

ARTICLES

WILLAMETTE LAW REVIEW

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NAVIGABILITY IN OREGON: BETWEEN A RIVER ROCK AND A HARD PLACE¹

JAS. JEFFREY ADAMS*

CODY WINTERTON**

I. INTRODUCTION

Oregon waterways have played a critical role in the state's settlement and prosperity. Rivers have been significant in transporting

Pacific Ocean at its doorstep, the Oregon landscape offers a recreational paradise. Oregon's rivers and streams entice those seeking to boat, fish and discover. Edwin Way Teale has explained, "To the lost man, to the pioneer penetrating a new country, to the naturalist who wishes to see the wild land at its wildest, the advice is always the same—follow a river. The river is the original forest highway. It is nature's own Wilderness Road."³

Modern-day explorers who seek to follow Teale's advice in Oregon, however, may confront hostile property owners along the way. Many private landowners believe they have the right to control access to the beds and banks of the rivers adjacent to their property. On the other hand, river users assume that those lands, like the water itself, are open to the public. Property owners point to deeds to prove their ownership rights; public river users point to the importance of providing public access and preserving rivers as recreational and ecological havens.⁴ Consequently, the pressure on state leaders and the legal system to clarify public and private rights to Oregon waterways has continued to build.⁵

Oregon has at least 1200 named waterways. Those waterways are located throughout Oregon's diverse landscape, from the deserts of eastern Oregon to the rugged Oregon coast. Of the 5,375 miles of waterways that recreational users enjoy, ownership along 4,075 miles (76%) is either privately owned or uncertain.⁶ The ownership status of the bed and the banks is dependent on whether the waterway is a navigable or non-navigable water body.⁷ Title to submerged and submersible lands under navigable water bodies vests in the state. Title to lands under non-navigable water bodies remains in question.⁸

3. Edwin Way Teale, <http://www.nps.gov/rivers/quotations.html>.

4. See generally 48 Or. Op. Att'y Gen. 1, 12 (1995) (stating that, historically, the bed and banks of navigable waterways are reserved for the public and not available for private ownership).

5. See, e.g., 49 Or. Op. Att'y Gen. 284, 306-08 (2001) (defining public and private property rights of water); 48 Or. Op. Att'y Gen. 1, 12-13 (1995) (discussing rights to navigable waterways); See also 50 Or. Op. Att'y Gen. ___ (No. 8281) (April 21, 2005) (slip op.) (discussing state ownership issues and public access rights on private land). The authors of this article did not participate to any extent in the formulation of the opinion issued on April 21, 2005.

6. See OR. STATE MARINE BD., MANAGING RIVER RECREATION: REPORT TO THE JOINT LEGISLATIVE INTERIM COMMITTEE ON NAVIGABILITY 8 (1998) [hereinafter OSMB].

7. See *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845) (asserting that all navigable waters belong to the public).

8. *Weise v. Smith*, 3 Or. 445, 448-49 (1869).

Over many years, federal law has developed a title test that determines which waterways are deemed to be “navigable.”⁹ Designation of a river as navigable transfers title to the State of Oregon, and in the process, challenges longstanding concepts of private property rights. All remaining water bodies that are not recognized as navigable under the federal test may still be subject to Oregon’s common law floatage easement, which allows recreational users to “float” on the surface of the water. The extent of the right of the public to use the bed and banks of waterways not declared navigable, however, or where public ownership is yet to be determined, is uncertain. Similarly, the extent of the right of riparian private property owners to restrict public use of the bed and banks of such waterways is unclear. Hence, “law enforcement agencies, district attorneys and public agencies are uncertain of the extent and enforceability of public and private rights.”¹⁰

When boaters and fisherman step out of their boats and onto the private property of the riparian landowners on the waterways that are subject to the floatage easement, they may be committing trespass. Because the river users and the landowners are unclear what rights each possess, the potential for conflict exists.¹¹ Over the years, recreational boaters and fishermen have faced verbal threats and guns.¹² They have confronted barbed wire fences strung across rivers, and on occasion have faced trespass actions. For their part, landowners have experienced litter, vandalism, and other problems relating to alcohol. Some landowners have reported that they feel their property has been invaded.¹³

The threshold difficulty in this controversy is determining which waterways are entitled to be designated as “navigable.” For most of

9. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

10. Paul R. Cleary, Director Division of State Lands, testimony before the Joint Legislative Interim Committee on Navigability (Dec. 9, 1998).

11. The public’s confusion about the law is illustrated by the findings of an Oregon State Marine Board survey conducted in 1998. The survey shows that Oregonians believe that 66% of the lands along rivers are public property and a majority believe they have a right to fish from the banks and portage around obstacles in a river. It is likely that those erroneous beliefs fuel the frustration of landowners and recreational users. See OSMB, *supra* note 6, at 9.

12. See *Northwest Steelheaders Ass’n, Inc. v. Simantel*, 199 Or. App. 471 (2005).

13. The State Land Board met in regular session on October 3, 1995. In describing to the Oregon Land Board the offensive behavior of some river users, riparian landowners explained that the public has left garbage in their yards, consumed alcohol and drugs, and urinated in their bushes. Some riparian landowners have felt threatened. Or. Dep’t. of State Lands, *at* http://www.oregonstatelands.us/slb_m/95oct3slb.htm (Oct. 3, 1995).

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2005]

NAVIGABILITY IN OREGON

619

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Over many years, federal law has developed a title test that determines which waterways are deemed to be "navigable."²² Designation of a river as navigable transfers title to the State of Oregon, and in the process, challenges longstanding concepts of private property rights. All remaining water bodies that are not recognized as navigable under the federal test may still be subject to Oregon's common law floatage easement, which allows recreational users to "float" on the surface of the water. The extent of the right of the public to use the bed and banks of waterways not declared navigable, however, or where public ownership is yet to be determined, is uncertain. Similarly, the extent of the right of riparian private property owners to restrict public use of the bed and banks of such waterways is unclear. Hence, "law enforcement agencies, district attorneys and public agencies are uncertain of the extent and enforceability of public and private rights."²³

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The threshold difficulty in this controversy is determining which waterways are entitled to be designated as “navigable.” For most of Oregon’s history, only a few court decisions have existed to guide the state in determining which rivers meet the federal test. Over the past quarter century, however, new cases have built upon early precedents and broadened traditional notions of navigability. As a result, the number and type of Oregon waterways capable of meeting the federal title test has expanded.

This Article suggests that the State Land Board should continue to inventory Oregon Rivers and to apply the federal navigability test to clarify ownership rights. In addition, the common law floatage easement should be codified with respect only to floatable rivers. Doing so would afford protection to riparian landowners along nonfloatable waterways, while clarifying the extent of the rights of the public on rivers that are floatable but have not been determined to be navigable.

ARTICLES

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Oregon waterways have played a critical role in the state's settlement and prosperity. Rivers have been significant in transporting valuable timber out of the Oregon mountains.²⁸ Moreover, with the Pacific Ocean at its doorstep, the Oregon landscape offers a recreational paradise. Oregon's rivers and streams entice those seeking to boat, fish and discover. Edwin Way Teale has explained, "To the lost man, to the pioneer penetrating a new country, to the naturalist who wishes to see the wild land at its wildest, the advice is always the same—follow a river. The river is the original forest highway. It is

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2005]

NAVIGABILITY IN OREGON

625

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2005]

NAVIGABILITY IN OREGON

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ARTICLES

WILLAMETTE LAW REVIEW

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2005]

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2005]

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639

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