

## American Whitewater

### Washington Navigability Report

#### Summary

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

#### State Test of Navigability

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

Washington courts have interpreted this test fairly liberally in other ways. For instance, the Washington Supreme Court has held that the quality of

navigability of a watercourse need not be continuous, but the seasons of navigability must occur regularly and be of sufficient duration to serve a useful purpose for commercial intercourse.<sup>6)</sup> Under this test, streams in their natural state, capable of floating shingle bolts after heavy rains and during the spring freshets, are navigable streams.<sup>7)</sup> The term “natural state” precludes streams that only can be made floatable by artificial means.<sup>8)</sup> Natural obstructions or portages apparently do not destroy navigability.<sup>9)</sup> Historical evidence of use of a stream for commercial transport purposes is persuasive evidence that the stream is navigable if the stream is in the same condition that it was in during the days of commercial use.<sup>10)</sup> In addition, navigability is not destroyed by disuse.<sup>11)</sup>

### Extent of Public Rights in Navigable and Non-Navigable Rivers

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

Washington does not recognize a right of portage. The Washington Supreme Court overruled a lower court's finding that log drivers could go upon privately-owned banks of navigable streams to free logjams.<sup>14)</sup> The court held that the log driver “must confine himself and his operations to the

highway itself – the bed of the stream, until the land owner consents to the use of the banks . . . . The driver must know from the beginning that he must, in no event, go upon the banks of the stream in his operations without the owner's permission, and thus controversies about damages accruing in that way will be avoided.”<sup>15)</sup>

## Miscellaneous

Criminal trespass on private property occurs when a person trespasses and the land is posted or notice is given in some other manner.<sup>16)</sup>

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

The State Scenic River system was established to recognize that many rivers possess outstanding natural, scenic, historic, ecological, and recreational values of present and future benefit to the public, and that a need exists to protect and preserve the natural character of such rivers and to fulfill other conservation purposes.<sup>19)</sup> Rivers within the State Scenic River system include specified sections of the Skykomish, Beckler, Tye, and Little Spokane.<sup>20)</sup> Declaration of a Green River Gorge Conservation Area<sup>21)</sup> and

Yakima River Conservation Area<sup>22)</sup> recognize a need to conserve these areas for the recreational needs of the region.

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

2) <sup>10)</sup> Kemp, 288 P.2d at 839.

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

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

5) Griffith, 63 P. at 240.

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

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

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

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

11) Id. at 841.

- 12) Id. See also Monroe Mill Co., 77 P. at 816.
- 13) Griffith, 63 P. at 244.
- 14) Monroe Mill Co., 77 P. at 816.
- 15) Id. See also Sumner Lumber & Shingle Co., 131 P. at 223.
- 16) Wash. Rev. Code § 9A.52.010 (2007).
- 17) Wash. Rev. Code § 79A.60.470 (2007).
- 18) Wash. Rev. Code § 79A.60.495 (2007).
- 19) Wash. Rev. Code § 79A.55.005 (2007).
- 20) Wash. Rev. Code § 79A.55.070 (2007).
- 21) Wash. Rev. Code § 79A.05.700 (2007).
- 22) Wash. Rev. Code § 79A.05.750 (2007).