INLAND RECREATIONAL FISHING RIGHTS IN VIRGINIA: IMPLICATIONS OF THE VIRGINIA SUPREME COURT CASE *KRAFT V. BURR*

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Leonard A. Shabman, Director

TABLE OF CONTENTS

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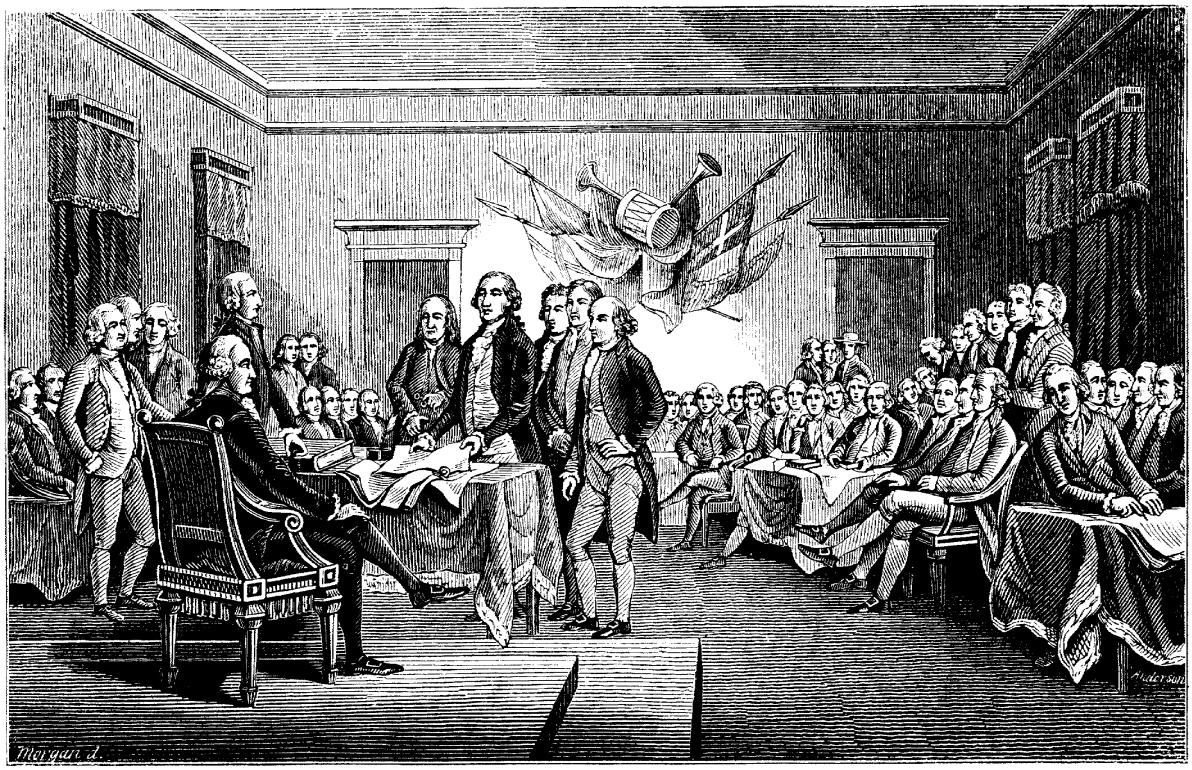
Abstract

The paper gives an overview of inland fishing rights in Virginia. The purpose of this paper is to (1) investigate the property rights structure of the recreational inland fishery in Virginia prior to 1996, (2) examine the 1996 Supreme Court ruling in *Kraft v. Burr,* and (3) examine the possible implications of this ruling on the future of recreational fishing rights in Virginia. The *Kraft* decision does not represent an immediate change in the nature of inland recreational fishing rights in Virginia. This decision, however, could prompt some riparian landowners holding land granted during the colonial period to claim exclusive fishing rights.



Introduction

A recent court case concerning fishing rights on the Jackson River has stirred controversy among recreationalists and riparian landowners. In September 1996, the Virginia Supreme Court ruled in *Kraft v. Burr* that crown grants issued by Kings George II in 1750 and George III in 1769 gave four landowners along the Jackson River the right to prohibit fishing in the waters flowing over their land. This case raises questions and concerns among landowners and recreational users alike over the status of recreational fishing rights in Virginia.

The purpose of this paper is to (1) investigate the property rights structure of the recreational inland fishery in Virginia prior to 1996, (2) examine the 1996 Supreme Court ruling in *Kraft v. Burr,* and (3) examine the possible implications of this ruling on the future of recreational fishing rights in Virginia. This paper will focus on fishing rights in inland waters of Virginia.[1] This effort focuses on the recreational rights to fish rather than the laws and regulations associated with use of fish (i.e. - how fish can be caught, how many fish can be caught, when fish can be caught).[2]

This paper argues that the *Kraft* decision does not represent an immediate change in the structure of inland recreational fishing rights in Virginia. The *Kraft* Court's broad interpretation of the crown grant language, however, may make it easier for riparian landowners holding land granted during the colonial period to establish exclusive fishing rights. Thus, depending on the extent to which streambed property was originally conveyed through crown grants and the extent to which riparian owners seek to claim these rights, future public rights to fish in inland streams could be restricted.

Overview of Inland Fishing Rights in Virginia Prior to *Kraft* [3]

The Commonwealth of Virginia's inland waterways provide numerous opportunities for recreational fishing. Private landowners, however, hold much of the land surrounding Virginia's inland waters. The interests of recreational users and private landowners may conflict over the rights to use these waters. Recreationalists may want access to rivers for boating and fishing opportunities. Riparian landowners, on the other hand, may want privacy to enjoy the beauty of their land or may wish to have exclusive rights to the resource. Landowners may also wish to be protected from trespass, littering, and other types of injury to their property.

In Virginia, private and public rights to fish in a body of water depend partly on the legal status of the adjacent riparian land and streambed, and partly on the physical characteristics of the water itself. When dealing with navigable waters where the streambeds are publicly-owned, the public is clearly entitled to a variety of rights including the right of passage and the right to fish. On the other hand, riparian landowners possess exclusive rights to fish in streams that are not able to float even small boats. Beyond these two situations, determining who has what recreational rights is often complicated and uncertain. The uncertainties can be attributed partly to the lack of judicial or statutory rules related to recreational fishing rights. Prior to 1996, only a few statutory enactments and one Virginia Supreme Court case specifically addressed recreational fishing rights of inland streams in Virginia.

Statutory Law Regarding Inland Recreational Fishing Rights

The following statute reserved all ungranted streambeds in the Commonwealth for public ownership in order to protect public recreational rights:

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

This statute can be traced back to legislation from 1780 which stated that "all unappropriated lands on the bay of the Chesapeake, on the seashore, or on the shores of any river or creek in the eastern parts of this Commonwealth, which have remained ungranted by the former government, and which have been used as common to all the good people thereof " could no longer be granted by the land office.[5] A similar statute, passed in 1802, made the same provision for lands in the western part of the Commonwealth.[6] An 1818 enactment consolidated the acts of 1780 and 1802 into one statute, thereby covering all lands in the Commonwealth.

In the Code of 1873, the clause that required the land to have been "used as common" was deleted. Before 1873, the presence of this clause may have caused some streambeds to pass into private ownership after 1780 and 1802 in places where public use was not yet

established.[7] After 1873, all streambeds of previously ungranted land remained in the public ownership.

Unless explicitly noted otherwise, the public is entitled to fish in waters overlying land owned by the Commonwealth. The effectiveness of these statutes in preserving streambeds for the public use, however, is questionable because much of the land in Virginia became private property prior to enactment.[8] Information regarding how much land that passed into private hands before the enactment of this statute is uncertain, but it is thought that it may be a substantial amount of the state's riparian land.[9]

Case Law Regarding Inland Recreational Fishing Rights

Aside from the 1996 *Kraft* case, there is only one Virginia Supreme Court ruling on recreational fishing rights on inland waters – the 1955 case *Boerner v. McCallister*.[1] In this case riparian landowner, McCallister, sought an injunction to enjoin a fisherman, Boerner, from trespassing on his land and fishing a portion of the Jackson River that passed over his property. McCallister, who owned the land on both sides of the river, held that he also owned the streambed and could prohibit others from fishing on his property.

These rights were conveyed to a previous owner in a crown grant from the king of England dating back to 1749-1751. McCallister brought suit because of Boerner's repeated trespass on his land and his refusal to stop fishing. In response, Boerner argued that the stream was open to public use because (1) the streambed was owned by the Commonwealth of Virginia, and (2) even if the streambed was privately owned and title derived from a crown grant, the stream had been used as a commercially navigable waterway and was subject to public uses, including fishing.[1]

To resolve the streambed ownership issue, the court considered the crown grant and Virginia statutes. In its ruling, the court held that streambeds could be granted by the crown stating "Where an original grant of land by the Crown between 1749 and 1751 included all the river's waters and water courses therein contained, there was no law preventing the conveyance of such waters and the grantee took title to part of the river within the grant."[10] The court also determined that the common law had not been changed by statute so as to impact the ownership of streambeds granted prior to 1780 for land in the eastern part of the state or those beds granted prior to 1802 in the western part of the state. Since the grant in question was made before 1780, the court decided that McCallister had ownership of the streambed, not the Commonwealth of Virginia.

Boerner claimed that the public had the right to fish in navigable streams, arguing that the Jackson River had been used commercially between 1901 and 1907 when loggers floated logs down the Jackson to a mill during high water[11]. The court stated that the test of a stream's "floatability" or "navigability" is whether the stream is "used or is susceptible

of being used in its natural or ordinary condition as a highway for commerce on which trade and travel are or may be conducted in the customary modes of trade and travel on water."[12]

Since this test of navigability is based on commercial use, a stream could be physically navigated in small recreational boats and still be ruled legally nonnavigable. The court ruled the evidence presented by Boerner was unsatisfactory to prove the section of the Jackson in question was legally navigable, so they declared it to be a nonnavigable stream.[13] Given the court's determination that the streambed was privately owned and in a nonnavigable river, Boerner was prevented from crossing McAllister's land to gain access to the river or to wade to fish from the streambank.

Because Boerner did not prove the waterway was navigable, the court did not have to address the question whether a *navigable* stream with a *privately owned* bed should be subject to public use such as fishing. However, the court stated that there was persuasive authority that suggested that even though a stream may be floatable or navigable, the public rights are limited to navigation.[14] This statement has little legal authority, however, since the statement was not necessary to decide the case.[15]

Fishing Rights and Streambed Ownership

The Virginia Supreme Court in the *Boerner* case suggested, but did not rule, that streambed ownership may confer exclusive fishing rights regardless of whether the stream is declared navigable or not. The *Boerner* case also suggests that future court actions related to inland recreational fishing rights should be sensitive to the determination of streambed ownership.
The present state of streambed ownership in Virginia is complex, resulting from various land patents of the colonial period and land grants made by the Commonwealth after its separation from England. This hodgepodge of conveyances contributes to the complexity and ambiguity of inland recreational fishing rights in Virginia.

There are two categories of streambed ownership, public and private. Public ownership means that the streambed is held as public property by the government for all to use. Navigable waterways *generally* have publicly-owned streambeds and the rights of the public to use these waterways for fishing are well established.[16] Privately owned streambeds belong to private entities or persons. Private ownership is established by purchase from the state, grants by the early Virginia government, or even conveyances by a crown grant from the king of England.[17]

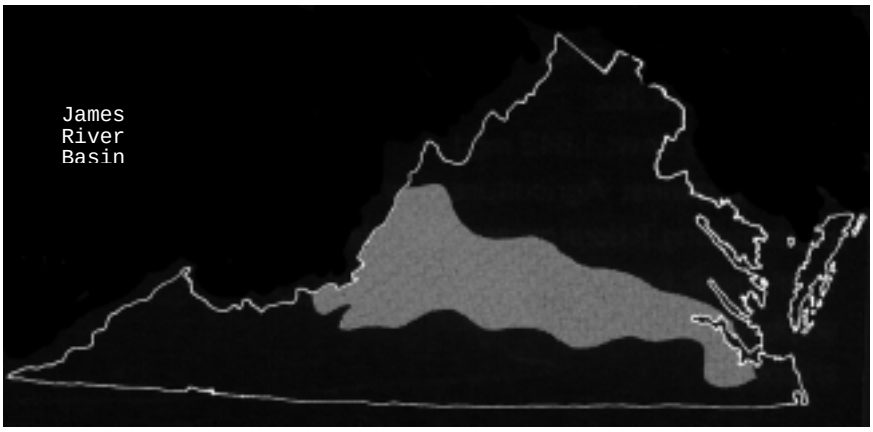
Early grants of riparian land to private individuals did not always explicitly convey streambeds to the landowner. Common law holds, however, that in nonnavigable waters streambeds are the property of the adjacent landowners, and recreational rights such as fishing rights rest with them as well.[18] The idea that the bed of a nonnavigable stream belongs to the riparian owner was supported in the 1824 case, *Mead v. Haynes*, which the Virginia Supreme Court stated, "...a grant bounded by a stream not navigable, extended to the middle of the stream."[19]

In navigable inland waters, streambed ownership is less clear. Decisions of the Virginia Supreme Court do not clearly resolve this issue but suggest that they are publicly owned.[20]

Home v. Richards (1798), addressed the issue of streambed ownership with the statement, “If it be [navigable], it is plain that the bed is not in the appellants as the soil of navigable rivers cannot

be granted."[21] In *Mead supra*, navigable streambeds were also said not to be grantable: "Even before the act of 1792, the beds of navigable streams were not grantable..."[22]

However, other cases suggest land under navigable waterways can be privately owned if explicitly granted by the state. The 1805 Supreme Court decision in *Martin v. Beverly* recognized the beds of navigable streams could be granted in certain situations. Justice Roane stated, "But the fact is, and is so admitted by many of our laws, that the beds of navigable rivers are granted to individuals."[23] *Morgan v. Commonwealth* stated, "The navigable waters of the State and the soil under them within its territorial limits are the property of the State, for the benefit of its own people, and it has a right to control them as it sees proper, provided it does not interfere with the authority granted the United States to regulate commerce and navigation."[24] This decision acknowledged that the state has discretion in deciding whether or not streambeds could be granted in navigable waters. A 1924 case, *James River and Kanawha Power Co. v. Old Dominion Iron and Steel Corp.*, recognized that beds of navigable streams could be granted in some situations: "Undoubtedly there are certain public uses of navigable waters which the State does not hold in trust for all the public, and of which the State cannot deprive them, such as the right to navigation, but, subject to these public rights, there is no reason why the beds of navigable streams may not be granted unless restrained by the Constitution."[25]

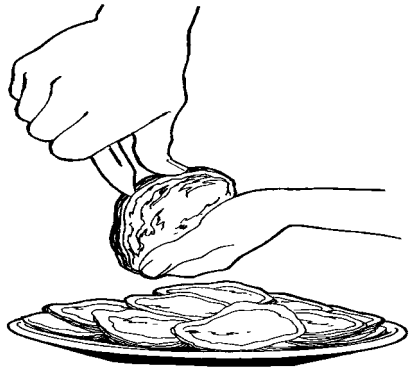


After holding that the state had the right to make grants of streambeds of navigable waterways, the court reached the conclusion that the office that granted land could not grant the beds of a navigable stream because it had not been given that power by the General Assembly.[26]

Crown or colonial grants can also convey private ownership to streambeds in both navigable and nonnavigable streams. The Virginia Supreme Court did recently confirm that the king of England (prior to the formation of the United States) could grant ownership to land underlying navigable waters. In *Commonwealth v. Morgan*, the court held that the crown had the power to grant the bed of a cove in a tidal, navigable waterway to a private person.[27] Although dealing with tidal waters, *Commonwealth v. Morgan* did establish that in certain circumstances land under navigable waters could be conveyed

to private landowners and appears to apply to nontidal waters.[28]

With the possession of the underlying land, the ruling acknowledged landowners could also exercise exclusive oyster harvesting rights.[29] While the oyster grounds and tidal beds were conveyed to the private landowner, this case did not discuss fishing rights in the water above private land.



Summary

Virginia statutes mandate that public ownership of streambeds in lands conveyed after 1780 in the eastern part of the state, and after 1802 in western part of the state are reserved for the public use including such purposes as "fishing and fowling."[30] However, the number of stream miles impacted by the 1780 and 1802 statutes is unknown. In cases where riparian lands were conveyed prior to the enactment of the 1780 and 1802 statutes, recreational fishing rights are less clear.

In general, riparian landowners possess exclusive fishing rights in water that cannot be physically navigated. Riparian landowners may also own land under navigable inland waters. Public fishing rights in physically navigable waters where the established private streambed ownership, however, is unclear. The extent to which public fishing rights exist over privately owned streambeds is uncertain, but it is clear that the public retains the right of passage in waters declared navigable. In addition, the rights of navigation may be separate from fishing rights. In other words the ability to float a boat down a river may not automatically convey a right to fish to the occupants of the boat. The *Boerner* case suggested that the right of public navigation did not include recreational activities such as fishing, but did not make a specific legal decision on this issue.[31]

Recent Court Rulings on Inland Fishing Rights: The Jackson River Conflict

In 1946, Congress authorized the construction of Gathright Dam on the Bath-Allegheny County border for the purposes of flood control, water quality control, and navigation.[32] The U.S. Army Corps of Engineers started acquiring land in 1967 and construction of the dam began in 1968.[33] Gathright Dam created Lake Moomaw and provided cold,

oxygen-rich releases in the waters below the dam, creating ideal trout habitat. Prior to the construction of the dam, this segment of

the Jackson River could not support a trout fishery because the water was too warm in the summer. The Corps acquired additional public access points downstream and, beginning in the early 1970s, the Commission on Game and Inland Fisheries stocked trout in the river. Money from the sale of fishing licenses was used to stock the stream. Since that time, this area has become one of the premier trout fisheries in Virginia.[34]

Along with the new trout fishery came increased amounts of fishing activity. Below the dam, the Jackson flows predominately through private property. Conflict then arose between the recreational fisherman and the surrounding landowners because of this increased recreational demand. The resulting tension sparked a number of landowner legal challenges to restrict public access to the fishery. As a historical coincidence, these conflicts occurred on the same stretch of the Jackson that gave rise to the *Boerner* case.

This following section will describe these legal challenges and the court decisions that addressed this conflict. The discussion will also assess the implications the Jackson River disputes have for recreational fishing rights in other Virginia rivers and streams.

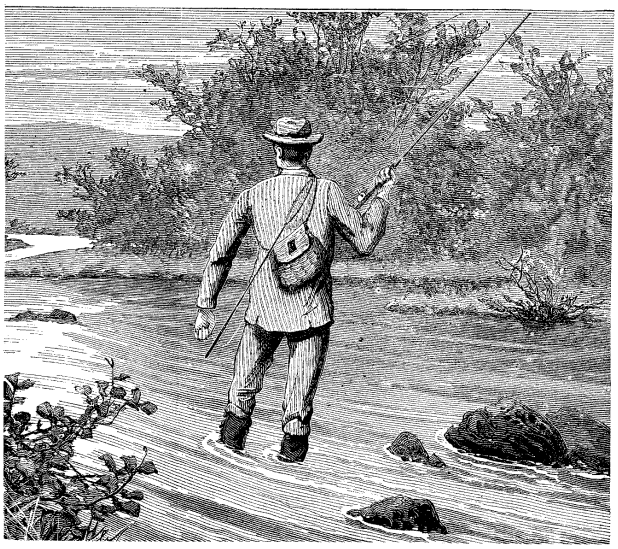
Loving v. Alexander

In the early 1980s, landowners attempted to prevent public recreational use along the Jackson River by restricting access and use of the stream. In *Loving v. Alexander,* 67 riparian landowners along a segment of the Jackson River brought suit against the Army Corps of Engineers.[35] The landowners challenged the Corps' determination of navigability of the Jackson as it applied to a segment of the Jackson between Covington and Gathright Dam (approximately 17 stream miles). The Corps' plan promoted public access and boating on the river. The plaintiffs claimed the Jackson River segment was nonnavigable, and that they owned property that bordered and included portions of the river. By facilitating public use of the river over private property, the landowners claimed the government was allowing a taking of their private property without compensation.

In *Loving supra*, the U.S. Court of Appeals held that the Jackson River was navigable.[36] As a coincidence, the federal test of navigability is nearly identical to the test used by the Virginia Supreme Court in the *Boerner* case.[37] The federal determination of navigability includes, "waters susceptible to use for commercial transport, either in their natural or improved condition, and those whose use or development would affect waters susceptible to commercial use."[38] Using the same navigability criterion on the same stretch of river, the federal court reached a different conclusion than the *Boerner* Court on the navigability of the Jackson.

The federal determination of the navigability was based on evidence from several Virginia court cases that illustrated various instances in the late 1800s and early 1900s where logs had been successfully floated down the river as "articles of commerce."[39] The court noted that these log drives were eventually prevented, not because they were proved financially unfeasible, but because of a court injunction.[40] Other evidence of navigability was found in early legislation from the Virginia General Assembly authorizing construction of a dam across the Jackson. The legislation dictated that the dam have "a good and sufficient lock for passage of boats [and]...keep the same in such repair as not to obstruct the navigation of said river...."[41]

Having established the Jackson as a navigable river, the court stated that its decision did nothing more than hold that "a navigable servitude applies to the Jackson River segment and that the defendants may require plaintiffs to allow public access to the *surface of the river*."[42] This meant that boats could use the surface of the disputed segment of the Jackson if they gained lawful entry to the river at public access points.[43] The ruling did not require private landowners to permit access to the river from or through their property.[44] The ruling also implied that, while recreational users could use the surface of the water, they could not make use of the streambed.[45] Given the *Boerner* decision, wading on the streambed or use of the bank would be considered trespass.



Since the case only involved issues of navigability and rights of passage, recreational fishing rights were not discussed in this case.[46] Federal interest in this case extended only to the realm of navigation, and the *Loving* court stated, "while the surface of the disputed section of the Jackson River may be used by the public, the use of its bed and its banks are matters of state law, subject only, so far as the United States is concerned here, to the navigational servitude and whatever regulation Congress may lawfully impose."[47] Thus, the rights of passage and rights to fish are separate. The court also noted that in *Boerner v. McCallister*, the state Supreme Court had not determined whether public interest in a navigable stream with a privately-owned bed extended any further than the right of

navigation.

Kraft v. Burr

In *Kraft v. Burr*, several landowners again sought to limit public recreational use along the same stretch of the Jackson River.[48] Landowners claimed to possess exclusive fishing rights in the portion of the Jackson flowing over their property. Since fishing from the stream banks or wading without a landowner's permission were already prohibited, landowners sought to prevent the public from fishing from boats that were lawfully navigating the river.

Charles A. Kraft, Jr., a professional fishing guide, had fished in the Jackson River over private streambeds where the property owners had posted signs prohibiting fishing. Kraft gained lawful entry to the water, floated lawfully on the river surface and fished from his boat. He did not walk on the bank, wade upon the bed, or anchor his boat in the disputed part of the river. Burr and the other property owners brought suit against Kraft to stop him from fishing in the waters of the Jackson River flowing over their property. The landowners sought a judicial ruling on their ownership of the streambed and of their exclusive fishing rights in the river running over those streambeds. The basis of their claim of exclusive fishing rights was not private bed ownership, but special grants from the crown of England.

On June 1, 1750, King George II granted William Jackson 270 acres of land along the Jackson River. This grant expressly conveyed property on both sides of the river, the streambed, and the "privileges of fishing, hunting, hawking and fowling."[49] Ethridge E. and Hazel Burr, Bobbie E. and Nancy A. Witt, and Robert M. and Bettie H. Loving now own land that was conveyed in the original Jackson patent. Nineteen years later, in 1769, King George III granted 93 acres of riparian land to Richard Morris. The Lovings, Thomas G. Botkins, Jr., Sarah Botkins Crosier, Alan S. Botkins, and Robert W. Botkins (and their respective spouses) now own the land conveyed in the Morris patent. The lands mentioned in the Jackson and Morris patents cover three miles of streambed immediately below the Gathright Dam.

The landowners' claim of exclusivity was based on two premises. First, English kings had the power to grant exclusive fishing rights over navigable water. Second, the grant language in both patents *did* in fact convey such exclusive fishing rights.

In challenging the landowners' claims, Kraft argued that a patent from the king that granted streambeds could not convey exclusive fishing rights in the waters flowing over those beds. His reasoning was that conveying exclusive fishing rights went against English common law, which provided that in navigable streams, these rights were

held by the King in *jus publicum*, or in trust for the public. Therefore, these exclusive rights could not be granted to a private person. Kraft based this argument on a treatise by Lord Chief Justice Hale entitled *De Jure Maris et Brachiorum Ejusdem* (Concerning the Law of the Sea and its Arms).[50] The court in *Commonwealth v. Morgan* cited the Hale treatise as the "best and most authoritative treatise on the power of the sovereign over streams."[51]

Kraft also argued that the language of the grant did not convey exclusive fishing rights. The Jackson patent granted "privileges of fishing and fowling," but in the Morris patent, these privileges were not explicitly stated. The Morris patent states:

> George the third etc. To all etc. Know ye that for divers good causes and considerations but more specially for an in consideration of the sum of Ten Shillings of good and lawful money for our sue paid to our Receiver General of our Revenues in this our Colony and Dominion of Virginia. We have given granted and confirmed and by these presents for us our heirs and successors Do five grant and confirm unto Richard Morris one certain Tract or parcel of land containing ninety three acres—lying and being in the County of Augusta on Jackson's River below Armstrong's land and bounded as followeth, to wit [metes and bounds description.]
> With all etc. to have hold etc. to be held etc. yielding and paying etc. provided etc. [signatory language].[52]

The Morris claimants relied on the abbreviation "etc." to support their claim of exclusive fishing rights, but Kraft argued that the language of this grant did not convey exclusive rights.

In a 4-3 decision, the court found that the crown could and did convey exclusive fishing rights to the riparian owners. In response to Kraft's first argument, the court stated that Kraft misinterpreted Lord Hale's treatise. The court quoted the following statement from the treatise, "the king may grant fishing within a creek of the sea."[53] Then the court referred to *Commonwealth v. Morgan* (1983) where it was held that the king did have the power to grant special rights to private persons, regardless of whether the waters were navigable or not.[54] The court also noted that the General Assembly implicitly acknowledged that the Virginia government would honor these types of grants. Because of legislation that had reserved all streambeds in state ownership except for those which were "conveyed by special grant or compact according to law," this principle was codified in Virginia law.[55] Hence, the court held that the king had the right to grant streambeds and therefore, had the right to grant exclusive fishing rights to Jackson and Morris.

Having established that such rights could be conveyed, the decision of the case turned upon the interpretation of whether these rights were conveyed. The majority of the court held that the language of the grant did convey exclusive fishing rights on the Jackson River to the original landowners and that these rights were later transferred to the successive landowners. Specifically considering the ambiguous use of the abbreviation "etc." in the Morris patent, the court decided the recording clerk's use of

"etc." was a convenient custom that eliminated much of the patent form language. The court held that the abbreviation "etc." stood for "the privileges of hunting, hawking, fishing and fowling," and that the Morris claimants did have exclusive fishing rights.[56]

Justices Koontz and Compton opined that neither patent granted exclusive fishing rights. Both justices felt that Kraft was lawfully in the water and the fish he intended to catch were in a state of *fera natureae,* free to swim up and down the river and free from any claim of private

ownership.[57] In addition, they concluded that the Jackson patent granted nothing more than "privileges," and such language does not convey exclusive rights. They also believed that the court's interpretation of "etc." in the Morris patent was too liberal. The justices then stated, "The majority cites no authority in support of its conclusion that the fishing rights were necessarily exclusive or that the crown could not grant less than exclusive fishing rights. In any event, the language of the patents does not specifically grant exclusive fishing rights."[58] The other dissenting judge, Justice Carrico, agreed with the majority of the court regarding the grants of rights in the Jackson patent, but felt that the term "etc." was not enough to convey exclusive fishing rights to the Morris claimants.

Analysis and Implications

The *Kraft* case does not create immediate changes in the nature of recreational fishing rights beyond the case at hand. The *Kraft* decision revolved around the narrow issue of whether special rights were conveyed in an original crown grant. In particular, the landowners in this case chose not to assert their rights to the fishery based on general private streambed ownership. In many ways, the *Kraft* case raises more questions about the extent of public fishing rights in Virginia than it answers.

The *Kraft* case clarifies that the exclusive right to fish can be conveyed to riparian owners by the colonial crown grants regardless of whether the stream is navigable. In the absence of special grants, however, the rights of riparian streambed owners in physically navigable waters are still uncertain. Reiterating a statement made in the *Boerner* case, the *Kraft* court noted that "there is persuasive authority to the effect that even though a stream may be floatable, and in some instances navigable, the public interest therein is limited to the right of navigation; the only restraint placed upon the owner being that they cannot obstruct or impede the public right."[59] As in the *Boerner* case, this opinion should not be interpreted as a legal precedent. The *Kraft* decision was based on the conveyance of a specific right, and not upon this more far-reaching interpretation of rights of riparian landowners. Therefore, the portion of the decision discussing navigability is not binding, but, nevertheless, may be persuasive in future decisions.

In another respect, the *Kraft* case raises new uncertainties about the status of public recreational fishing rights throughout the Commonwealth. The court decision in *Kraft* was based on a liberal interpretation of the language in a land grant. The court interpreted the words "privileges of fishing" to mean exclusive fishing rights. Furthermore, a crown grant may convey exclusive fishing rights even if fishing privileges are never explicitly mentioned. The court held that exclusive fishing rights were conveyed through the abbreviation "etc." in the Morris patent. This liberal interpretation may have implications for future rulings, where anyone with a crown grant may be able to prove they also have exclusive fishing rights in the waters bordering their property. The extent that these special crown grants exist in other inland waters of Virginia is unknown. Since a substantial portion of the Commonwealth of Virginia may have been conveyed under crown grants, exclusive private fishing rights could be extensive.[60]

Whether the *Kraft* decision will be used to extend private claims in inland waters depends on whether other landowners with crown grants bring their cases to court and have exclusive fishing rights established. Where and when this will happen remains to be seen.

Jackson River Epilogue

Two years after the Supreme Court ruling in *Kraft v. Burr*, confusion and conflicts continue to surround the status of recreational fishing rights on the Jackson River. The question that recreationalists want answered is, "Can I fish?" The unfulfilling answer to that question is, "It depends" and "Maybe." The current confusion on the Jackson River illustrates the ambiguities surrounding recreational fishing rights in inland waters.

The area along the Jackson affected by the *Kraft* decision starts several hundred yards below Gathright Dam and extends until public access point number 2, Johnson Springs (about 3 miles of river). Game officers and the sheriff's office have been writing trespassing summons and arresting offenders to people found fishing in the Jackson River over established crown grant lands.

Thomas Botkins, Jr. is one of the private landowners granted exclusive fishing rights under the Morris grant. Immediately after the case, Botkins encountered few problems with trespassing. Recently, that has begun to change. According to Botkins, the amount of trespassing has increased recently "now that it has been a while since the court decision and there are rumors out where people feel they can do whatever they want."[61] He has had many problems with people fishing on his property since the court decision, and has had to call the game warden on many occasions, by his account at least 10 or 12 times. He is not allowing the public to fish on his land for a fee, but is allowing some people to fish there with permission.

Below Johnson Springs access point into the city of Covington (about 14 miles), the question of "Can I fish?" is far more uncertain and depends on where you are. The land along this stretch of the Jackson River is predominately private property, but the landowners have not established exclusive private fishing rights in court.

Several of the landowners below the Johnson Springs access point have asked the Allegheny County commonwealth attorney, J. Chris Alderson, to enforce exclusive fishing rights on their property. Alderson replied that he will not enforce exclusive fishing rights on private property that was not involved in the *Kraft* decision, unless those landowners go to court and have their rights established.[62] However, Larry Mohn, division chief of the Virginia Department of Game and Inland Fisheries, noted that potential anglers should be reminded that landowners still have the option of going to court to try to establish exclusive rights.[63] These landowners could attempt to trace their land titles back to the original grant or argue on more general terms that streambed ownership, in general, encompasses an exclusive right to fish. Thus, there remains a possibility that persons found fishing on any private property could be prosecuted. Although private fishing rights have not been established below Johnson Spring access point, trespassing signs are posted on private property all along the river. At some of the public access points,

signs

were posted that read, “To avoid possible trespass, prosecution for fishing, fishing from boat or wading, written permission is required on posted property or oral permission on property not posted.” Due to the current ambiguities over fishing rights, anyone fishing is fishing at their own risk.

So where is it safe to fish? Dale Remington, a ranger at the James River Ranger District of the U.S. Forest Service in Covington, said fishing was definitely allowed at the public access points on the river.[64] Remington said that about 100 feet of river on either side of the public access points is open to public fishing. These access points are publicly owned land. The ranger station is also reminding the public that they have rights of passage all along the river below the dam (provided they gain lawful entry).

Those wishing to boat or fish on the Jackson below the Gathright Dam should be wary of comments by other recreationalists and some landowners. Misinformation about public recreational rights appears prevalent. Many local residents and recreationalists are unclear of what the law states. Some state the public could fish from a boat but they could not wade on the stream bottom, while others think that all fishing, floating, or wading is prohibited on private land. The game warden for Allegheny County, Jay Dowdy, said there have been reports of landowners shouting at people on the river that they are not allowed to float over privately owned streambeds.[65] The *Loving* ruling clearly states otherwise.

The *Kraft* case, however, may have an unintended impact on the status of what has been called one of the "premier trout fisheries in the East."[66] In 1997, the Department of Game and Inland Fisheries suspended the trout-stocking program below the Gathright Dam.[67] Some evidence suggests trout fishing may suffer accordingly. Kurt Martin, a local realtor in the area, noted that property prices have declined along with fishing expectations.[68] Consequently, the Jackson River may relinquish its premier trout fishery title.

APPENDIX: Determinations of Navigability

Even though the Supreme Court of Virginia has declared certain streams to be navigable or nonnavigable, no explicit criteria that can be used to identify navigable waters has been described.[69] For example, what constitutes commercial is not always clear. In some other states, commercial use is interpreted as floating logs.[70] The Virginia Supreme Court in *Boerner v. McCallister* determined that evidence of log floating down a river for a period of six years during times of high water was not sufficient to declare a stream navigable.[71] Use of a stream or river by commercial fishing guides may or may not constitute commercial use depending on the criteria used to define "commercial."

Just because a stream does not support commercial use (however defined) does not imply that the stream is physically nonnavigable. Streams that are capable of floating small crafts have been declared nonnavigable by the commercial standard. To remedy this ambiguity, some states have adopted the recreational standard as another method of determining navigability. It defines waterways to be navigable if they are physically so (i.e. suitable for use by canoes or other recreational boats), even if the waters are not used commercially.[72] Michigan and Ohio, for example, define navigability by this standard. The Virginia Supreme Court has not formally rejected the recreational use standard, but has not accepted it either, continuing to define navigability solely in terms of commercial use.[73]

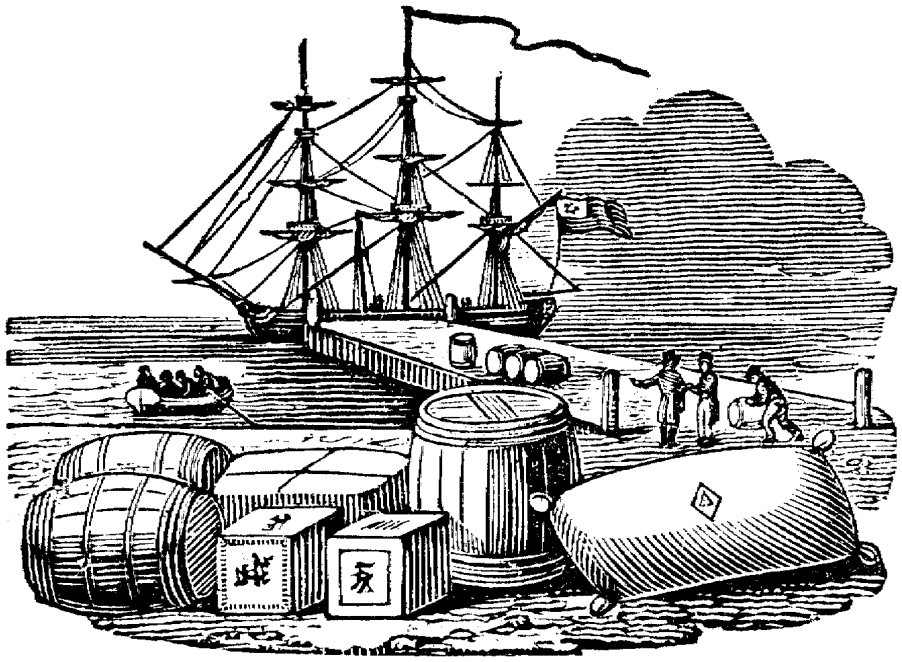
Definitions of navigability play a role in determining the extent of public ownership and thus public fishing rights in inland waters. The degree of public ownership of streambeds is related to the navigable status of inland waters. In addition, the extent of public recreational fishing rights in waters where the streambed is privately held may also depend on definitions of navigability. As the discussion of the *Boerner* case indicates, whether the right of navigation also includes the right to fish, has not been explicitly addressed by the Virginia Supreme Court.

Federal interest in issues of navigability concern rights of passage and interstate commerce. Federal court decisions regarding navigability can be traced back to the 1871 case, *The Steamer Daniel Ball v. United States* in which the U.S. Supreme Court held that the English common law doctrine of navigability had no application in this country, and that a different test must be applied to determine the navigability of U.S. rivers.[74] The court stated waterways 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."[75]

With some minor modifications, the navigability test from *Daniel Ball* is used today to define federal jurisdiction under the Commerce Clause.

The federal definitions of navigability generally extend only to issues of rights of passage. Conflicts over other uses of inland waters, such as recreational fishing rights, are usually resolved by state law.[76] The states can and often do use a different definition of navigability than the federal courts. The Virginia Supreme Court decided in *Ewell v. Lambert* that the state test to determine navigability is, "whether the stream is being used, or is susceptible of being used, in its natural and ordinary condition, as a highway for commerce, on which trade and travel are or may be conducted in the customary modes of trade and travel on water."[77] This statement is very similar to the federal definition. Simply put, Virginia defines navigability through commercial use and public recreational rights in Virginia generally extend to streams that have been used for commercial navigation purposes.



Endnotes

[1] In this paper, inland waters are nontidal waters that flow directly into tidal waters. Thus, inland waters do not include isolated private ponds.

[2] With the exception of private ponds, the state controls the use of the fish regardless of whether a private landowner or the public has been granted rights to fish. Thus, recreational fishing rights grant public or private *access* to the fishery, but not unrestricted *use* of the resource. The state retains the right to manage the fish resource including the regulation of seasons, fishing methods, and catch limits. In general, see Joan G. Windell, *Fish and Game* Am Jur 2nd 648.

[3] See Cox, W. E. and K. A. Agrow. Public Recreation on Virginia's Inland Streams. Bulletin 120, Blacksburg: Virginia Water Resources Research Center, 1979, for a more detailed and comprehensive discussion of this issue.

[4] Code of Virginia, 28.2-1200.

[5] Cox, W. E. Public Recreational Rights on Virginia's Inland Streams. Special Report 10, Blacksburg: Virginia Water Resources Research Center, 1980 at 2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Boerner supra* n. 10.

[11] *Id.*

[12] *Id.*

[13] An appendix to this report contains a more detailed discussion on the determination of stream navigability.

[14] *Boerner supra* n. 10.

[15] Cox *supra* n. 5 at 3.

[16] Cox *supra* n. 5 at 4.

[17] Privately owned streambeds that were conveyed by crown grants from the King of England are distinct from other private streambeds in that there are different legal implications. When dealing with crown grants, the rights that are conveyed depend on the particular language of the grant.

[18] Cox *supra* n. 3 at 38.

[19] *Mead v. Haynes*, 24 Va. (3 Rand.) 33 (1824). See Cox *supra* n. 3 at 43.

[20] Cox *supra* n. 5 at 8.

[21] *Home v. Richards*, 8 Va. (4 Call.) 441 (1798). See Cox *supra* n. 3 at 41.

[22] *Mead* supra n. 20. See Cox *supra* n. 3 at 41.

[23] *Martin v. Beverly*, 9 Va. (5 Call.) 444 (1805). In general see Cox *supra* n. 3 at 42.

[24] *Morgan v. Commonwealth*, 98 Va. 812; 35 S.E. 448; 1900 Va. LEXIS 109 (1900).

[25] *James River and Kanawha Power Company v. Old Dominion Iron and Steel Corporation*, 138 Va. 461 (1924). See *Cox supra* n. 3 at 47.

[26] *Id.*

[27] *Commonwealth v. Morgan* 225 Va. 517, 303 S.E.2d 899 (1983).

[28] *Id.*

[29] *Id.*

[30] Code *supra* n. 4.
[31] *Boerner supra* n. 10. See Cox *supra* n. 5 at 7.
[32] *Loving v. Alexander,* 745 F. 2d 861, 1984 U.S. App. LEXIS 17955 (1984).
[33] *Id.*
[34] "Va. High Court to Tackle Trout Fishing Dispute", *Roanoke Times*, March 7 1996, Associated Press
[35] *Loving v. Alexander*, 548 F.Supp 1079 (1982)
[36] *Id.*
[37] Federal court decisions regarding navigability can be traced back to the 1871 case, *The Steamer Daniel Ball v. United States* in which the Supreme Court held that the English common law doctrine of navigability had no application in this country, and that a different test must be applied to determine the navigability of U.S. rivers.

The court stated waterways 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." (*The Daniel Ball v. United States*, 19 L. Ed 999 (1900).)
[38] Cox *supra* n. 5 at 5; Other federal cases include *U.S. v. Utah* (1931) where it was stated that the extent and manner of use of a navigable river is not important as long as it can actually be used as an avenue for commerce, and *U.S. v. Appalachian Electric Power*, where three ways in which navigability can be established were described: (1) present use or suitability for use, (2) suitability for future use with reasonable improvement, and (3) past use or suitability for past use. This case also held that "When once found to be navigable, a waterway remains so." (*Loving v. Alexander*, 745 F. 2d 861; 1984 U.S. App LEXIS 17955 (1984).)
[39] *Loving supra* n. 31.
[40] Landowners were able to acquire an injunction because the floating of logs damaged riparian property (stream banks). See *Hot Springs Lumber and Manufacturing Co. v. Revercomb*, 106 Va. 176, 55 S.E. 580 (1906), and *Hot Springs Lumber and Manufacturing Co. v. Revercomb*, 110 Va 240, 65 S.E. 557 (1910).
[41] *Loving supra* n. 31.
[42] *Id.*
[43] The issue that the streambed was privately owned was not disputed in this case.
[44] *Loving supra* n. 31.
[45] *Id.*
[46] The federal interest in navigability generally extends only to issues of rights of passage. State law usually resolves conflicts over other uses of inland waters, such as recreational fishing rights.
[47] *Loving supra* n. 31.
[48] *Kraft v. Burr*, 476 S.E.2d 715 (Va. 1996). Some of the plaintiffs in this case had been involved with the earlier *Loving v. Alexander* case as well.
[49] *Kraft supra* n. 44.

[50] *Id.*
[51] *Commonwealth v. Morgan* 225 Va. 517, 303 S.E.2d 899 (1983).
[52] *Kraft supra* n. 44.
[53] *Id.*
[54] The court in *Commonwealth v. Morgan* granted the streambed and oyster harvesting rights in a tidal, navigable waterway, but did not challenge the public use of waters above the streambed. *Commonwealth v. Morgan* 225 Va. 517, 303 S.E.2d 899 (1983).
[55] *Kraft supra* n. 44.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Cox supra* n. 5 at 2; Bill Cochran, "Supreme Court Ruling Rocks Boat and Anglers Alike" *The Roanoke Times*, page C2, Sept 29, 1996.
[61] Botkins, Thomas. Personal communication. 3 Aug. 1998.
[62] Alderson, J. Chris. Personal communication. 29 July 1998.
[63] Mohn, Larry. Personal communication. 30 July 1998.
[64] Remington, Dale. Personal communication. 31 July 1998.
[65] Dowdy, Jay. Personal communication. 31 July 1998.
[66] Cochran, Bill. "Supreme Court Ruling Rocks Boat and Anglers Alike." *The Roanoke Times*, page C2, Sept 29, 1996.
[67] Mohn, Larry. E-mail to author. 24 Aug. 1998.
[68] Martin, Kurt. Personal communication. 4 Aug. 1998.
[69] Cox *supra* n. 3 at 27; *Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932)* also supported that view that fishing rights and navigation rights are separable. Other states do not agree stating that the public retains the right to fish as a right of navigation regardless of where the streambed is privately owned.
[70] "Public Rights of Recreation, Boating, Fishing, Wading, or the Like on Inland Streams the Bed of Which is Privately Owned", 6 ALR 4th 1030.

[71] *Boerner supra* n. 10.
[72] Cox *supra* n. 3at 20.
[73] Cox *supra* n. 5 at 6; The General Assembly has enacted various statutes regarding navigable waters, many applying to specific streams; these include statutes for navigability declarations, authorizations for improvements to navigation, and prohibitions of obstructions to navigation. However, many of these statutes came early in the history of the Commonwealth and are not currently codified in the Code of Virginia. An example of one of these early statutes regards, "authorization for opening and extending the navigation of "Potowmack" [Potomac] River from tide water to highest place practicable on North Branch. River, when works completed, will be taken to be navigable as a public highway (1784). See Cox *supra* n. 3 at 88 for more details.
[74] *The Daniel Ball v. United States*, 19 L. Ed 999 (1900).
[75] *The Daniel Ball v. United States*, 19 L. Ed 999 (1900).

[76] When a federal project is involved in a property rights conflict, the federal court has jurisdiction, as in *Loving v. Alexander*. Cox *supra* n. 5 at 5.

[77] *Ewell v. Lambert*, 177 Va. 222, 13 S.E. 2d 333 (1941). See Cox *supra* n. 5 at 5.