

## **The Jackson River Fishery and Public Access Litigation**

### **Summary**

The Jackson River tailwater, which is composed of the stretch of river extending downstream from Lake Moomaw to Covington, is recognized as one of the premier trout fisheries in the eastern United States. With this status, however, has come a history of challenges related to public fishing access to the river. Since the establishment of coldwater releases from Gathright Dam, which enabled the creation of the current wild trout fishery, conflicts between riparian landowners and river users have seen increased visibility, with an ongoing court case involving alleged trespass by anglers on bottomland claimed to be privately owned. Though greatly concerned, the Department in fact has limited authority to become involved in the current case. In carrying out its responsibilities as the Commonwealth's fish and wildlife management agency, the Department does not have the ability to determine ownership rights or to unilaterally enter private litigation. Private property rights must also be recognized where they exist. Ultimately, full resolution of conflicts among constituents and private landowners will require involvement of not just the Department, but also other entities.

### **History of the Jackson River Trout Fishery**

The Jackson River tailwater, now one of the Commonwealth's best coldwater fisheries, was historically a warmwater fishery. In past years, the river's primary sport species included smallmouth bass, rock bass, redbreast sunfish and pickerel. This changed with the establishment of the current wild trout fishery following the construction of Gathright Dam, and naturally-reproducing populations of rainbow and brown trout now provide recreational angling opportunities.

The Gathright Dam project, authorized by Congress in the 1940s, began in the late 1960s and was completed in 1979. In acquiring the property necessary for the construction of the dam and Lake Moomaw, its resulting impoundment, the U. S. Army Corps of Engineers negotiated for the purchase of approximately 5,235 acres of Gathright Wildlife Management Area, one of the Department's (then known as the Commission of Game and Inland Fisheries) management areas. The Commission attempted to have the Corps replace the lost acreage by purchasing other suitable land.<sup>1</sup> This would in principle be similar to what the federal Fish and Wildlife Service requires of a state in an instance where it seeks to dispose of lands purchased with federal Pittman-Robertson funds or state license dollars. This approach was not accepted. Eventually, recognizing the Jackson River's potential to be one of the region's best public trout fisheries, the Commission accepted compensation of \$620,000, reportedly together with the understanding that the Corps would establish the coldwater releases from the dam necessary for the fishery, purchase six public access sites, and establish legal fishing rights downstream.

The coldwater discharges necessary to establish a trout fishery resulted from the dam project. Discharges of water at approximately 60-70 degrees or colder have led to the river's conversion to an

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<sup>1</sup> The Commission itself replaced the approximate acreage lost at Gathright WMA through purchase of C.F. Phelps WMA over the period of 1975-77. Cost was approximately \$4 million for 4,539 acres.

ideal fishery for wild trout, with water temperatures remaining at or less than 70 degrees for up to 18 miles downstream of the dam. Six public access sites were made available to the Commission by the Corps, though two sites were considered unsatisfactory by staff at the time according to their reports.

Perhaps the greatest challenge to the development of the public trout fishery was the clarification of legal fishing rights in the area downstream of Gathright Dam. As will be discussed in greater detail, public use of the Jackson River had over time been subject to question and, indeed, litigation. Partially addressing this controversy was a declaration by the Corps in 1978 that the river was navigable, which established a right by the public to navigate the stretch of river below the dam. This determination was challenged by litigation initiated by local landowners, but as will be discussed below, was upheld. Recent cases have not affected the public's navigation rights, and access to the banks of the river have been understood to remain in the ownership of landowners (as with other waterbodies). However, it is public access to the river bottom, as well as fishing rights (in the case of *Kraft v. Burr*) that have remained in question due to the alleged existence of private ownership granted prior to or shortly after the American Revolution. This private ownership would have been deeded by the English Crown (hence the term "Crown Grants" or "King's Grants"), or, for a brief period of time following American independence, by the Commonwealth of Virginia itself.<sup>2</sup>

Preliminary estimates of the value of a Jackson River trout fishery to the local economy ranged between \$2.9 and \$10.9 million based upon full establishment.<sup>3</sup> Following the commencement of the coldwater release, the Department stocked the Jackson in pursuit of this promising fishery, with the goal of establishing a self-sustaining wild trout population. When stocking was ceased in 1997, this goal was in fact realized. Trout populations in the Jackson River are now self-sustaining, and the fishery is regarded as one of the Commonwealth's best public trout fishing destinations.

### **Prior Litigation History**

Disputes concerning public access rights to the Jackson River have arisen for over a century.<sup>4</sup> The navigability of the Jackson had been challenged in state court even prior to the federal action noted above. Since the time navigability was determined, the most recent—and currently most discussed—cases have looked to issues of river bottom ownership and fishing rights.

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<sup>2</sup> Note that allegations and findings of Crown Grants are not limited to the Jackson River, nor is this type of inquiry a new judicial event. While the discussion of this paper is limited to the river segment in question, these cases have occurred in other areas of the Commonwealth as well. Outside of the Department's portion of the Code of Virginia, § 28.2-1200 states that "[a]ll the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of the Commonwealth, not conveyed by special grant or compact according to law, shall remain the property of the Commonwealth and may be used as a common by all the people of the Commonwealth for the purpose of fishing, fowling, hunting, and taking and catching oysters and other shellfish." This section has been explained as creating a presumption of public ownership of bottomlands unless private ownership through special grant or compact is shown.

<sup>3</sup> These estimates anticipated guide services, lodging, and other local businesses being established in response to the full development of the fishery and full access to it.

<sup>4</sup> The cases most relevant to the current discussion are included in this document. They do not, however, include all reported court cases involving the Jackson River.

In the context of the current Jackson River case, several prior cases are often mentioned. While there have been a number of cases involving this segment of the Jackson and, in many instances, its navigability, the first often mentioned is Boerner v. McCallister, 197 Va. 169 (1955), which predated the federal confirmation of the Jackson's navigability. As with other cases to follow, Boerner concerned an allegation of trespass by a fisherman in a portion of the river. The defendant in the case, Frank Boerner, contended, among other things, that the Plaintiff sought to prevent him and other members of the public from using a river that belonged to the Commonwealth of Virginia. While the Court reported that it was brought to Mr. Boerner's attention that he did not have to defend the action and incur the related costs, but could simply agree to cease his personal alleged trespass, he chose to proceed. The Plaintiff, Frank McCallister, claimed ownership of the river bottom by Crown Grant, as well as alleged that the Jackson River itself was non-navigable, and therefore, any access to the river was in private hands. In finding for Mr. McCallister, the Virginia Supreme Court recognized his Crown Grant claim and further refused to overturn a lower court's factual determination that this portion of the Jackson River above Covington was, in fact, non-navigable. Thus, no public access to the involved segment of the Jackson River would have been available.

Navigability of the Jackson River was considered again following the U.S. Army Corps of Engineers finding it to be navigable during the time period that Gathright Dam was being constructed. Loving v. Alexander, 745 F.2d 861 (4th Cir. 1984), mentioned above, was an appeal of the Corps' finding of navigability brought by a number of landowners along the Jackson. The Fourth Circuit upheld the Corps' determination; however, the decision did not itself necessarily fully open the river to fishing use. The Court was careful to explain that the Corps' determination would give the public access only to the surface of the river; that is, the right of navigation. Rights to use the bed of the river, as well as any public rights beyond that of navigation, were left to be determined according to state law.

The best-known recent case, Kraft v. Burr, 252 Va. 273 (1996), bears a strong resemblance to the current litigation, with an important distinction. In that action, several riparian landowners brought a private trespass action against a professional fishing guide, Charles Kraft, claiming ownership of the Jackson River bottom adjoining their lands by Crown Grant.<sup>5</sup> Going further than the current action, it was additionally alleged that exclusive fishing rights had been granted within this segment. As in the current (and the Boerner) case, this was a private civil trespass action brought by private landowners against a private defendant; the Commonwealth was not a party to the litigation.<sup>6</sup> Relying on trespass case precedent, the Kraft decision found that a prima facie showing of title, supported by possession of the property, was sufficient to sustain a trespass action against someone who does not claim title himself.<sup>7</sup> Further, due to wording included in the Crown Grants in question, the court additionally found

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<sup>5</sup> Note that one of the Crown patents included in the Kraft case was the Jackson patent addressed in the Boerner case.

<sup>6</sup> Note that the type of action is of consequence, as it informs both the extent of a court's inquiry and the impact of its finding.

<sup>7</sup> In a trespass action, the Court is not called upon to make an actual finding of ownership binding against the world, but rather a finding that a substantial enough indication of ownership exists to maintain the trespass action against the particular defendant. This action is distinct from one that would actually establish title as against all others, such as a quiet title action.

for the plaintiffs on their claim of exclusive fishing rights to this segment of the Jackson.<sup>8</sup> As a result, while the public retains the right to navigate the portion of the Jackson River adjoining the Kraft properties, the Department currently informs its constituents that access to the bottomland and fishing in that section remains in private hands. This is a practical action taken by the Department to avoid its constituents potentially facing private trespass actions rather than one strictly required by court order, as the litigation was solely between private parties and was not dispositive of title against the Commonwealth.

### **Current Litigation**

Since the time of the Kraft decision, and dating to the commencement of the circumstances giving rise to the current trespass action, the Department is unaware of further litigation that has occurred involving public access to the bottom of the Jackson River. The current case pending in Allegheny County Circuit Court again involves landowners along the Jackson River who claim ownership of the river bottom by grant, in this case a Crown Grant and a 1785 grant by the Commonwealth of Virginia (made prior to the time at which such grants ceased to be made), and again the defendants to the action are private parties who have made use of that bottomland. Like the Kraft case, public navigation rights settled in Loving are not challenged. Unlike the Kraft decision, the Plaintiffs in this case have not made an allegation of exclusive fishing rights also being held by them; rather their sole ownership allegation pertains to the river bottom. The Defendants are alleged to have repeatedly trespassed on this river bottom, presumably while wade fishing. The Plaintiffs seek an injunction prohibiting the Defendants from further trespassing, and have additionally requested \$10,000 in damages.

As in prior litigation, the Commonwealth is not a party to this action. The Defendants sought to join the Commonwealth to the case; however, the Court denied this motion. While the current Circuit Court proceedings (along with any appeals that may be brought) are still pending, the Court has issued a decision on a Motion for Partial Summary Judgment that appears to follow the reasoning of the Kraft case on the issue of the necessary ownership showing by the Plaintiffs. In its June 5, 2012 ruling on the Motion, the Court did not find that the Plaintiffs were in fact the fee simple owners of the river bottom in question, as that is not required for a civil trespass action. However, similar to Kraft, the Court did find that the Plaintiffs had made the necessary prima facie showing of title to proceed; that is, they had met the burden of proof needed to maintain a trespass claim. Whether they are likewise the true owners of the bottomland (and not the Commonwealth) remains an open question.

### **Challenges Faced by the Department**

1. While recent public attention has focused on whether the Department should itself be involved in the current litigation, in fact any such decision as to this involvement is one beyond the Department's authority.
  - a. The Department is not itself under any circumstances the owner of any portion of the Jackson River bottom. The bottomlands would instead be owned by the

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<sup>8</sup> Three justices dissented on this finding.

Commonwealth of Virginia itself. Therefore, even if the Department sought to independently intervene in the current or any other legal action affecting title to the river bottom, it is unlikely that it would be a proper party permitted to join; further, even could it join the current action, it would not appear that the Department itself could assert an ownership interest greater than that claimed by the Plaintiffs.

- b. Aside from the observation immediately above, the Department lacks the authority to independently intervene in a court action. As a state agency, the Department is represented in legal matters by the Office of the Attorney General and any decisions concerning intervention in a court case would be made in coordination with that office.
2. The Department has historically, and must continue to, respect private property rights in instances where private ownership is demonstrated.
  - a. While much discussion has been had over the effect of a fishing license issued by the Department, in no case does a Department hunting or fishing license grant access to private property. They are instead authorizations to engage in the hunting or fishing activity in a lawful manner; the decision as to where to hunt or fish is a separate issue that must be addressed by the sportsman.
  - b. Some level of confusion has resulted from license holders being permitted to access Wildlife Management Areas and Department lakes following the purchase of a license (or boat registration, or access permit); however, these areas are distinct from rivers due to the Department managing them, or having the authority to allow public access.
3. Determining appropriate guidance to be given by the Department to its constituents is not always straightforward.
  - a. The Department has historically relied on the best information available in providing information and signage regarding available public fishing opportunities. It will continue to do so. However, it is important to note that the Department's role in cases such as the current one is the provision of information—it does not itself determine ownership status of river bottoms, or have any legal role in that determination.
  - b. Each of the cases involving the Jackson River tailwater concern individual segments of the river, and not the entire stretch between Gathright Dam and Covington. As each title claim stands on its own merits, it is not the case that the ownership situation of a parcel along one segment affects the status of the entire stretch of river.
  - c. While the Department is well aware of the current litigation, until that litigation is complete it is unknown what its effects will be. To complicate matters further, the potential practical effects of the case are unclear. On its face, the case addresses only trespass to bottomlands and does not address fishing rights.
  - d. As with Kraft v. Burr, this is a private trespass action between private parties and does not involve the Commonwealth, nor will it determine the Commonwealth's ownership interest.
  - e. As is evident from the discussion above, the circumstances and legal implications of these situations are complex and require the expertise of other agencies to fully determine. Any course of action by the Department in reacting to the current case will include reliance upon advice received from the Office of the Attorney General.

4. While each of these cases is determined according to its own merits, the fact of the recent litigation being brought, and claims of private ownership that have arisen on other water bodies, does raise questions as to whether similar situations might exist in other rivers.
  - a. The Department itself lacks the authority, the funding, and indeed the legal expertise, to locate, examine, and determine the existence of these other instances. Thus, any work directed to this end will necessarily involve cooperation, and likely often reliance upon, other agencies. Any complete solution may additionally require General Assembly action.
5. Finally, the continued challenges to public access to the stretch of the Jackson River between Gathright Dam and Covington do raise some question as to whether the Department, and indeed the Commonwealth, received the full benefit of the agreements and understandings that were reached with the federal government to allow the inundation of former Gathright WMA acreage and then-existing coldwater fisheries as a part of the Gathright Dam project. Staff representations from that time indicate that agreement was predicated upon, in part, the clarification of public access rights to the fishery in this area. The Kraft decision explicitly found for the private landowners on the issue of exclusive fishing rights, and even cases focused solely upon bottomlands ownership may, in practical impact, be quite detrimental to public fishing in other areas. This inquiry will require additional efforts by Department staff to discover what specific agreements and understandings were reached with the U.S. Army Corps of Engineers at the time that Gathright Dam was constructed so that it may be determined whether they have been completely fulfilled.