The Right to Float on By: Why the Washington Legislature Should Expand Recreational Access to Washington's Rivers and Streams

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I. INTRODUCTION

"Violators will be shot. Survivors will be shot again." So reads the no trespassing sign pinned to the wall of Harold Honeycutt's shop.[1] Honeycutt's property sits on the banks of the Kettle River, in the northeastern corner of Washington State. The Kettle River originates in the Okanogan Highlands of British Columbia, crosses into the United States near Ferry, Washington, and eventually drains into the Columbia River at Kettle Falls.[2] Like many landowners in this sparsely populated part of the state, Honeycutt purchased his property for its remote characteristic.[3]

While Honeycutt and other property owners in the Kettle River watershed value the privacy afforded by the region's remoteness, the region is also popular with river-based recreationalists. During spring and early summer, when the Kettle's waters are high due to snow melt-off, whitewater kayakers paddle the challenging Kettle River Gorge, which is characterized by a section of technical Class V rapids.[4] Later in the

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1. Mike Lewis, *Property Owner Claims Rafters Have No Right to Float on By*, SEATTLE POST-INTELLIGENCER, Sept. 13, 2003, *available at* http://seattlepi.nwsource.com/local/139487_floaters13.html?searchpagefrom=1&searchdiff=563.

2. DAMES & MOORE, INC. ET AL., KETTLE RIVER WATERSHED INITIAL ASSESSMENT 1 (May 1995), *available at* http://www.ecy.wa.gov/pubs/95164.pdf.

3. Lewis, *supra* note 1; *see also Washington Homeowner Angry at River Users*, KENAI PENINSULA CLARION, Aug. 22, 2003, *available at* http://peninsulaclarion.com/stories/082203/out_082203out006001.shtml [hereinafter *Homeowner Angry at River Users*].

4. JEFF BENNETT & TONYA BENNETT, A GUIDE TO THE WHITEWATER RIVERS OF WASHINGTON 238 (2d ed. 1981). The International Scale of River Difficulty establishes six difficulty classes for rivers (Class I–Class VI). *Id.* at 22–23.

summer, when water levels are lower, flocks of rafts, canoes, and inner tubes float down the Kettle's generally placid waters.[5]

Recreational use of the Kettle River has long resulted in conflicts between recreational river users and riparian landowners.[6] In 1971, rafters on a church-sponsored float trip were shot at while floating down the Kettle River by a riparian property owner who was enraged by what he saw as a constant violation of his property rights.[7] Patricia Stambor, a participant in that trip, was hit in the thigh by a ricocheted bullet.[8] The man who shot Stambor claimed he was firing at rocks to scare away the rafters.[9]

More recently, rafters have accused Honeycutt of firing weapons at them and blocking the Kettle River with logs and other obstructions.[10] Honeycutt believes that he owns the beds underlying the Kettle to mid-channel and hence, the right to exclude boaters from his property. Honeycutt told reporters, "It's been known ever since we lived here that we own to the center of the river."[11] Honeycutt and other property owners argue that rafters trespass on their property, have wild drunken parties on sandbars, and disrupt the isolated sanctity of their property. Rafters see Honeycutt, whose garage is decorated with Confederate flags and anti-immigrant literature, as a backwoods crank whose values do not comport with present times.[12] The Ferry County prosecutor issued an opinion in 2003 stating that "[t]he Kettle River is open for use to the public below the high water marks for boating, rafting, tubing, canoeing, kayaking, fishing or other permissible recreational activity."[13] In 2004, this same prosecutor filed criminal coercion charges against Honeycutt,

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5. RICH LANDERS & DAN HANSEN, PADDLE ROUTES OF THE INLAND NORTHWEST 134 (1998).

6. "Riparian land" is defined as land that contacts a watercourse capable of supporting riparian rights during periods of ordinary flow. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 3.31 (2003). Any contact between the highest point of ordinary flow is sufficient. *Id.*

7. Lewis, *supra* note 1.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* The deed to Honeycutt's property states that the Kettle River is non-navigable and that Honeycutt owns the riverbed to the midpoint. E-mail from Mike Lewis, Seattle Post-Intelligencer, to the author (Feb. 8, 2004) (on file with author).

12. *Homeowner Angry at River Users*, *supra* note 3.

13. Public Use of the Kettle Riverbed and the River Waters, 2003-7 Op. Ferry County Prosecuting Att'y 9 (2003) (on file with author)[hereinafter Ferry County Prosecutor Opinion]. James A. von Sauer, the Ferry County Prosecutor, stated that the Kettle River was navigable when Washington entered the Union in 1889, so title to the river's bed passed to the state. *Id.* at 5–6. Mr. von Sauer also opined that the public trust doctrine protects public recreational access to the Kettle River. *Id.* at 8–9. The concept of navigability-for-title is discussed in Part III.A, *infra*. The public trust doctrine is discussed in Part III.C, *infra*.

alleging that he "tried to force the floaters not to do something they had a right to do."[14]

The concepts of navigability and public trust are at the center of conflicts between river users and riparian landowners. In Washington, the beds of all rivers that are "navigable-in-fact" are owned by the state as public trust lands.[15] The state has the right to use, regulate, and control public trust rivers as common highways for commerce, trade, and intercourse.[16] In contrast, where a river is classified as not navigable-in-fact, riparian property owners enjoy fee-simple ownership of the riverbed to the midpoint of the channel.[17]

Property owners like Honeycutt base their claim to ownership of the riverbed on an unpublished 1925 ruling from a neighboring county that designated the Kettle River as non-navigable.[18] Many landowners in the Kettle River watershed, including Honeycutt, purchased property on the Kettle in reliance upon its classification as a non-navigable river and the corresponding alleged right to exclude others.[19] Nevertheless, the Kettle River remains a popular destination for river rafters, canoeists, and kayakers. Consequently, conflicts between riparian property owners and recreational river users have plagued the region more than thirty years.[20]

The conflicts on the Kettle River mirror conflicts that are occurring with increasing frequency throughout the country.[21] American Whitewater, a nonprofit boater advocacy group that provides river reports and access information, logs between eighty and two hundred reports of con-

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14. Associated Press, *Man Charged with Coercion in Dispute with River Floaters*, SEATTLE TIMES, Nov. 12, 2003, *available at* http://seattletimes.nwsource.com/html/localnews/2002089259_webriver12.html.

15. Watkins v. Dorris, 24 Wash. 636, 644, 64 P. 840, 843 (1901).

16. New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 503, 64 P. 735, 738–39 (1901).

17. *Watkins*, 24 Wash at 644, 64 P. at 843.

18. Tomas Alex Tizon, *Landowners, Shooing Water Sportsmen, Claim a River*, PHILA. INQUIRER, Nov. 28, 2003, *available at* http://www.timesleader.com/mld/inquirer/news/nation/7365350.htm. Mr. Honeycutt and other riparians rely upon *Kettle River Industrial & Development Co. v. State*, No. 8282 (Stevens Co. Super. Ct. Dec. 10, 1925) to argue that they own the bed of the Kettle River adjacent to their properties. Ferry County Prosecutor Opinion, *supra* note 13, at 4. In *Kettle River Industrial*, the Stevens County Superior Court ruled that "the Kettle River, which rises in the Dominion of Canada and flows through the state of Washington to the Columbia River, is a non-navigable stream." No. 8282 at 1. However, the Ferry County Prosecutor opined that *Kettle River Industrial* "has no application whatsoever to land located solely in Ferry County" because the Stevens County Superior Court had no jurisdiction to render an opinion regarding land in Ferry County and was without authority to quiet title to land outside of Stevens County. Ferry County Prosecutor Opinion, *supra* note 13, at 4.

19. Lewis, *supra* note 1; *Homeowner Angry at River Users*, *supra* note 3.

20. Lewis, *supra* note 1.

21. *See generally* Patrick O'Driscoll, *Boating Rights Hit Choppy Waters*, USA TODAY, July 27, 2001, at A3 (discussing the nationwide rise in conflicts between riparian property owners and river recreationalists).

flicts between landowners and river recreationalists each year.[22] Kayakers in Colorado have been harassed by police helicopters for floating public rivers, and landowners in New York and other states have strung barbed wire across public rivers to prevent river access.[23] A Colorado landowner brought a civil trespass suit against a river outfitting company, seeking an injunction to stop floating on the Lake Fork of the Gunnison River.[24] Musician and actor Huey Lewis, who owns riparian property in Montana, has fenced his property to deter fly fishers from legally accessing a traditionally fished tributary of the Bitterroot River.[25] Montana has one of the nation's most liberal public access laws,[26] and Lewis' attempts to block access to Mitchell Slough have been met by protests from local anglers, including attorneys and state representatives.[27]

Conflicts between recreationalists and riparian property owners also play out in state politics. For example, in 2000, Oregon voters passed Measure 7, which required governments to pay private property owners for any reduction in property value resulting from government regulation, such as expanded recreational river access.[28] Although Measure 7 was held unconstitutional by the Oregon Supreme Court, its supporters reintroduced an amended version called "Son of 7"[29] that was approved by sixty-one percent of Oregon voters in 2004.[30]

Shifting cultural values seem to lie at the heart of these conflicts. As more people measure the value of remaining wild lands using an aesthetic and recreational calculus instead of an extractive and isolationist calculus, traditional user groups and residents of remote areas of the American West are challenged and displaced by newcomers who bring different and sometimes competing values.[31]

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22. *Id.*

23. Jason Robertson, *Why 'Access'?*, American Whitewater (Apr. 26, 2001), *available at* http://www.americanwhitewater.org/archive/article/175.

24. Lu Snyder, *Rafting Companies Watch Water Court Case*, SUMMIT DAILY NEWS, May 13, 2002, *available at* http://www.summitdaily.com/article/20020408/NEWS/204080102&SearchID=73202317030441.

25. Daryl Gadbow, *Anglers Will Go onto Huey Lewis' Land to Make a Point*, MISSOULIAN, Aug. 2, 2003, *available at* http://www.missoulian.com/articles/2003/08/02/news/mtregional/znews06.txt.

26. MONT. CODE ANN. § 23-2-301, -302 (2002).

27. Gadbow, *supra* note 25.

28. Stephen D. Osborne et al., *Laws Governing Recreational Access To Waters of the Columbia Basin: Survey and Analysis*, 33 ENVTL. L. 399, 448 n.7 (2003).

29. *Id.*

30. Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A58185-2005Feb27?language=printer.

31. *See generally* Jan G. Laitos, *The Transformation of Public Lands*, 26 ECOLOGY L.Q. 140, 144 (1999).

As recreational use of Washington's rivers increases, conflicts between river users and riparian property owners will surely continue, if not increase. Washington's laws of public trust and navigability, which were established more than one hundred years ago, are inadequate for resolving these modern conflicts. Other states, notably Montana, have resolved similar conflicts by enacting legislation that provides for broad public access to the state's rivers while protecting basic property rights.[32] Washington should follow suit by establishing a broad public right of recreational access to Washington's inland waters. Such an enactment would not be a radical departure from current common law jurisprudence. By enacting legislation similar to Montana's Stream Access Law, the Washington Legislature would recognize the importance of water-based recreation to the state's population and economy while respecting property rights. Additionally, legislation that expanded public recreational access would echo formal state policy.

This Comment surveys the contemporary status of Washington's navigability doctrine and public trust laws and proposes a solution to the increased conflicts between riparian property owners and recreational river users. Part II addresses the federal navigability jurisprudence that establishes the minimum standards for determining whether a river is navigable. Part III surveys the law of navigability and the public trust doctrine in Washington. Part IV highlights the importance of recreation to Washington residents. Part V analyzes how other jurisdictions, particularly Montana, have resolved conflicts between recreationalists and riparian property owners. Part VI argues that Washington should adopt a recreational boat test to determine a river's navigability and demonstrates that riparian landowners will not be exposed to increased liability if Washington adopts such a test. Part VII concludes by discussing the likely implications for landowners and recreationalists if Washington adopts a modern stream access law based on a recreational boat test.

II. FEDERAL NAVIGABILITY JURISPRUDENCE

The federal navigability-for-title test provides the foundation for determining whether property in a waterway is owned by the state or owned privately.[33] Navigability-for-title is exclusively a question of

32. The Montana Stream Access Law established two types of rivers: (1) rivers that are navigable-in-fact for the purpose of determining state ownership of underlying beds, and (2) all other rivers. MONT. CODE ANN. § 23-2-301, -302 (2002). The law declares that "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters." *Id.*

33. The Submerged Lands Act of 1953 also vested in the states "title to and ownership of the lands beneath navigable waters within the boundaries of the respective states." 43 U.S.C. § 1311(a)

law.[34] In *Martin v. Waddell*, the United States Supreme Court established the basic framework of federal navigability in the United States.[35] The Court looked to English common law, which recognized that the King held title to all coastlines and that the public had a right of fishing in navigable arms (streams) that flowed off of the ocean, unless the King or some other person had gained exclusive ownership in the bed of the river.[36] After examining English common law, the Court held that, at the time of the American Revolution, "the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."[37]

Subsequently, the Court provided a test for distinguishing those rivers that passed to the states and those that remain in private hands.[38] In *The Daniel Ball*, the Court held that all rivers that are navigable-in-fact are public rivers, and thus are owned by the states.[39] Rivers are navigable-in-fact when "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[40] Furthermore, a waterway is navigable within the meaning of acts of Congress only when the waterway "form[s] in [its] ordinary condition by [itself], or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."[41] This latter clause, referring to interstate commerce, defines the outer boundaries of Congress's ability to regulate ownership and access to the waterways under the Commerce Clause.[42]

(2000). Navigability determines the extent of federal admiralty jurisdiction. U.S. CONST. art. III, § 2, cl. 1. Navigability also determines the extent of Congress's ability to regulate under the Commerce Clause. Gibbons v. Ogden, 22 U.S. 1, 22 (1824).

34. United States v. Oregon, 295 U.S. 1, 14 (1935) (stating that "[s]ince the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the state under which the lands lie are navigable or non-navigable, is a federal, not a local one. It is, therefore, to be determined according to the law and usages recognized and applied in the federal courts.").

35. 41 U.S. 367 (1842).

36. *Id.* at 388–89.

37. *Id.* at 410.

38. The Daniel Ball, 77 U.S. 557, 563 (1870). Title to the beds of navigable rivers passed to the original thirteen states at the time of the American Revolution. *Martin*, 41 U.S. at 410. Under the equal footing doctrine, title in the beds of navigable rivers passed to other states at the time they were admitted to the Union. Pollard v. Hagan, 44 U.S. 212, 223 (1845).

39. 77 U.S. at 563.

40. *Id.*

41. *Id.*

42. *Id.*

The Supreme Court has liberally defined the concept of navigability-in-fact by adopting a test that measures capacity for commercial use. A river becomes a public highway "if it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted."[43] In *The Montello*, the Court held that a stream or river is navigable-in-fact when it is "generally and commonly useful to some purpose of trade or agriculture."[44] However, the Court was unwilling to stretch the rule to include "every small creek in which a fishing skiff or gunning canoe can be made to float at high water."[45] Despite the Court's apparent distinction based on the type of boat used, the concept of navigability is actually less concerned with the type of boats used or the presence of occasional difficulties, such as logjams, rapids, and waterfalls. Instead, the navigability-for-title test focuses on the question of whether the stream, in its natural and ordinary condition, affords a channel for useful commerce.[46] In other words, a river's capacity for commercial use determines whether the river is navigable.

The navigability-for-title test is a backwards looking test[47] that has the potential to create disparate classifications of rivers with regard to recreational boating. To determine whether a river is navigable, courts will look at the condition of the waterway at the time of statehood.[48] A river must have been navigable-in-fact at the time of statehood, meaning that the river was capable of supporting commercial use.[49]

After determining that the river was capable of supporting commerce at the time of statehood, courts generally also require that the type of commerce that the river could have supported be a "legitimate" form of commerce. This concept is illustrated by the fact that in *The Montello*, the Supreme Court was unwilling to classify as navigable any small stream that could float a gunning canoe or raft at high tide on the ground that such a stream could not support a legitimate form of commerce.[50] In contrast, in *Alaska v. Ahtna*, the Ninth Circuit Court of Appeals classified the lower Gulkana River as navigable, in part because commercial guided fishing and sightseeing tours had been conducted on the river since 1970.[51] In holding that the Lower Gulkana was navigable, the

43. The Montello, 87 U.S. 430, 441 (1874).

44. *Id.* at 442.

45. *Id.*

46. United States v. Holt Bank, 270 U.S. 49, 56 (1926).

47. TARLOCK, *supra* note 6, § 8.3.

48. Alaska v. Ahtna, Inc., 891 F.2d 1401, 1404 (9th Cir. 1989).

49. *Id.*; *see also* United States v. Utah, 283 U.S. 64, 82 (1931) (holding that "the question of . . . susceptibility in the ordinary condition of the rivers, rather than of the mere manner or extent of actual use, is the crucial question . . . [t]he extent of existing commerce is not the test").

50. The Montello, 87 U.S. 430, 442 (1874).

51. *Ahtna*, 891 F.2d at 1405.

Ninth Circuit deemed recreational rafting and sightseeing to be legitimate forms of commerce because they were common forms of commerce when Alaska became a state in 1959.[52] Nonetheless, federal courts deciding cases in states that obtained statehood in the nineteenth century, such as Washington, almost uniformly refused to hold that recreational use alone is sufficient to qualify a river as navigable-in-fact.

As demonstrated by the incongruent results in *Ahtna* and other federal navigability-for-title cases, the determination of navigability seems to be less dependent on any characteristic of the rivers at issue. Instead, the classification of navigable-in-fact seems to depend on the historical and social context that existed at the time of statehood. As commercial use of wild lands in the West shifts from traditional extractive enterprises to aesthetic and recreational activities, the backwards looking federal navigability-for-title test will continue to produce disparate results and grant broader title to states that entered the Union at a later date.[53]

Determinations reached under the navigability-for-title test are permanent; thus, a river's status as navigable will not change because of physical changes in the river or changes in the river's use.[54] This concept is called "indelible navigability."[55] In *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*,[56] the Ninth Circuit held that the White River in Washington was navigable-in-fact and subject to regulation by the Federal Energy Regulatory Commission, disregarding that a dam had been built on the river in 1911. The court held that once a river is found to be navigable, it remains so.[57] Even though the dam significantly diminished the flow of the White River and rendered it virtually useless for navigation, the court concluded that the river was navigable-in-fact because at the time of statehood it was "susceptible of being used, in its natural and ordinary condition as a highway for useful commerce."[58]

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52. *Id.*

53. *See generally* Jennie Bricker, *Navigability and Public Use: Charting a Course up the Sandy River*, 38 WILLAMETTE L. REV. 93, 101–04 (2002); Osborne et al., *supra* note 28, at 408–09.

54. Puget Sound Power & Light Co. v. Fed. Energy Reg. Comm'n., 644 F.2d 785, 790 (9th Cir. 1981).

55. Chris A. Shafer, *Public Rights in Michigan's Streams: Towards a Modern Definition of Navigability*, 45 WAYNE L. REV. 9, 21 (1999) (citing David M. Guinn, *An Analysis of Navigable Waters in the United States*, 18 BAYLOR L. REV. 559, 563 (1966)).

56. 644 F.2d at 787.

57. *Id.*

58. *Id.* (citing Rochester Gas & Elec. Corp. v. Fed. Power Comm'n, 344 F.2d 594, 596 (2d Cir. 1965)).

III. NAVIGABILITY AND THE PUBLIC TRUST IN WASHINGTON STATE

The federal navigability-for-title test establishes the minimum standards for determining when title to a riverbed is held by a state. States, however, may establish more expansive standards for determining when title to streambeds is held by the state.[59] Thus, states may own title to the beds of rivers and streams that do not satisfy the federal navigability-for-title test.

When Washington became a state in 1888, title to the beds of all rivers and streams that satisfied the federal navigability-for-title test passed to the state under the equal footing doctrine.[60] Washington courts have created a two-tiered navigability scheme. In the first tier, all rivers are navigable, and thus the state owns their beds, if they satisfy the federal navigability-for-title test.[61] In the second tier, Washington courts have deemed that even if a river falls short of the federal navigability-for-title test, which requires capacity for commercial use at the time of statehood, a river may still be navigable for public use.[62] In this category, the title to the waterways' beds belongs to riparian property owners, rather than the state.[63] In the following discussion, section A explains Washington's two-tiered system for determining public access to rivers and streams. Section B continues with an examination of Washington's public trust doctrine, which provides an alternative basis for public access to rivers and streams.

A. Navigability-for-Title and Public Access in Washington State

The first tier of Washington's navigability scheme includes those rivers that satisfy the federal navigability-for-title test. As noted above, the equal footing doctrine provided Washington with ownership to the riverbeds of all navigable waters when it became a state in 1888.[64] The

59. *See* Shively v. Bowlby, 152 U.S. 1, 40 (1894).

60. *See* Pollard v. Hagan, 44 U.S. 212, 223 (1845). The Equal Footing Doctrine is based on a 1797 congressional mandate, stating that "[w]henever any of the said states shall have sixty-thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." *Id.*

61. *See* Harris v. Hylebos Indus., Inc., 81 Wash. 2d 770, 771, 505 P.2d 457, 458 (1973); Weden v. San Juan County, 135 Wash. 2d 678, 699, 958 P.2d 273, 283 (1998).

62. *See* Fortson Shingle Co. v. Skagland, 77 Wash. 8, 10–11, 137 P. 304, 305 (1913).

63. Watkins v. Dorris, 24 Wash. 636, 645, 64 P. 840, 843 (1901). Washington's common law framework shares features with the framework codified by Montana's Stream Access Law. *See* MONT. CODE ANN. § 23-2-301, -302 (2002).

64. *See* Pollard v. Hagan, 44 U.S. 212, 223 (1845). Washington common law defines "river" as "a natural stream of water flowing betwixt banks or walls in a bed of considerable depth and width, being so called whether its current sets always one way or flows and reflows with the tide, or a body of flowing water, a running stream of no specific dimensions, larger than a brook or rivulet, and pent on either side by walls or banks." Larson v. Nelson, 118 Wash. App. 797, 806–07, 77 P.3d 671, 676 (2003).

Washington Constitution establishes the outer bounds of state ownership of riverbeds:[65]

> The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.[66]

The Washington Constitution distinguishes between the nature of the state's ownership with respect to the riverbeds and the right of navigation: The state owns the beds of navigable rivers in fee,[67] but holds the right of navigation "in trust for the whole people" of this state.[68] Because the state holds the right to navigation in trust, all meandered streams[69] and navigable streams in Washington are public highways.[70] If a stream is not meandered, the court must determine whether the stream is navigable-in-fact.[71] If the stream is navigable-in-fact, the state owns the bed of the stream below the ordinary high-water mark.[72] An individual claiming a right of access has the burden of proving that the stream is navigable-in-fact.[73]

The second tier of Washington's navigability scheme encompasses the rivers and streams that fall short of the federal navigability-for-title test, but are nonetheless capable of commercial use. In the early twentieth century, the Washington Supreme Court held that the right of commercial access to Washington's rivers extends beyond the navigability-for-title test. The court created a right for public commercial access for rivers where the beds are privately owned. In *Monroe Mill Co. v. Menzel*, the court held that the West Fork of Wood's Creek was capable of floating shingle bolts; therefore, it was navigable for limited commercial purposes.[74] The conflict in *Monroe Mill Co.* centered on a dam that barred

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65. WASH. CONST. art. XVII, § 1.

66. *Id.*

67. Muir v. Johnson, 49 Wash. 66, 68, 94 P. 899, 900 (1908).

68. State v. Sturtevant, 76 Wash. 158, 165, 135 P. 1035, 1037 (1915).

69. Meandered streams are defined as streams that are affected by the ebb and flow of tides. This Comment does not explore the issues relating to title to tidelands and meandered streams, except where necessary for the discussion of navigability.

70. Act of Mar. 17, 1890, ch. 16, § 9, 1889–1890 Wash. Laws 470 (stating that "all meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways").

71. Watkins v. Dorris, 24 Wash. 636, 644, 64 P. 840, 843 (1901).

72. *Id.*

73. *See* East Hoquiam Boom & Logging Co. v. Neeson, 20 Wash. 142, 149, 54 P. 1001, 1003 (1898).

74. 35 Wash. 487, 494, 77 P. 813, 815 (1904).

an upstream riparian property owner from transporting shingle bolts downriver.[75] The court found the river to be navigable, reasoning that with the removal of the dam, the creek would be capable of navigation by shingle bolts during periods of heavy rain and regularly recurring freshets.[76] The court justified its conclusion on the grounds of "commercial convenience and necessity."[77] Specifically, access to rivers capable of floating shingle bolts was necessary because Washington timber was located primarily in areas inaccessible except by river and because the transport of shingle bolts to market was vital to Washington's "great logging industry."[78] To further these economic goals, the court was willing to burden private property by allowing commercial public access. The court reasoned that private property with non-navigable-for-title streams were "naturally burdened . . . by the streams themselves, with their defined banks and flowing water, and [thus], it is not an additional burden to the landowner for the timber product to float along with the already running water."[79]

The court noted, however, the rights of riparian property owners must be "strictly and carefully guarded" to ensure that their land is not damaged.[80] Moreover, "[t]he fundamental principle of right in the landowner to control his own premises outside of the bed of the stream must not be violated."[81] Therefore, the driver of shingle bolts or logs must "confine himself and his operations to the highway itself—the bed of the stream—until the landowner consents to the use of the banks, or until the right to the use has been acquired in a lawful way."[82]

Under this analysis, Washington courts have distinguished between rivers that are navigable highways for general commerce (navigable-for-title) and rivers that have a capacity for navigation for the limited purposes of floating commercial forest products.[83] As long as a river has a "capacity for valuable floatage," Washington courts will generally find that the public has a right of navigation for limited commercial purposes, even though the lands underlying the waters are privately held.[84]

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75. *Id.* at 490, 77 P. at 814.

76. *Id.* at 493–94, 77 P. at 815. "Freshets" are regularly occurring seasonal increases in the volume of a river or stream, usually resulting from snowmelt. Dillabough v. Okanogan County, 105 Wash. 609, 610, 178 P. 802, 803 (1919).

77. *Monroe Mill Co.*, 35 Wash. at 494, 77 P. at 815.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 498, 77 P. at 816.

82. *Id.*

83. Watkins v. Dorris, 24 Wash. 644–45, 64 P. 840, 843 (1901).

84. Sumner Lumber & Shingle Co. v. Pac. Coast Power Co., 72 Wash. 631, 635, 131 P. 220, 222 (1913).

Some Washington courts have not, however, consistently applied the capacity for valuable floatage test. Instead, they have determined that certain flows of water are not navigable by relying upon an "actual use" test rather than a "capacity-for-use" test.[85] In *Griffith v. Holman*, the Washington Supreme Court denied recreational access to the Little Spokane River.[86] The river averaged forty feet wide and four feet deep at high water, but the court classified the river as non-navigable because it had only been "used to a limited extent for the purposes of pleasure by the running of rowboats up and down said river by persons desiring to fish for pleasure."[87] The court relied on the Little Spokane's actual use, rather than its capacity for useful (commercial) navigation. Despite its willingness to burden private riparian lands with a public easement for commercial use, the court would not burden these lands with a public easement for recreational use.

In contrast to its application of an actual use test in *Griffith*, in *Lant v. Wolverton* the Washington Supreme Court held that Pacific Lake was a navigable body of water based on the lake's capacity for use.[88] In reaching its decision, the court relied on the lake's dimensions and noted that the lake had not been used for traditional commerce; instead, the lake had been frequently used for pleasure boating, fishing, and bathing.[89] The court properly held, however, that the test "is not whether it has been used for commerce in the past, but whether it is capable of such use. If it has such capacity, it cannot be assumed that it will not sometime be used for that purpose, because only time will tell what its future use will be. The question is determined by capacity, not by use."[90]

B. The Public Trust Doctrine in Washington State

The public trust doctrine represents an additional basis for public access to Washington's rivers and streams, including access for recreational purposes.[91] The public trust doctrine, a judicial doctrine with an-

85. *Id.* at 635, 131 P. at 222.

86. Griffith v. Holman, 23 Wash. 347, 359, 63 P. 239, 243 (1900); *see also* Francis J. Conklin, *Floating Down the River: In re: The Little Spokane*, 17 GONZ. L. REV. 869, 890–92 (1982).

87. *Griffith*, 23 Wash. at 349, 63 P. at 240.

88. 122 Wash. 63, 64, 210 P. 1, 2 (1922).

89. *Id.* at 63–64, 210 P. at 1–2.

90. *Id.*; *see also* Ralph W. Johnson, *Riparian and Public Rights To Lakes and Streams*, 35 WASH. L. REV. 580, 609 (1960) (arguing that Washington courts have adopted two sets of rules regarding navigability, one for lakes and one for streams).

91. Although Washington courts recognized the doctrine, they did not utilize the term "public trust" until 1987. Caminiti v. Boyle, 107 Wash. 2d 662, 669, 732 P.2d 989, 995 (1987). For a history of the public trust doctrine in Washington, see generally F. Lorraine Bodi, *The Public Trust Doctrine in the State of Washington: Does It Make Any Difference To the Public*, 19 ENVTL. L. 645, 646–50 (1989).

cient roots in the common law, provides public ownership interests in navigable waters and underlying lands.[92] The public trust doctrine facilitates public access to navigable waters for the purposes of navigation, commerce, and recreation.[93] Under this doctrine, the public right of access arises from the judicial recognition of a property right, like an easement, that the state owns for the benefit of the public.[94] The state's interest in public trust land is nearly permanent, and the state may not dispose of trust land "in a way that the public's right of access is substantially impaired, unless the action promotes the overall interests of the public."[95] Thus, the public's right to access trust lands may only be defeated by express legislation that furthers public, rather than private, values.[96]

In Washington, the public trust encompasses the beds of navigable waters and the waters themselves.[97] In *New Whatcom v. Fairhaven Land Co.*, the court interpreted article 17, section 1 of the Washington Constitution to extend the public trust doctrine to all the state's navigable waters.[98] The court held that state trust lands were burdened with an easement "for the purpose of travel, as on a public highway."[99]

The Washington Supreme Court has extended the public trust doctrine beyond the limits of commercial use by recognizing that the state's waters are useful for recreational activities. State ownership of trust lands is classified by the concepts of *just privatum* and *jus publicum*.[100] Under *jus privatum*, the state holds "full proprietary rights in tidelands and shorelands and has fee simple title to such lands."[101] The state may convey title to *jus privatum* lands in any manner not forbidden by state or federal constitutions.[102] Under *jus publicum*, "the public has an overriding interest in navigable waterways and lands under them."[103] The state cannot convey *jus publicum* interests; thus, the state retains the sovereignty and dominion and holds the waterways in trust for the public.[104] The court defined the *jus publicum* interest as the right "of navigation, together with its incidental rights of fishing, boating, swimming, water-

92. Johnson, *supra* note 90, at 525–26.

93. *Id.*

94. *Id.*

95. *See* Rettkowski v. Dep't of Ecology, 122 Wash. 2d 219, 230, 858 P.2d 232, 237 (1993).

96. *Id.* at 230, 858 P.2d at 237.

97. Ralph Johnson, et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 526 (1992).

98. *Id.* at 524.

99. New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 504, 499 P.2d 735, 739 (1901)).

100. Caminiti v. Boyle, 107 Wash. 2d 662, 668, 732 P.2d 989, 993–94 (1987).

101. *Id.* at 668, 732 P.2d at 993.

102. *Id.*

103. *Id.* at 668, 732 P.2d at 994.

104. *Id.* at 669, 732 P.2d at 994.

skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters."[105] While the public trust doctrine currently applies only to navigable waters, scholars have noted that the doctrine provides strong protections for public use, including recreational uses, of the state's waters.[106]

IV. OUTDOOR RECREATION IN WASHINGTON STATE

In recent years, the use of public lands in the United States has undergone a fundamental shift.[107] Traditionally, public lands have been valued and used primarily for their commodity resources, including timber, minerals, and livestock grazing.[108] Extractive use of public lands decreased dramatically during the last two decades of the twentieth century. Since the mid-twentieth century, however, recreation and preservation have emerged as the two dominant uses of public lands.[109] In Washington, more than three million people participate in some form of outdoor recreation annually.[110] As the state's population continues to grow, the number of people participating in outdoor activities in Washington is projected to increase significantly over the next twenty years.[111] Prompted by the increased popularity and economic benefits of outdoor recreation, the Washington Legislature has recognized a need to enhance the state's recreational resources.[112] This section will examine the shift from extraction to recreation on public lands, the patterns of participation and economic benefits of outdoor recreation in Washington, and the ways in which the Washington State government has recognized and attempted to promote outdoor recreation.

A. From Extraction to Recreation: Shifting Uses of Public Lands

Public land use in Washington has shifted from resource extraction to recreation. Between the mid 1960s and early 1980s, annual timber harvests on National Forest Service lands decreased from twelve billion

105. *Id.*

106. Osborne et al., *supra* note 28, at 441–42.

107. Laitos, *supra* note 31, at 143–44.

108. *Id.* at 146.

109. *Id.* at 160.

110. OUTDOOR INDUSTRY FOUNDATION, OUTDOOR RECREATION PARTICIPATION AND SPENDING STUDY, A STATE BY STATE PERSPECTIVE 2, *available at* http://www.outdoorindustry.org/State_by_State_Study.pdf (last visited Apr. 20, 2005).

111. INTERAGENCY COMMITTEE FOR OUTDOOR RECREATION, ESTIMATES OF FUTURE PARTICIPATION IN OUTDOOR RECREATION IN WASHINGTON STATE 4 (Mar. 2003), *available at* http://www.iac.wa.gov/Documents/IAC/Recreation_Trends/Est_Future_Participation_Outdoor_Rec_3-03.pdf [hereinafter ESTIMATES OF FUTURE PARTICIPATION].

112. WASH. REV. CODE § 79A.25.005 (2003).

board feet to less than four billion board feet.[113] Both hardrock mining and energy mineral mining activities on public lands also declined dramatically during this same period.[114] Similarly, livestock grazing lands diminished sharply in the latter half of the twentieth century.[115]

While extractive use of public lands decreased, recreation and preservation emerged as the dominant uses of public lands.[116] Recreational use of National Forest Service lands has increased more than 100 percent since 1970.[117] Likewise, recreational use of Bureau of Land Management lands increased 176 percent from 1982 to 1996.[118] Between 1950 and 1995, the National Parks experienced a 711 percent increase in visitors.[119] More than 149 million Americans, or two-thirds of the population, participate in some form of outdoor recreation.[120] Nationally, outdoor recreation is a $40 billion industry that accounts for 768,000 full-time jobs and $13 billion in annual wages.[121] In 1996, Americans spent nearly $100 million on canoes and kayaks alone.[122]

B. Patterns of Participation and Economic Benefit of Outdoor Recreation in Washington State

Washington residents participate in outdoor recreational activities at high rates, particularly in water-based activities that would be affected by the adoption of a recreational capacity-for-use standard for river access. More than three million Washington residents participate in outdoor recreational activities.[123] Nationally, Washington ranks in the top fifteen

113. Laitos, *supra* note 31, at 153.

114. *Id.* at 156–60.

115. *Id.* at 160. Between 1955 and 1996, livestock grazing on federal lands fell off forty-five percent. *Id.*

116. *Id.* at 160.

117. *Id.* at 161.

118. *Id.* at 161–62.

119. *Id.* at 162.

120. OUTDOOR INDUSTRY FOUNDATION, *supra* note 110, at 3.

121. TRUST FOR PUBLIC LAND, THE ECONOMIC BENEFITS OF PARKS AND OPEN SPACES 23, *available at* http://www.tpl.org/content_documents/Chap4.pdf (last visited Apr. 20, 2005).

122. *Id.* at 27.

123. OUTDOOR INDUSTRY FOUNDATION, *supra* note 110, at 3. The Outdoor Industry Foundation ("OIF") lists state-by-state participation rates for twenty-one different human-powered activities, such as hiking, mountaineering, mountain biking, fly fishing, canoeing, and kayaking. *Id.* The OIF reported the following levels of freshwater-based recreation in Washington for 2001: whitewater rafting, 478,026 participants; whitewater kayaking, 132,026 participants; recreational kayaking, 264,053 participants; fly-fishing, 346,000 participants; and canoeing, 582,737 participants. *Id.* The OIF defines a "participant" as a person over the age of 16 who reports participating in an activity at least once per year. *Id.* The Washington Inter-Agency Committee for Outdoor Recreation ("WICOR") reports that more than eighteen million Washingtonians participate in some form of outdoor activity. *See generally* INTERAGENCY COMMITTEE FOR OUTDOOR RECREATION, AN ASSESSMENT OF OUTDOOR RECREATION IN WASHINGTON STATE 116 (Oct. 2002), *available at* http://www.iac.wa.gov/Documents/IAC/Recreation_Trends/SCORP_Oct_2002.pdf [hereinafter

states for numbers of people who participate in several water sports: whitewater rafting, 5th; whitewater kayaking, 7th; recreational kayaking, 5th; fly fishing, 14th; and canoeing, 14th.[124]

Outdoor recreation makes a significant economic impact in Washington. A recent Department of Fish and Wildlife report concluded that hunters, fishers, and wildlife viewers spend approximately $2.1 billion annually in Washington.[125] According to the Outdoor Industry Foundation, Washingtonians spend more than $209 million annually on equipment for the fifteen human-powered activities surveyed.[126]

C. Washington State Policy Regarding Recreation

The Washington Legislature has recognized explicitly the importance of recreation to the state's population. Enacting legislation that expands recreational access to Washington's rivers and streams would be consistent with this policy. In 1989, the Washington Legislature recognized a need to enhance the state's recreational resources.[127] The legislature found that population growth and increased urbanization resulted in the overcrowding of existing recreational lands and an overall decrease in lands suitable for outdoor recreation.[128] Diminished outdoor recreational opportunities negatively affect the health and well-being of Washingtonians.[129] The legislature specifically addressed water-based recreation when it declared the following:

> Washington is uniquely endowed with fresh and salt waters rich in scenic and recreational value. This outdoor heritage enriches the lives of citizens, attracts new residents and businesses to the state, and is a major support of its expanding tourist industry. Rising population, increased income and leisure time, and the rapid growth of boating and other water sports have greatly increased the demand for water related recreation, while waterfront

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ASSESSMENT OF OUTDOOR RECREATION]. WICOR uses a broader definition of outdoor recreation that includes activities not accounted for by the OIF, such as team sports, motorized recreation, gardening, and urban walking. *Id.*

124. OUTDOOR INDUSTRY FOUNDATION, *supra* note 110, at 10, 16, 18–21.

125. Jeff Koenings, *Outdoor Recreation Plays a Big Role in State Economy*, SEATTLE TIMES, Nov. 19, 2003, *available at* http://seattletimes.nwsource.com/html/opinion/2001794928_koenings19.html; WASHINGTON DEP'T OF FISH AND WILDLIFE, ECONOMIC BENEFITS OF FISH AND WILDLIFE RECREATION IN WASHINGTON STATE 1 (Dec. 2002), *available at* http://wdfw.wa.gov/factshts/econ_benefits_rec.htm. The Department of Fish and Wildlife Fact Sheet accounts for a wide range of activities that would not be impacted by an expansion of recreational access to freshwater streams and rivers, including saltwater sport fishing, clam digging, and saltwater scuba diving. *See id.*

126. OUTDOOR INDUSTRY FOUNDATION, *supra* note 110, at 26.

127. WASH. REV. CODE § 79A.25.005(1) (2003).

128. *Id.*

129. *See id.*

> land is rapidly rising in value and disappearing from public use. There is consequently an urgent need for the acquisition or improvement of waterfront land on fresh and salt water suitable for marine recreational use by Washington residents and visitors.[130]

Based on these findings, the Washington Legislature declared that the policy of the state and its agencies is to "preserve, conserve, and enhance recreational resources and open space."[131]

While Washington has an abundance of lands suitable for recreation, the 2002 Washington Inter-Agency Committee for Outdoor Recreation ("WICOR") report indicates that Washingtonians are feeling more crowded in all recreational pursuits.[132] Furthermore, the public contends that physical access to recreational resources, rather than a lack of supply, is a critical issue.[133] WICOR predicts that statewide levels of recreational use will increase over the next twenty years consistent with the following projected growth rates: canoeing, 30 percent; rafting, 30 percent; and fishing, 20 percent.[134]

By expanding recreational access to Washington's rivers and streams, the Washington Legislature would be acting in conformity with existing policy. A recreational capacity-for-use standard would "enhance recreational resources" [135] by giving kayakers, fishers, and other recreationalists greater access to Washington's freshwater resources. Such an enactment would be a compelling recognition of the significant social and economic effects produced by recreation in Washington.

V. CONFLICT AND RESOLUTION IN OTHER JURISDICTIONS

As economies driven by recreational fishing and boating are increasingly replacing traditional extractive economies, many states have expanded public access to waterways by adopting a recreational boat test to determine the navigability of a river. Today, at least thirteen states have adopted a "capacity for recreational use" test to identify the rivers and lakes that are accessible to the public for recreational use.[136] Many state statutes exemplify the modern trend of balancing widespread rec-

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130. § 79A.25.005(2).

131. § 79A.25.005(1).

132. ASSESSMENT OF OUTDOOR RECREATION, *supra* note 123, at 2. WICOR reports that there are approximately ten million acres of public lands managed in whole or in part for outdoor recreation in Washington. *Id.*

133. *Id.*

134. ESTIMATES OF FUTURE PARTICIPATION, *supra* note 111, at 37, 44.

135. WASH. REV. CODE § 79A.25.005(1) (2003).

136. Shafer, *supra* note 55, at 41. Nine states have explicitly refused to adopt recreational boat standards: Alabama, Colorado, Delaware, Georgia, Indiana, Louisiana, Kansas, Missouri, and Pennsylvania. *See* TARLOCK, *supra* note 6, § 8:28.

reational access to rivers and streams with the protection of private property rights.

Minnesota was one of the first states to adopt a navigability test based on recreational use.[137] In *Lamprey v. Metcalf*, the Minnesota Supreme Court held that "so long as [waterways] are capable of use for boating, even for pleasure, they are navigable within the spirit of the common law rule."[138] In reaching its decision, the court noted that the question of public access to rivers and streams should be considered from a practical as well as a legal standpoint.[139] Accordingly, the court reasoned that although many streams and lakes may not be suitable for commercial navigation, such streams "have been, from the earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc."[140]

Following in the footsteps of Minnesota, Wisconsin also adopted a recreational use standard.[141] *Diana Shooting Club v. Husting* involved an alleged trespass on a river that had been navigated by the public in skiffs and rowboats for more than thirty years.[142] In holding that the defendant did not trespass upon private property, the court also held that navigable waters "should be free to all commerce, for travel, for recreation, and also for hunting and fishing, which are now mainly . . . forms of recreation."[143] Thus, in 1914, the Wisconsin Supreme Court held that a stream is navigable in fact if it is capable of "floating any boat, skiff, or canoe of the shallowest draft used for recreational purposes."[144]

In a move that was subsequently adopted by other states, the Wisconsin Legislature codified the court's expanded definition of navigability. Wisconsin statutory law now declares that "all streams, sloughs, bayous and marsh outlets, which are navigable in fact for any purpose whatsoever, are declared navigable to the extent that no dam, bridge or other obstruction shall be made in or over the same without the permission of the state."[145] Other states that have adopted a recreational boat

137. Lamprey v. Metcalf, 53 N.W. 1139, 1144 (Minn. 1893); *see also* TARLOCK, *supra* note 6, § 8:28 (noting that the court's decision in *Lamprey* "has had a great influence on the development of public recreational rights because it freed states of the limits of federal tests of navigability").

138. 53 N.W. at 1144.

139. *Id.* at 1140.

140. *Id.*

141. Shafer, *supra* note 55, at 42.

142. 145 N.W. 816, 816–17 (Wis. 1914).

143. *Id.* at 820.

144. Muench v. Pub. Serv. Comm'n, 53 N.W.2d 514, 519 (Wis. 1952).

145. WIS. STAT. ANN. § 30.10(2) (West 2002).

test include Missouri,[146] New York,[147] Wyoming,[148] California,[149] Idaho,[150] Arkansas,[151] and Ohio.[152]

In a pair of 1984 cases, the Montana Supreme Court adopted one of the most expansive recreational capacity tests.[153] In the first of these two cases, *Montana Coalition for Stream Access v. Curran*, the court distinguished between navigability-for-title and navigability-for-use.[154] Defendant Curran owned extensive tracts of land bordering the Dearborn River. Curran argued that he owned the riverbed and thus held a right to prohibit access to his property.[155] Plaintiffs, a coalition of recreational river users, argued that the Dearborn River was navigable for recreational purposes; therefore, any attempt by Curran to restrict access was illegal.[156] Like ownership of river beds in Washington, ownership of

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146. Elder v. Delcour, 269 S.W.2d 17, 26 (Mo. 1954) ("[T]he waters of the Meramec River are public waters and the submerged area of its channel . . . [are] a public highway for travel and passage by floating and by wading, for business or for pleasure . . . .").

147. People v. Kraemer, 164 N.Y.S.2d 423, 429 (N.Y. Police Ct. 1957) ("[T]he utility of the harbor for pleasure boating would in itself be sufficient to warrant the court in holding that its waters were navigable as a matter of law.").

148. Day v. Armstrong, 362 P.2d 137, 147 (Wyo. 1961) ("Irrespective of the ownership of the bed or channel of waters, and irrespective of their navigability, the public has the right to use public waters of this State for floating usable craft and that use may not be interfered with or curtailed by any landowner. It is also the right of the public while so lawfully floating in the State's waters to lawfully hunt or fish or do any and all other things which are not otherwise made unlawful.").

149. People v. Mack, 97 Cal. Rptr. 448, 454 (Cal. Ct. App. 1971) ("The streams of California are a vital recreational resource of the State. The modern determinations of the California courts, as well as those of several of the states, as to the test of navigability can well be restated as follows: members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft.").

150. S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1298 (Idaho 1974) ("The federal test of navigability involving as it does property title questions, does not preclude a less restrictive state test of navigability establishing a right of public passage wherever a stream is physically navigable by small craft.").

151. Arkansas v. McIlroy, 595 S.W.2d 659, 664–65 (1980):

> Arkansas, as most states in their infancy, was mostly concerned with river traffic by steamboats or barges . . . . We have had no case regarding recreational use of waters such as the Mulberry. It may be that our decisions did or did not anticipate such use of streams which are suitable, as the Mulberry is, for recreational use. Such use would include flat-bottomed boats for fishing and canoes for floating or both. There is no doubt that the segment of the Mulberry River that is involved in this lawsuit can be used for a substantial portion of the year for recreational purposes. Consequently, we hold that it is navigable at that place with all the incidental rights of that determination.

152. Coleman v. Schaeffer, 126 N.E.2d 444, 447 (Ohio 1955) ("[P]laintiff . . . has operated his boat rental business for 14 years . . . [h]ence, this court is of the opinion that Beaver Creek is a navigable stream at the location in question.").

153. Mont. Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163, 169 (Mont. 1984); Mont. Coalition for Stream Access, Inc. v. Hildreth, 684 P.2d 1088, 1091 (Mont. 1984).

154. *Curran*, 682 P.2d at 166.

155. *Id.* at 165.

156. *Id.*

river beds in Montana is determined by the federal navigability-for-title test.[157] The *Curran* court, however, distinguished between ownership and use, and held that "where title to the bed of the Dearborn River rests with the state, the test of navigability for *use*, and not for title, is a test to be determined under state law and not under federal law."[158] Although the court initially found that the state owned title to the riverbed under the navigability-for-title test, the court also considered the question of whether private ownership of the riverbed would be relevant to public use rights.[159]

Relying on the Montana Constitution[160] and the public trust doctrine, the *Curran* court rejected Curran's claim that he owned the riverbed, concluding that "Curran has no right of ownership to the riverbed or the surface waters because their ownership was held by the federal government prior to statehood in trust for the people. Upon statehood, title was transferred to the State, burdened by the public trust."[161] But considering the question raised by Curran's claim to private ownership, the court held that even if the state owned only the water itself, such ownership would not be affected by private ownership of the beds underlying the river because private ownership of the riverbeds is irrelevant to public access rights to the waters.[162] "The capability of use of the waters for recreational purposes determines their availability for recreational use by the public."[163] Thus, even if Curran were the owner of the riverbeds, he would still have no right to control the Dearborn's waters or exclude the public.[164] The court further held that recreational river users may enter private riparian property to portage around obstructions in the river, so long as the river users utilize the least intrusive method.[165]

In *Montana Coalition for Stream Access v. Hildreth*, the Montana Supreme Court clarified its decision in *Curran*.[166] In *Hildreth*, a riparian property owner constructed a fence across the Beaverhead River to prevent access by fishers.[167] The trial court found that the Beaverhead River was navigable under a recreational boat test; therefore, Hildreth was pro-

157. *Id.* at 168.

158. *Id.*

159. *Id.* at 169–71.

160. Under the Montana Constitution, "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people." MONT. CONST. art. IX, § 3(3).

161. *Curran*, 682 P.2d at 170.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 172.

166. 684 P.2d 1088, 1091–92 (Mont. 1984).

167. *Id.* at 1090.

hibited from denying public access to the section of river abutting his property.[168] While affirming the trial court's result, the Montana Supreme Court held that it was "unnecessary and improper to determine a specific test under which to find navigability for recreational use."[169] The court noted that its decision in *Curran* did not establish a recreational boat test for determining navigability for use.[170] Rather than devising a formal test, the court in *Hildreth* held that "the capability of use of the waters for recreational purposes determines whether the waters can be so used."[171] Because the Montana Constitution clearly provides that the state owns the waters for the benefit of the public, the court declined to limit the public's use of waters "by inventing some restrictive test."[172] Therefore, under *Curran* and *Hildreth*, Montana adopted a capacity-for-use standard that grants to the public the right to use any waters capable of being used for recreational purposes. This liberal test opened virtually all of Montana's waters to public access.

In 1985, the year after the *Curran* and *Hildreth* decisions, the Montana Legislature codified a capacity-for-use test in the Montana Stream Access Law.[173] This statute established two categories of waters in Montana. Class I waters include those waters that are navigable under the federal navigability-for-title test[174] and those that have the capacity for commercial uses, such as log floating, transportation of furs and skins, shipping, commercial guiding, or the transportation of merchandise.[175] Class II waters include all waters that are not Class I, except lakes.[176]

Under the Montana Stream Access Law, "all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters."[177] Recreational uses under the statute include the following: fishing; hunting; swimming; floating in small craft or other flotation devices; boating in motorized craft unless otherwise prohibited or regulated by law or craft propelled by oar or paddle; other water-related pleasure activities; and related unavoidable or incidental uses.[178]

Although the Montana Stream Access Law provides the public with expansive access to Montana's rivers and streams, the law also recog-

168. *Id.* at 1091.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See* MONT. CODE ANN. § 23-2-301, -302 (2002).
174. § 23-2-301(2).
175. *Id.*
176. § 23-2-301(3).
177. § 23-2-302(1).
178. § 23-2-301(10).

nizes and protects private property interests. Class I streambeds that do not have water flowing on them may not be used as a right-of-way.[179] Overnight camping and the construction of duck blinds and temporary moorages are prohibited on the banks of Class I rivers if such activities are within sight of an occupied dwelling.[180] Overnight camping is prohibited on land abutting Class II streams.[181] Furthermore, all activities that are not defined as recreational are prohibited on Class II streams.[182] While recreational users are granted a right to portage around obstructions above the ordinary high-water mark, they must do so in the least intrusive manner and must avoid damaging private property.[183] Finally, in recognition of private property rights, the law does not grant an easement or public right of way to cross private lands for access to public waters.[184]

The Montana Stream Access Law provides a model for other states, including Washington, grappling with the conflict between recreational river use and riparian property owners. Montana's law balances the rights of the public to utilize waters owned by the state and the rights of private property owners. Recreationalists are assured that private property owners will not restrict access to public waters. Private property owners are also protected by the statute's limits on portaging and access to private lands. Because the federal navigability-for-title test still defines the outer limits of the public trust doctrine, the capacity-for-use test does not impede upon the rights of private property owners.[185] The capacity-for-use test is not concerned with, and does not determine, the ownership of beds over which public waters flow. Furthermore, the Montana Stream Access Law assures private property owners that recreational river users will not unnecessarily damage or encroach upon their property.

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179. § 23-2-302(2)(g).

180. § 23-3-302(2)(e), (f).

181. § 23-3-302(3)(b).

182. § 23-3-302(3)(d).

183. § 23-2-311(1).

184. § 23-2-302(4).

185. In 2001, litigants challenged the constitutionality of the Montana Stream Access Law in federal court. Madison v. Graham, 126 F. Supp. 2d 1320, 1322 (D. Mont. 2001). The District Court found that the Stream Access Law did not constitute a taking under the Fifth Amendment because it did not deny property owners of all economically viable uses of their land. *Id.* Instead, the court found that the statute's impact was *de minimis*. *Id.* The court also found that the statute advanced a legitimate governmental interest. *Id.* It is likely that riparian landowners would also challenge the constitutionality of any attempt by the Washington Legislature to enact a law similar to Montana's Stream Access Law. A thorough discussion of the takings issue is beyond the scope of this Comment. In accordance with the conclusion of the *Madison* court, legal commentators have noted that expanding the scope of recreational access to inland waters generally does not constitute an unconstitutional taking because any devaluation of land is *de minimis*. *See* Johnson, *supra* note 90, at 583–87.

VI. RECREATIONAL USE AND LIABILITY IN WASHINGTON

Riparian property owners should not fear exposure to tort liability if Washington were to expand recreational access to the state's rivers and streams. In an attempt to encourage the opening up of private lands to recreational use by the public, the Washington Legislature enacted the Recreational Land Use Immunity Act ("RLUIA"), which protects landowners against potential liabilities arising from such use. The RLUIA provides that property owners who allow nonpaying persons to use their land for recreational purposes "shall not be liable for unintentional injuries to such users."[186] The stated purpose of the statute is to "encourage owners . . . of land and water areas or channels to make them available to the public for recreational purposes by limiting their liability toward persons entering thereon and toward persons who may be injured or otherwise damaged by the acts or omissions of persons entering thereon."[187] The RLUIA "changed the common law by altering an entrant's status from that of a trespasser, licensee, or invitee to a new statutory classification of recreational user."[188]

The RLUIA's liability shield extends to both private and public landowners who are in lawful possession and control of land or water areas.[189] Only individuals or entities with a broad and permanent interest

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186. WASH. REV. CODE § 4.24.210(1) (2003).

187. § 4.24.200; *see also* Nielsen v. Port of Bellingham, 107 Wash. App. 662, 667, 27 P.3d 1242, 1244 (2001) (holding that the "purpose of the statutory grant of immunity is to encourage property owners to open up their properties for public recreational use").

188. Van Dinter v. Kennewick, 64 Wash. App. 930, 935, 827 P.2d 329, 332 (1992) (holding that a "landowner is liable for injuries caused by an obvious condition of his land which he should expect the invitee will not discover because of the circumstances surrounding his use of the property"). Under Washington common law, a landowner's duty of care to entrants is determined by the entrant's status as an invitee, licensee, or trespasser. Degel v. Majestic Mobile Manor, Inc., 129 Wash. 2d 43, 49, 914 P.2d 728, 731 (1996). An "invitee" is defined either as a "public invitee" or a "business visitor." Younce v. Ferguson, 106 Wash. 2d 658, 667, 724 P.2d 991, 995–96 (Wash. 1986) (adopting the definition of "invitee" from the Restatement (Second) of Torts § 332 (1965)). A "public invitee" is "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public." *Id.* at 667, 724 P.2d at 995. A "business visitor" is "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* at 667, 724 P.2d at 996. A "licensee" is defined as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." *Id.* A "trespasser" is a person "who enters the premises of another without invitation or permission, express or implied, but goes, rather, for his own purposes or convenience, and not in the performance of a duty to the owner or one in possession of the premises." Winter v. Mackner, 68 Wash. 2d 943, 945, 416 P.2d 453, 454 (1966). Landowners generally only owe trespassers and licensees the duty to refrain from willfully or wantonly injuring them. *Degel*, 129 Wash. 2d at 49, 914 P.2d at 731. However, landowners owe invitees "an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition." *Id.*

189. WASH. REV. CODE § 4.24.210(1) (2003); *See also* Tennyson v. Plum Creek Timber Co., 73 Wash. App. 550, 556–58, 872 P.2d 524, 528–29 (1994).

in the land are shielded from liability.[190] This limitation was recognized in *Tennyson v. Plum Creek Timber Co.*, where timber contractors operating on privately held land were not shielded from liability because they left the property after meeting their contractual obligations, and thus had no continuing authority to determine whether land should be open to the public.[191] Because the RLUIA is intended to encourage landowners to open their land by limiting their liability, the court held that extending immunity to the contractors would not further the statute's purpose.[192] Under the RLUIA, owners of land or water areas are shielded from liability regardless of whether the land or water areas remain in their "primeval state."[193]

Washington courts have construed the scope of covered activities liberally. In *Curran v. City of Marysville*, the Washington Court of Appeals held "that 'outdoor recreation' . . . encompasses all recreational activities which commonly are conducted outdoors. Recreational activities are those which 'provide diversions or amusements.'"[194]

Although landowners are generally not liable for injuries incurred by recreational users of their land, liability will attach to landowners under three circumstances: (1) where the landowners charged a fee for the use of the land; (2) where the landowner intentionally inflicted the injuries; or (3) where the landowner failed to post adequate warnings about a dangerous artificial latent condition of which the landowner had knowledge.[195] Therefore, in the absence of a fee or an intentional act on the part of the landowner, liability will attach to a landowner who makes his or her land available for recreational use only when the landowner failed to warn of a (1) known, (2) dangerous, (3) artificial, and (4) latent condition.[196] The terms "known," "dangerous," "artificial," and "latent" each modify "condition," rather than each other.[197]

Washington courts have held that a landowner must have actual, rather than constructive, knowledge of the injury-causing condition before liability will attach.[198] The term "known" refers to landowner's mental state, and the landowner must know of the condition and must know that it is dangerous and latent.[199] The requirement of actual knowledge

190. *See Tennyson*, 73 Wash. App. at 556–58, 872 P.2d at 528–29.

191. *Id.* at 556–58, 872 P.2d at 528–29.

192. *Id.* at 558, 872 P.2d at 529.

193. Ravenscroft v. Wash. Water Power Co., 136 Wash. 2d 911, 921, 969 P.2d 75, 81 (1998).

194. 53 Wash. App. 358, 364, 766 P.2d 1141, 1144 (1989).

195. Davis v. Washington, 144 Wash. 2d 613, 616, 30 P.3d 460, 462 (2001).

196. Tabak v. Washington, 73 Wash. App. 691, 695, 870 P.2d 1014, 1017 (1994).

197. *Id.*

198. Cultee v. Tacoma, 95 Wash. App. 505, 517, 977 P.2d 15, 22–23 (1999).

199. Ertl v. Parks & Recreation Comm'n, 76 Wash. App. 110, 114–15, 882 P.2d 1185, 1188 (1994).

distinguishes the RLUIA from the common law liability for dangerous conditions, where liability attaches when a landowner knows or should know of a dangerous condition.[200] Summary judgment for the landowner in a liability action is appropriate under the RLUIA when a plaintiff fails to produce evidence that the landowner had actual knowledge of the injury-causing condition.[201] The requirement of actual knowledge has important applicability to recreational river use.[202] Commentators have pointed out that because streams and river channels constantly change due to flooding, storm-induced surges, and other natural phenomena, the requirement of actual knowledge assures that, to avoid liability, riparian landowners will not have a duty to constantly reassess the safety of streams that flow over their property to avoid liability.[203]

The injury-causing condition must be dangerous. Although the RLUIA does not define "dangerous," Washington courts have narrowly construed the term "dangerous" to include only "a condition that poses an unreasonable risk of harm."[204] In *Gaeta v. Seattle City Light*, the court reasoned that a narrow definition of "dangerous" is necessary to protect landowners from liability, and a broad definition of "dangerous" would run contrary to the stated purpose of the statute.[205]

The injury-causing condition must be artificial. In *Ravenscroft v. Washington Water Power Co.*, the court defined "artificial" as "contrived through human art or effort and not by natural causes detached from human agency; relating to human direction or effect in contrast to nature . . . formed or established by man's efforts, not by nature."[206] The court held that a submerged stump in a manmade lake was an artificial condition because the injury-causing condition resulted from defendant's acts of cutting down trees, leaving the stumps, and then raising water levels to a point that did not cover the stump.[207] Given the fact that many rivers in Washington are subject to artificial variations in water levels, commentators have noted that *Ravenscroft*'s holding—that a submerged stump can constitute an artificial hazard that could expose a landowner to liability—has been used by land managers to restrict recreational access to Washington rivers.[208]

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200. *Id.*

201. *Id.*

202. Osborne et al., *supra* note 28, at 442–43.

203. *Id.*

204. Gaeta v. Seattle City Light, 54 Wash. App. 603, 609, 774 P.2d 1255, 1259 (1989).

205. *See id.*

206. Ravenscroft v. Wash. Water Power Co., 136 Wash. 2d 911, 922, 969 P.2d 75, 81 (1998) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 124 (1986)).

207. *Id.* at 923, 969 P.2d at 82.

208. Osborne et al., *supra* note 28, at 444.

The fourth requirement of liability—latency—mitigates most landowner concerns and protects against much potential liability.[209] The RLUIA defines "latent" as "not readily apparent to the recreational user."[210] The condition, rather than the danger the condition poses, must be latent.[211] Conditions that are obvious, readily apparent, or in plain view are not considered "latent."[212] Furthermore, courts have held that the dispositive question when determining whether a condition is latent is "whether the condition is readily apparent to the general class of recreationalists, not whether one user might fail to discover it."[213] As the general class of recreational river users is likely to be aware of the broad-spectrum hazards of waterborne recreation, the latency requirement is likely to shield landowners. Landowners can also protect themselves by providing conspicuous signage that warns recreational users of the presence of latent or indiscernible hazards.[214]

While landowners' concerns about increased exposure to liability are valid, expanding recreational access to rivers and streams would not expose landowners to increased liability. Washington's RLUIA provides landowners with significant protections against liability, and the adoption of a capacity-for-recreational use test would in no way alter the protections afforded by the RLUIA.

VII. CONCLUSION

Under Washington law, the public has limited access to the state's freshwater recreational resources. The public enjoys the right to access all navigable-for-title rivers because the state holds the right to navigation on these rivers "in trust for the whole people" of the state.[215] In *Monroe Mill Co. v. Menzel*, the Washington Supreme Court established a limited right of navigation that extends beyond the scope of the public trust based upon a river's "capacity for valuable floatage."[216] However, the court's early twentieth century interpretations of "valuable floatage" do not reflect the realities of twenty-first century commerce. In *Griffith v. Holman*, the court erroneously applied the capacity-for-use test estab-

209. *Id.* at 443.

210. Davis v. State, 102 Wash. App. 177, 191, 6 P.3d 1191, 1198 (2002) (quoting Van Dinter v. Kennewick, 121 Wash. 2d 38, 45, 846 P.2d 522, 526 (1993); *see* WASH. REV. CODE § 4.24.210(3) (2003).

211. Chamberlain v. Dep't of Transp., 79 Wash. App. 212, 219, 901 P.2d 344, 348 (1995).

212. Ravenscroft v. Wash. Water Power Co., 136 Wash. 2d 911, 925, 969 P.2d 75, 83 (1998).

213. *Chamberlain*, 79 Wash. App. at 219, 901 P.2d at 348.

214. Preston by Preston v. Pierce County, 48 Wash. App. 887, 890, 741 P.2d 71, 73 (1987) (citing Morgan v. United States, 709 F.2d 580, 583 (9th Cir.1983)), *overruled on other grounds by* Van Dinter v. Kennewick, 121 Wash. 2d 38, 46, 846 P.2d 522, 526 (1993).

215. State v. Sturtevant, 76 Wash. 158, 160, 135 P. 1035, 1037 (1913).

216. 35 Wash. 487, 495, 77 P. 813, 815 (1904).

lished in *Monroe Mill Co.* and held that prior use by recreational watercraft was insufficient to create a public right of access to a non-navigable-for-title stream.[217] Commentators have noted that the *Griffith* holding is ripe to be overturned.[218]

The rationale in *Monroe*, *Watkins*, and other early stream access cases was predicated upon an antiquated definition of "commerce."[219] Because the *Griffith* court was unwilling to endow a right of access upon streams floatable by recreational boats, it follows that the *Griffith* court was unable to conceive of recreation as a commercial activity. A modern court, however, would be hard pressed to come to the same conclusion. As the economic impact of Washington's traditional extractive industries diminishes,[220] the economic impact of outdoor recreation expands.[221] Millions of Washingtonians participate in outdoor recreation,[222] and Washington has some of the highest rates of participation for freshwater based activities.[223] Accordingly, the Washington Legislature has declared that it is the official policy of Washington State to expand and enhance recreational resources.[224]

In recognition of the economic and social values of recreation, and to further its stated policy, the Washington Legislature should adopt a stream access law that expands the public's right to access freshwater resources for the purpose of recreation. For guidance, the legislature should look to Montana's Stream Access Law.[225] Montana's law promotes public access while effectively protecting property rights. Washington courts have already established a two-tiered system of access similar to that created by Montana's Stream Access Law.[226] However, the capacity for "valuable commercial floatage" test has been interpreted unrealistically; thus, recreational access is still limited in Washington. By adopting a law similar to Montana's Stream Access Law, the legislature would not radically alter the common law because Washington courts

217. 23 Wash. 347, 358–59, 63 P. 239, 243 (1900).

218. *See* Conklin, *supra* note 86, at 900; Johnson, *supra* note 90, at 609; Osborne et al., *supra* note 28, at 437–38.

219. *See Monroe Mill Co.*, 35 Wash. at 494–95, 77 P. at 815 (holding that access to a non-navigable-for-title stream was a "commercial convenience and necessity" for supporting "the great logging industry of this state"); Watkins v. Doris, 24 Wash. 636, 645, 64 P. 840, 843 (1901) (holding that a stream can be navigable as a public highway for the purpose of floating logs and timber, even where landowner owns riverbed); *Griffith*, 23 Wash. at 353, 63 P. at 241 (holding waters are navigable if used for "some purpose useful to trade or agriculture").

220. *See generally* Laitos, *supra* note 31, at 144.

221. *See generally* OUTDOOR INDUSTRY FOUNDATION, *supra* note 110, at 2.

222. ASSESSMENT OF OUTDOOR RECREATION, *supra* note 123, at 113–14.

223. OUTDOOR INDUSTRY FOUNDATION, *supra* note 110, at 2.

224. WASH. REV. CODE § 79A.25.005 (2003).

225. MONT. CODE ANN. § 23-2-301, -302 (2002).

226. *See* Monroe Mill Co. v. Menzel, 35 Wash. 487, 494–96, 77 P. 813, 815 (1904).

already recognize that some non-navigable-for-title streams are burdened with a right of public (commercial) access.[227] Instead, by updating the law and recognizing that recreational boating is indeed "valuable floatage," the legislature would merely be acting in accordance with its stated policies.

While such an enactment would surely draw protest from riparian property owners, the concerns raised would be negligible. The restrictions that would be placed on recreational users' access to riparian property would ensure that expanding recreational access to privately held streams would not affect riparians' ownership interests in their land. Furthermore, if Washington closely tailors its legislation to the Montana Stream Access Law, the public would have only a minimal right to access land above the high-water mark, and such access would be limited to short portages or other activities rationally related to river recreation.[228] Even though a modern stream access law would expand public access, landowners would remain protected from liability by the Recreational Land Use Immunity Act.[229]

By adopting a modern stream access law, the Washington Legislature would also curtail the increasing instances of conflicts between riparian property owners and recreational river users. The antagonistic and often violent interactions that have plagued regions like the Kettle watershed are fueled by the uncertainty of the common law. Clearly defined access and property rights would resolve these ambiguities and temper hostilities. By updating and clarifying access and property rights, a modern stream access law would protect the property interests valued by people like Harold Honeycutt, while ensuring that the public enjoys a right to peacefully float on by.

227. *Id.*

228. MONT. CODE ANN. § 23-2-302 (2002).

229. WASH. REV. CODE § 4.24.210 (2003).