

# What are the public's rights on rivers?

## Federal law

### Navigable rivers

Almost all of the rivers and creeks in the United States are *navigable for Clean Water Act purposes*, even if they are only ankle-deep. Rivers that were usable in the past for fur trade canoes or log drives, and are usable today for commercial raft trips or canoe or kayak classes, are *navigable for Commerce Clause purposes*. This includes rivers that have “falls, rapids, sand bars, and carries” (portages.)<sup>1</sup>

These historical uses frequently occurred on smaller rivers than the ones that are typically used for recreation today. Fur traders used shallow creeks that today’s canoeists would rarely use, due to frequent gravel bars and logjams.<sup>2</sup> Loggers used steep creeks that today’s kayakers would rarely use due to frequent portages.<sup>3</sup> Consequently, the rivers that are typically used for recreation today are navigable for Commerce Clause purposes.

Government agencies designate various river stretches as navigable, but rivers that are physically usable as described above are already legally navigable for Commerce Clause purposes, and are already open to public recreation under federal law, without official designation.<sup>4</sup>

### Public easement

There are many places where these rivers also serve as property boundaries and private landowners own to the middle of the river, or all the way across the river. However, these rivers are subject to the federal “navigational servitude,” which includes a “navigational easement” for “the benefit of the public, regardless of who owns the riverbed.”<sup>5</sup> This easement is similar to a utility easement or a rural road easement passing through private land. Private ownership of the beds and banks is “a bare technical title, always subject to public rights to use the stream.”<sup>6</sup> Rivers are held “as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery.”<sup>7</sup>

<sup>1</sup> Navigable rivers: *Economy Light v. United States*, 256 U.S. 113 (1921) (shallow, obstructed rivers used by canoes in “early fur-trading days” are navigable.) *United States v. Appalachian Electric*, 311 U.S. 377 (1940) (rivers with rapids used for “the floating out of logs” are navigable.) Cases cited herein are available at openjurist.org.

<sup>2</sup> Fur traders: *The American Fur Trade of the Far West* by Hiram Martin Chittenden, Stanford Univ. Press 1936-1954, pg. 762 (fur traders went up “all the sources of all the rivers,” including the “rivulets.”)

<sup>3</sup> Loggers used steep creeks: See numerous photos in *The Loggers* by Richard Williams, Time-Life Books 1976.

<sup>4</sup> Without official designation: *The Montello*, 87 U.S. 430 (1874) (rivers that are navigable in fact are navigable in law, without official designation, including rivers only navigable in canoes and the like, with obstructions, rapids and falls requiring portages.)

<sup>5</sup> Public easement: *Montana v. United States*, 450 U.S. 544 (1981).

<sup>6</sup> Bare technical title: *Scranton v. Wheeler*, 179 U.S. 141 (1900).

<sup>7</sup> To be freely used by all: *Martin v. Waddell*, 41 U.S. 367 (1842).

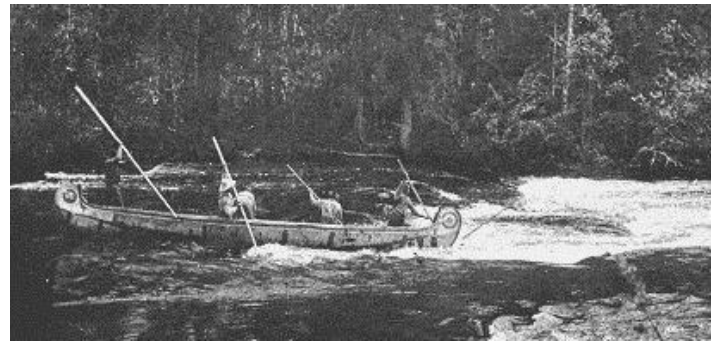
The easement includes public rights to portage around obstacles, rapids, or waterfalls, to engage in “sport fishing and duck hunting,”<sup>8</sup> to walk on the gravel bars and beaches, and to walk above the high water line as needed when walking along the banks of rivers.<sup>9</sup>

### Obstructing rivers

Obstructing rivers is a violation of federal law.<sup>10</sup> Riparian landowners cannot hang fences, cables, or “No Trespassing” signs across rivers.

### Getting to and from rivers

State governments have a duty to maintain public access to rivers.<sup>11</sup> Where bridges cross rivers, the public has the right to get from the bridge down to the river (unless there is other public access nearby.)<sup>12</sup>



**A fur trade canoe in rapids around 1900.** The U.S. Supreme Court has confirmed that rivers that were usable in the past for fur trading and logging continue to be public rivers today, even if they have rapids, boulders, obstructions, and portages.

## State law

State governments manage the water, fish, sand and gravel, and other resources in rivers. State law determines whether riparian landowners own to the high water mark, low water mark, or middle of rivers.<sup>13</sup> In all states, however, private property on rivers is “a bare technical title, always subject to public rights to use the stream,” as noted above. State authority on rivers is subject to the

<sup>8</sup> Sport fishing and duck hunting: *Montana v. United States*, 450 U.S. 544 (1981).

<sup>9</sup> Walking along the banks: *The Montello*, 87 U.S. 430 (1874).

<sup>10</sup> Obstructing rivers is a violation: 33 U.S.C. 403.

<sup>11</sup> Maintain public access: *Illinois Central v. Illinois*, 146 U.S. 387 (1892) (states can never “abdicate” their duty to provide public access “freed from the obstruction or interference of private parties.”) *Gion v. Santa Cruz*, 465 P.2d 50 (Cal.1970) (states and municipalities required to maintain public access to navigable waters.)

<sup>12</sup> Bridges to rivers: 39 Am. Jur. 2d *Highways, Streets, and Bridges* section 66 at 628 (1999) (“A public highway leading and extending to navigable waters,” should “reach the water so as to enable the public to enjoy the right of navigation.”) 48 Attorney General Opinion no. 13 (Mont. 2000) (bridges over rivers are the “intersection of two rights-of-way” that “provide access from one right-of-way to the other.”)

<sup>13</sup> State property law: *Packer v. Bird*, 137 U.S. 661 (1891).

public's "paramount right of navigation."<sup>14</sup> States are the "guardians" of rivers, so that "free navigation is secured."<sup>15</sup> Various segments of the beds and banks of rivers are owned by states or private landowners, but "whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters."<sup>16</sup> State authority on rivers is subject to the "paramount power" of the United States to ensure that rivers remain free to public use.<sup>17</sup>

Some state legislatures have designated a few rivers as navigable, and the rest as not navigable. These designations determine state or private *land ownership* along rivers, but they do not affect the federal *navigational easement* through private land on rivers in that state.



**Modern river trips** use the same rivers that were used in the past for fur trading and logging. Public rights to canoe, kayak, raft, portage, fish, fowl, and walk along the banks of these rivers are confirmed by federal law. They do not need state by state confirmation, although state government confirmation helps reduce public confusion about recreational rights on rivers in that state.

## State courts

Over the years, some state courts have denied public rights to navigate on rivers flowing through private land. Others have confirmed public rights to navigate but not fish. Under the Supremacy Clause of the U.S. Constitution, past state court decisions are no longer valid to the extent that they conflict with current federal law, even though they are "still on the books."<sup>18</sup> State court decisions and state definitions of navigability can reconfirm public rights where such rights are doubted, but they cannot deny public rights that are confirmed by federal law.<sup>19</sup> As noted earlier, current federal law confirms the public easement for

<sup>14</sup> Subject to public's paramount right of navigation: *Weber v. Board of Harbor Commissioners*, 85 U.S. 57 (1873)

<sup>15</sup> Guardians of free navigation: *Pollard v. Hagan*, 44 U.S. 212 (1845).

<sup>16</sup> Public rights: *Scranton v. Wheeler*, 179 U.S. 141 (1900).

<sup>17</sup> Paramount power: *Montana v. United States*, 450 U.S. 544 (1981).

<sup>18</sup> Supremacy Clause: Article VI, clause 2 (federal law is "the supreme law of the land, and the judges in every state shall be bound thereby.")

<sup>19</sup> Cannot deny public rights confirmed by federal law: *Hitchings v. Del Rio Wood Recreation & Park District*, 55 Cal. App. 3d 560, 127 Cal. Rptr. 830 (1<sup>st</sup> Dist. 1976) (states can create "their own definitions of navigability," but these cannot be "in conflict with federal dominion.")

navigation, fishing, fowling, and walking along the banks, on rivers that are typically used for recreation today, including small rivers with logjams, rapids, waterfalls, and portages. Past state decisions that deny these public rights don't need to be revered by the state courts or legislature. They simply don't apply any longer.

## State confirmation

Even so, state confirmation of public rights can help reduce confusion. State courts and legislatures can confirm public rights based on federal definitions of navigability, or based on state definitions (that do not exclude rivers covered by the federal definitions.) They can also confirm them based on other sources such as public ownership of the water, the Public Trust Doctrine, the Laws of Nature, and the doctrines of custom, prescription, and dedication by adverse use.

There are commercial benefits, tax revenues, and recreational benefits when state governments clarify public rights on rivers under current federal law. There are also negative consequences for not clarifying these rights. River users can take their business to other states where their rights are not questioned. Landowner fences across rivers can result in wrongful death. Heated arguments between landowners and river users can lead to fatal shootings and long jail sentences for landowners.<sup>20</sup> Needless confrontations between officers and river users waste valuable law enforcement resources.

## The bottom line

The law has confirmed public rights to canoe, kayak, raft, fish, fowl, and walk along rivers, in western civilization since ancient times, and in the United States since the founding of the nation. Not clarifying these rights, in every state, is hazardous for all concerned. ♠ ♠ ♠

**River law is straight forward.  
Clear up the confusion: Buy the book!**  
***Public Rights on Rivers***

***Public Rights on Rivers*** covers the complete history of public uses of rivers, from ancient times to the present, and explains how U.S. law has long confirmed public rights to canoe, kayak, raft, portage, fish, fowl, swim, and walk along the banks of rivers, in all fifty states. Clear up the confusion and know the law. ***Public Rights on Rivers*** is available for immediate download at:

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<sup>20</sup> Fatal shootings: See "Fatal shooting after argument along river in Missouri" at stltoday.com.