

Evaluation of the SPLASH Grant Scheme Voluntary Access Agreements 2008-2012

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I do not wish my response to be confidential.

I would be happy to be contacted for further information, preferably by e-mail.

My personal involvement is the defence of the rights of the British people by pursuing the legitimate aim [*Rowland v EA*] of preserving the public right of navigation on all unregulated watercourses.

Dated 1st September 2013

My comments are as follows

The Evaluation of the SPLASH Grant Scheme Voluntary Access Agreements 2008-2012 is predicated on the uncritical acceptance of hidden and entirely fallacious assumptions, which reflects little credit on the academic credentials of this report. These assumptions are:-

1. That there is no general right of navigation on non-tidal watercourses.
2. That a *profit a prendre* for fishing rights includes the right to control navigation.
3. That the Environment Agency has a remit for navigation on waters for which it is not the statutory navigation authority.
4. That VAAs have some basis in law.
5. That there are organisations other than Parliament which may represent the general public in matters of their rights.

That there is no general right of navigation on non-tidal watercourses.

This based on the restatement in commentaries and law text books of the doctrine originally stated by Humphrey Woolrych in 1830. However, the law is not to be found in such places which are only unaccountable persons writing about the law. The law itself is to be found in legislation and case law.

Current case law, Lord Wilberforce [*Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd*, 1976], sets out some general principles of law relating to public rights of navigation.

"I have referred to these cases drawn from different systems of law, to support the existence of a rule, which is really one of the common law of nations, resting ultimately upon facts and needs, not confined to any one place or time, that the use of a river, according to its natural quality and capacity, for downstream floating is recognised by law, and to support the use of broad and liberal principle for the statement and application of the rule"

"The interaction of natural and visible capacity for use with human exploitation thus produces by inevitable process a segregation between rivers of public use and other rivers or streams which have not the character of public use."

Which in summary states that the public right of navigation is almost a universal human right and that its existence may be determined, as a matter of fact, by visual inspection of the stream's capacity. The generality of the wording prevents the argument that this only applies to Scottish law.

This is fully in accord with the affirmation of the common law public right of navigation on all rivers affirmed by the 1472 Act for Wears & Fishgarths, which tells us that, as a matter of fact, the PRN on all rivers existed between 1297 and 1472.

Mr Justice Lightman [*Rowland v EA*, 2003] considered how a PRN may be extinguished. He concluded that as long as the stream continued to flow the PRN could only be extinguished by legislation or the exercise of statutory powers. Since proof of non-existence is impossible, the onus of proof is on those claiming the absence a PRN on a stream which is visibly navigable.

Reliance on the Woolrych doctrine is unsafe for the following reasons:-

1. Comments in commentaries and textbook entries are not legislation or the exercise of statutory powers so may not extinguish a PRN.
2. The Woolrych doctrine is unsupported by case law. *Bourke v Davis* which is sometimes cited was rejected as misleading by the House of Lords in *AG v Brotherton*, 1990.
3. It is based on a series of errors highlighted by [Rev Dr Caffyn](#).
4. It was contrary to the legislation in force in 1830 , 1472 Act for Wears & Fishgarths.
5. It is contrary to current case law.

That a *profit a prendre* for fishing rights includes the right to control navigation.

Fish Legal can produce no legislation or case law to support this egregious confabulation concerning the law. Even in the absence of a PRN, the matter of navigation is between the owner of the soil of the river and the navigator. Fishing rights are the right to fish and confer no rights, whatsoever, to interfere with other persons.

That the Environment Agency has a remit for navigation on waters for which it is not the statutory navigation authority.

This was considered at the highest level by the English EA and it was concluded that the EA has no remit for navigation unless it is the statutory navigation authority. As a consequence, the EA publication, *Living on the Edge* http://a0768b4a8a31e106d8b0-50dc8025...114_c70612.pdf , was amended to contain the statement, "*The Environment Agency has control over navigation for some waterways only, and will not become involved in disputes or give legal advice about navigating any other waterways.*"

Unless the Welsh Environment Agency has been given additional powers in this respect then EA involvement in matters of navigation would be *ultra vires*.

That VAAs have some basis in law.

A PRN is a right that any member of the public may exercise without let or hindrance. Any restrictive agreement or arrangement, whatever terminology is used, is not only unlawful but as an interference with a PRN is a public nuisance [*Tate and Lyle v GLC and PLA*]. The use of public funds to generate a public nuisance would seem to indicate that some public authority is acting in *ultra vires*.

At best these could only be a private contract between the parties involved, creating no liabilities on third parties. However, even the existence of a contract is doubtful since there must be consideration on both sides. Since the fishermen can produce no legislation or case law to show they have any powers in relation to navigation, they do not have the power to permit navigation as consideration on their side.

That there are organisations other than Parliament which may represent the general public in matters of their rights.

BOPA, as a membership organisation may only represent its members and only control its members activities if their memorandum of association gives the organisation those powers. Likewise, Canoe Wales is a membership organisation representing a minority of recreational paddlers in Wales. Its memorandum of association gives the organisation no powers to tell its members where and when to paddle. Neither organisation has any powers to direct members of the public in the exercise of their rights.

England and Wales share a Common Law jurisdiction. Although the Welsh Assembly may have powers to represent its constituents in Wales it has no powers to change the common law in such a way as to restrict the rights of persons resident in England even when visiting Wales since there is no separate jurisdiction.

Only the Parliament at Westminster has the power to modify a public right of navigation in England or Wales. Any other person or organisation may only give advice on the use of a PRN to such members of the general public who may be prepared to listen to them.

General Considerations.

The use of public funds on activities of dubious legality in support of the outrageous assertions of the fishing community would seem to be an abuse.

The setting up of a limited liability company, Welsh Dee Fishing Ltd, to commit the public nuisance of interfering with a PRN would appear to be means of avoiding liability for an unlawful activity. I will be taking this up with the appropriate authorities.

The activities of the Wye and Usk Foundation in regard to promoting unlawful restrictions on the PRN on various rivers in Wales conflicts with their charitable status which is required under the new charities act to be for the benefit of all. This is also a matter I will be addressing.

There is a better way of achieving the aims of SPLASH based on the rule of law. This I have demonstrated in Dovedale. The advice given in my [river guide](#) addresses all the issues, practical, ecological, and social to be found in this highly sensitive area and has received positive reviews from the EA and local interests. I chose Dovedale as a test case because it had all the issues. I am now working on the Welsh Dee and the Derbyshire Derwent beginning by asserting the PRN, This appears to be the only viable way forward.

Once the PRN has been asserted the way would be open for setting up long distance canoe trails with the economy boosting infrastructure such as riverside camp sites.