

Public Rights on Rivers in the United States

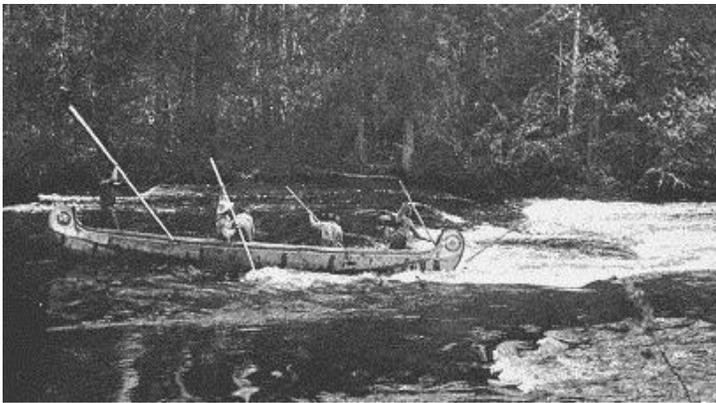
Federal law

Navigable rivers

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 rapids, waterfalls, and portages.¹

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.² Loggers used steep creeks that today's kayakers would rarely use due to frequent portages.³ Consequently, the rivers that people typically use for raft, kayak, or canoe trips in today's world 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.⁴



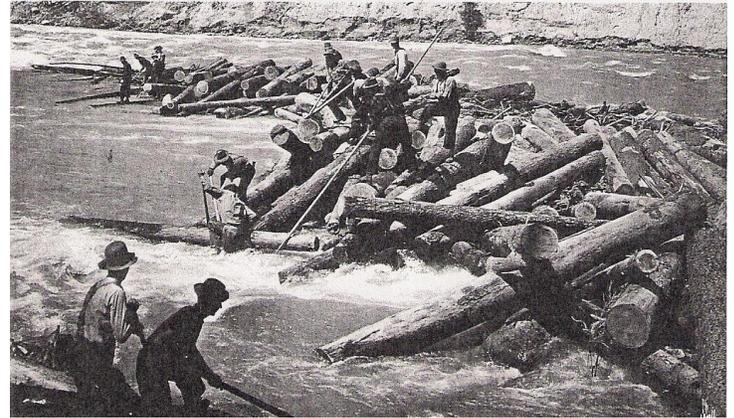
A fur trade canoe in rapids around 1900. The U.S. Supreme Court has confirmed that rivers that were usable in the past for fur trading and logging continue to be public rivers today, even if they have rapids, boulders, obstructions, and portages.

¹ **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” floating out of logs” in the “sparsely settled regions of the Western mountains” are navigable.) *Connecticut Light & Power Co. v. Federal Power Commission*, 557 F.2d 349 (2d Cir. 1977) (rivers with “numerous rapids, waterfalls, and boulders” are navigable.) *Alaska v. Ahtna*, 891 F.2d 1401 (9th Cir. 1989) (shallow, rocky rivers used for commercial raft trips are navigable.) *Atlanta School of Kayaking v. Douglasville County Water District*, 981 F.Supp. 1469 (N.D.Ga. 1997) (small whitewater rivers used for kayak and canoe classes are navigable.) Cases at openjurist.org and other websites.

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

³ **Loggers used steep creeks:** See numerous photos in *The Loggers* by Richard Williams, Time-Life Books 1976, and *The Gunnison Country* by Duane Vandenbusche, B & B Printers, Gunnison 1980.

⁴ **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 similar craft.)



Freeing a log jam in rapids around 1900. Rivers in Colorado that were usable for transporting logs in the past are still public rivers today, under federal law, even if they have rapids, obstructions, and waterfalls.

Public easement

There are many places where these rivers serve as property boundaries, so 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*, including the federal *navigational easement* for “the benefit of the public, regardless of who owns the riverbed.”⁵ This easement is similar to a utility easement or a rural road easement passing through private land. It includes public rights to portage around obstacles, rapids, or waterfalls, to engage in “sport fishing and duck hunting,”⁶ to walk on the gravel bars and beaches, and to walk above the high water line as needed when walking along the banks of these rivers.⁷ Landowner fences, cables, or “No Trespassing” signs across these rivers violate federal law, exposing the landowner to criminal prosecution as well as liability for wrongful death or injury.⁸

State governments manage the water, fish, sand, gravel, and other resources in rivers. State property law determines whether riparian landowners own to the high water mark, low water mark, or middle of rivers.⁹ In all states, however, private property on rivers is “a bare technical title, always subject to public rights to use the stream,” and “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.”¹⁰

Under federal law, state governments are the “guardians” of rivers, so that “free navigation is secured.”¹¹ They hold rivers “as a public trust for the benefit of the whole community, to be freely used by all for navigation and

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

⁶ **Sport fishing and duck hunting:** *Martin v. Waddell*, 41 U.S. 367 (1842). *Montana v. United States*, 450 U.S. 544 (1981).

⁷ **Walking along the banks:** *The Montello*, 87 U.S. 430 (1874).

⁸ **Fences across rivers violate federal law:** 33 U.S.C. § 403.

⁹ **State property law:** *Packer v. Bird*, 137 U.S. 661 (1891).

¹⁰ **Subject to public rights:** *Scranton v. Wheeler*, 179 U.S. 141 (1900).

¹¹ **Guardians of free navigation:** *Pollard v. Hagan*, 44 U.S. 212 (1845).

fishery.”¹² They have a duty to eliminate fences across rivers, and maintain public access to rivers at customary places such as where bridges cross rivers.¹³ State authority on rivers is subject to the public’s “paramount right of navigation,”¹⁴ and to the “paramount power” of the United States to ensure that rivers remain free to public use.¹⁵

State law

In some states, the legislature has 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. In some states, the state courts have denied public rights on rivers flowing through private land. However, under federal law states cannot interfere with navigation,¹⁶ and under the Supremacy Clause of the U.S. Constitution, past state court decisions no longer apply, to the extent that they conflict with current federal law, even though they are “still on the books.”¹⁷

Even so, state reconfirmation of public rights can help reduce public confusion and prevent conflict. State courts and legislatures can reconfirm 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 reconfirm them based on other sources, such as state ownership of the water, the Public Trust Doctrine, the Laws of Nature, or the doctrines of custom, prescription, and dedication by adverse use.

There are commercial benefits, tax revenues, and recreational benefits when state governments reconfirm public rights on rivers. There are also negative consequences for not reconfirming 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.¹⁸ Needless confrontations between officers and river users waste valuable law enforcement resources.

¹² **To be freely used by all:** *Martin v. Waddell*, 41 U.S. 367 (1842).

¹³ **Maintain public access:** *Northwest Ordinance of 1787* (the carrying places leading to navigable rivers shall be “forever free.”) *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 must maintain public access to navigable waters.) 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 66 at 628 (1999) (“A public highway leading and extending to navigable waters” must “reach the water so as to enable the public to enjoy the right of navigation.”) 48 Atty. Gen. Op. 13 (Mont. 2000) (bridges over rivers are the “intersection of two rights-of-way” that must “provide access from one right-of-way to the other.”)

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

¹⁵ **Paramount power:** *Montana v. United States*, 450 U.S. 544 (1981).

¹⁶ **States cannot interfere:** *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁷ **Supremacy Clause:** U.S. Constitution, Article VI, clause 2 (federal law is “the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.”)

¹⁸ **Fatal shootings:** See “Fatal shooting after argument along river in Missouri” at stltoday.com.



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.

In review, current federal law confirms the public easement to navigate, fish, fowl, and walk along the beds and banks of rivers that people typically use for raft, kayak, or canoe trips, and state law cannot deny the public easement on these rivers.

However, river users should avoid confrontations with landowners or law enforcement officials. These matters are better discussed around a table, with the book *Public Rights on Rivers* at hand, rather than on a river bank. River users should also avoid getting cited or arrested, and should avoid a “test case,” which would be expensive yet pointless, since federal law already confirms the public easement on rivers that are physically navigable as described earlier.

Law enforcement officials should avoid citing or arresting people who are navigating, portaging, or walking along the beds and banks of rivers that are physically navigable in rafts, kayaks, or canoes. These rivers are navigable for Commerce Clause purposes under federal law. They cannot be closed to the public under erroneous notions about state law.

Clear up confusion and know the law. Get the new book *Public Rights on Rivers*, available for immediate download at: nationalrivers.org


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