to legal action for injunctive relief or even civil liability for damages for false arrest.

Solving the problem

How can we resolve the problem? Historically, the courts have deferred to the executive or legislative branches when questions of riparian and public rights to water resources have arisen. **The most effective approach appears to be the adoption of a uniform policy by the PLC to delineate public property rights in small streams.** Such a uniform policy could define the upper limits of public ownership as a function of average annual streamflow or some other qualitative or quantitative criterion. A reasoned decision by the PLC would require a comprehensive review of the administrative records of the Virginia Land Office, the legislative records of the relevant enactments of the Virginia General Assembly, and other historical data. Assembling such information would be a logical first step by the PLC.

A uniform small stream policy would make a substantial contribution to resolving questions of riparian rights and recreational access. However, it is likely that site specific conflicts would continue to arise when riparian surface owners assert title to a given streambed. In such instances, the PLC could develop procedures to resolve conflicts in legal title and recreational use through negotiation and/or administrative declaratory rulings based on available real property records and historical information. The PLC already has the legal authority to adopt such a uniform small stream policy.

After years of controversy, the Virginia General Assembly is considering legislative options such as enacting a statutory definition of navigability for public access. Such action would be premature in West Virginia since the PLC has not yet developed an adequate information base to evaluate the extent of conflicting public and private interests. Unlike Virginia, our state has the opportunity to carefully consider the issues and establish a process to resolve the conflicts before our citizens experience the same disarray in recreational access and private rights.

Larry W. George practices environmental, real estate, and business law in Charleston, West Virginia. He was formerly Commissioner of the West Virginia Division of Energy and Deputy Director of the Division of Natural Resources.

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