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Recreational Use of Watercourses

by Peter N. Davis

INTRODUCTION

The rights of abutting landowners and members of the public to use the surface of watercourses are governed by several legal doctrines. Most importantly, their rights are influenced by public recreational uses which unreasonably impinge on the riparian’s use of surface water. The riparian may use the entire surface of the watercourse subject to public right of navigation and floatage, as discussed below, the riparian can go wherever a member of the public can go. The riparian may use the surface in a reasonable manner for purposes such as, boating, swimming, bathing, fishing, hunting, and the like.

II. SURFACE USES

A. Surface Uses by Riparians

A riparian landowner has a right to use the surface of the watercourses abutting his shoreline. This is true whether or not the watercourse is a public water subject to public use rights. The states are in conflict, however, whether the riparian has a right to use the entire surface of the riparian watercourse or only that portion overlying his portion of its bed. Of course, where the abutting watercourse is subject to a public right of navigation and floatage, as discussed below, the riparian can go wherever a member of the public can go.

The riparian may use the surface in a reasonable manner for purposes such as, boating, swimming, bathing, fishing, hunting, and the like. Uses which unreasonably impinge on the rights of other riparians may be limited or enjoined.

In some states, as discussed below, the beds of navigable or floatable waters are owned by the state. In those states, the riparian has the same rights to use the surface as members of the public. There is no riparian right to use the surface of an artificial body of water, except where the riparian owns the bed. However, if the artificial body of water has become a natural watercourse by passage of time, then the natural watercourse surface use rules apply.

B. Surface Uses by Members of The Public

Definition of public waters. The public may use the surface of waters navigable under federal law or considered public or floatable under state law. Federal navigable waters are those which are or were historically navigated in waterborne interstate commerce, or could be made so with reasonable improvements. States differ on their definitions of public waters; they range from tidal waters alone, to waters

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4 Snively v. Jaber, 296 P.2d 1015 (Wash. 1956); Bino v. City of Hurley, 76 N.W.2d 571 (Wis. 1956).


7 Greisinger v. Klinhardt, 9 S.W.2d 978 (Mo. 1928).


9 See supra 67 to 70.

published in intrastate commerce, to all, of the public extend laterally to the public right of navigation if they were rendered floatable by artificial means and can be reached from the public water only through a tortuous course with extreme dexterity. Bed ownership. Those public rights exist whether or not the states own the beds of navigable or floatable waters. Where the state owns the beds, its ownership is for the benefit of the public rights of members of the public may use the surface as beneficiaries of state ownership. States which own the beds extend public rights to continuously submerged beds of tidal waters. In Missouri, members of the public may go wherever the public waters extend. However, there are no cases directly defining the lateral extent of public waters. Waters connected to public waters are not subject to the public right of navigation if they were rendered floatable by artificial means and can be reached from the public water only through a tortuous course with extreme dexterity.

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Lateral extent of public waters. On inland waters, the rights of members of the public extend laterally to the ordinary high water mark. On tidal waters, they extend up to the mean high tide line in most states, but only to the mean low tide line in those states which limit public rights to continuously submerged beds of tidal waters. In Missouri, the public may go wherever the public waters extend. However, there are no cases directly defining the lateral extent of public waters. Waters connected to public waters are not subject to the public right of navigation if they were rendered floatable by artificial means and can be reached from the public water only through a tortuous course with extreme dexterity.

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of navigable or floatable waters use the three different definitions of navigability mentioned above for bed title purposes. Where the state does not own the beds of navigable or floatable streams, the abutting riparians own bed title. However, those private bed titles are impressed with a public easement of navigation or floatage. Missouri uses the commercial navigability test for state bed ownership. The state owns beds underlying commercially navigable waters. Commercially navigably waters do not include waters floatable only by small recreational boats. Private ownership extends to the ordinary low water mark. The ordinary low water mark is a statistical average of the margin status of the watercourse and is based on the high water mark.

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On the boundary between the state-owned beds of navigable waters and the privately-owned shore, see generally supra note 10 WATER AND WATER RIGHTS section 6.03(a); note 1 A. TARLOCK section 3.09[1][c-d].

22 See supra note 21 Davis, at 674-76 nn. 50-51, 680-81 nn. 68-71, 699-700 n. 152.


25 See e.g., Skinner v. Osage County, 822 S.W.2d 437 (Mo. Ct. App. 1991); Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954); Hauber v. Gentry, 215 S.W.2d 754 (Mo. 1948).

26 See Skinner v. Osage County, 822 S.W.2d 437 (Mo. Ct. App. 1991); Sibley v. Eagle Marine Indus., Inc., 607 S.W.2d 431 (Mo. 1980); Volkering v. Brooks, 359 S.W.2d 736 (Mo. 1962); Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960); Hauber v. Gentry, 215 S.W.2d 754 (Mo. 1948).


28 See Skinner v. Osage County, 822 S.W.2d 437 (Mo. Ct. App. 1991); E.D. Mitchell Living Trust v. Murray, 818 S.W.2d 326 (Mo. App. Ct. 1991); Sibley v. Eagle Marine Indus., Inc., 607 S.W.2d 431 (Mo. 1980); Volkering v. Brooks, 359 S.W.2d 736 (Mo. 1962); Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960); Hartvedt v. Harpst, 173 S.W.2d 65 (Mo. 1943); State ex rel. Citizens' Elec. Lighting & Power Co., 69 S.W. 374 (Mo. 1902).

29 See Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960).

30 See Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954); Hobart-Lee Tie Co. v. Grabner, 219 S.W. 975 (Mo. Ct. App. 1920) [logs].

31 See e.g., State ex rel. Citizens' Elec. Lighting & Power Co., 69 S.W. 374 (Mo. 1902).

32 See e.g., Peterson v. City of St. Joseph, 156 S.W.2d 691 (Mo. 1941).
of particular islands.\textsuperscript{33} *Obstructions to navigation.* Owners of the shore or bed may not exclude or block public use of the waters over the bed.\textsuperscript{34} Because public rights extend only wherever the water extends, the public cannot traverse temporarily exposed beds of rivers, lakes and coastal waters.\textsuperscript{35} The coastal states are divided whether the public may traverse the dry sand portion,\textsuperscript{36} the wet sand portion of a coastal beach,\textsuperscript{37} or only the portion covered by water.\textsuperscript{38} While the public may incidentally touch the bed or banks while engaged in navigation,\textsuperscript{39} it may not occupy the bed\textsuperscript{40} or use the shoreline along or islands in inland waters for water-related activities.\textsuperscript{41} The public may not portage from one watercourse to another.\textsuperscript{42} In Missouri, owners of the shore or bed may not exclude or block use of the surface or privately-owned beds of public waters by the public.\textsuperscript{43} Since public rights extend wherever the public waters extend, members of the public may traverse over the submerged beds of public water, even the privately-owned portions which lie beneath commercially nonnavigable waters and portions which lie between the ordinary low water mark and the shore of navigable waters.\textsuperscript{44} The public may incidentally touch the bed or use the bank,\textsuperscript{45} but may not use the shore or private-owned islands for extended water-related activities.\textsuperscript{46}

*Types of public uses.* Members of the public may use public waters for swimming, boating, bathing, fishing, hunting, and the like.\textsuperscript{47} Such uses include a right to wade in the water over a privately-owned bed.\textsuperscript{48} Uses which unreasonably impinge on the rights of other members of the public or of private riparians may be limited or enjoined.\textsuperscript{49} The government may regulate public use of the surface, such as by imposing boat speed limits.\textsuperscript{50} Where excess use is a problem, the government may limit the number of public users.\textsuperscript{51}

In Missouri, members of the public may use public waters for swimming, boating, fishing, wading, and the like.\textsuperscript{52}

*Public rights in side canals.* The law is mixed whether the public right

\textsuperscript{33} Islands in nonnavigable waters belong to the riparian owner of the bed. Islands in navigable waters initially belong to the State. See Skinner v. Osage County, 822 S.W.2d 437 (Mo. App. Ct. 1991); Peterson v. City of St. Joseph, 156 S.W.2d 691 (Mo. 1941). However, by legislation in 1895, islands in navigable rivers and riverbeds no longer contained flowing water ("abandoned riverbeds") are transferred to the respective counties for school purposes. See Mo. Rev. Stat. §§ 241.290, 300; Volkerding v. Brooks, 359 S.W.2d 736 (Mo. 1962); Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960); Ancona Realty Co. v. Frazier, 41 S.W.2d 820 (Mo. 1931). The counties may sell those islands and abandoned riverbeds. See Mo. Rev. Stat. §§ 241.309-310. But islands formed in the Mississippi and Missouri Rivers may be retained by the Conservation Commission or the State Park Board (DNR) for wildlife habitat or recreational purposes; the counties receive title only to islands surplus to those needs. See Mo. Rev. Stat. § 241.291.

\textsuperscript{34} See Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974).


\textsuperscript{37} See e.g., CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115 (Alaska 1988); City of Daytona Beach Shores v. State, 483 So.2d 405 ( Fla. 1986).

\textsuperscript{38} See e.g., Bell v. Town of Wells, 510 A.2d 509 (Me. 1986); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356 (Mass. 1979).


\textsuperscript{40} See e.g., Munninghoff v. Wisconsin Conservation Comm'n, 38 N.W.2d 712 (Wis. 1949) (muskrat traps); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) (wading).

\textsuperscript{41} See e.g., Galt v. State, Dep't of Fish, Wildlife & Parks, 731 P.2d 912 (Mont. 1987).

\textsuperscript{42} See e.g., Lundberg v. University of Notre Dame, 282 N.W. 70 (Wis. 1938).

\textsuperscript{43} See e.g., City of Springfield v. Mecum, 320 S.W.2d 742 (Mo. Ct. App. 1959); Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954).

\textsuperscript{44} Id.

\textsuperscript{45} See e.g., Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954) (portaging around obstructions); O'Fallon v. Daggett, 4 Mo. 343 (Mo. 1836)(dictum).

\textsuperscript{46} See e.g., Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954) (dictum) (fishing from bank); Hobart-Lee Tie Co. v. Grabner, 219 S.W.975 (Mo. Ct. App. 1920) (landing floating logs); O'Fallon v. Daggett, 4 Mo. 343 (Mo. 1836) (repairing steamboat).

\textsuperscript{47} See e.g., Diana Shooting Club v. Hustin, 145 N.W. 816 (Wis. 1914). See generally, supra note 10 WATER AND WATER RIGHTS c. 31; note 1 A. TARLOCK section 8.06[2]. See also Annot., 6 A.L.R. 4th 1030 (1981).

\textsuperscript{48} See Rushton ex rel. Hoffmaster v. Taggart, 11 N.W.2d 193 (Mich. 1943).


\textsuperscript{50} See Mungenhoffer v. Wisconsin Conservation Comm'n, 38 N.W.2d 712 (Wis. 1949) (muskrat traps); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961) (portaging around shoals and rapids).

\textsuperscript{51} See Menzer v. Elkhart Lake, 186 N.W.2d 290 (Wis. 1971).


\textsuperscript{53} See Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954).
to use the surface extends into dredged side canals filled with water from public waters. Some courts reason that public access is allowed and public rights extend into side canals because they are continuously floatable from the public water and the water in them comes from the public water. On the other hand, other courts reason that the side canal was artificially created and is not part of the naturally-created public watercourse. But in one case involving a flood-enlarged previously-nonfloatable watercourse? But in one case involving a flood-enlarged previously-nonfloatable watercourse, the naturally-created public water status is from a civil law jurisdiction, which limits public rights to natural watercourses. The other decision favoring private status involved connection of a previously nonpublic water and did not involve constructed side canals. Thus, common law jurisdictions, like Missouri, may favor private waters status for constructed side canals, but are divided whether to retain private water status for previously nonpublic waters later connected to public waters. State regulation of obstructions to navigation. Many states regulate bulkhead and pierhead lines, and piers and wharves and other obstructions to navigation. In states which recognize a state navigation servitude, states and local governments need not pay compensation for impairment or destruction of access to navigability of state navigable waters. Several states regulate wetlands dredging and filling. Missouri has not enacted any statutes regulating structures in navigable waters, obstructions to navigation, or wetlands filling and dredging. By default, regulation of all

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51 See supra note 10, 4 WATER AND WATER RIGHTS section 32.02(a) n. 14.
54 See Dycus v. Sillers, 557 So.2d 486 (Miss. 1990).
58 See Dycus v. Sillers, 557 So.2d 486 (Miss. 1990).
62 See generally supra note 10, I WATER AND WATER RIGHTS sections 6.01(a)(2); note 1 A. TARLOCK section 3.17[1]. See also Plager, Interference with the Public Right of Navigation and the Riparian Owners' Claim of Privilege, 33 Mo. L. Rev. 608 (1968).
wetlands and regulation of obstructions on federally navigable waters, such as the Mississippi and Missouri Rivers, is left entirely to the federal government.

Municipal jurisdiction over structures in riverbed. Under their zoning authority, municipalities may regulate the location or construction of docks and other structures along or within watercourses. In Missouri, zoning authority has been expressly extended to structures within 100 yards of the shoreline of lakes with a total shoreline of at least 150 miles. This provision probably was intended to apply to the Lake of the Ozarks and other large reservoirs. It is not clear whether this statute impliedly denies exercise of such zoning authority over structures in rivers or smaller lakes.

III. FEDERAL REGULATION OF OBSTRUCTIONS TO NAVIGATION

Federal jurisdictional waters. The federal government has constitutional power to regulate navigation on navigable waters of the United States. Waters subject to federal navigation jurisdiction include waters in three categories: (1) waters which are being used presently for commercial navigation in waterborne interstate commerce; (2) waters so used historically (such as by fur traders in canoes, by keelboats, or by sawlogs floated to market); and (3) waters which are "susceptible of navigation" and can be made navigable by feasible improvements at reasonable cost. This includes canals constructed across fastland. The mere ability of the watercourse to float recreational boats does not establish navigability for federal regulatory purposes.

Lateral extent of jurisdictional waters. Federal navigation jurisdiction extends laterally to the ordinary high water mark. The ordinary high water mark is the highest level the navigable watercourse reaches without overflowing its banks and flooding adjacent land.

Extension of federal jurisdiction to side canals. In United States v. Sexton Cove Estates, Inc., the court held that side canals connected to navigable waters required a § 10 permit if their construction affected the bed, location, or currents of the navigable water. The court characterized the connected canals as analogous to tributaries to navigable waters, which are subject to federal jurisdiction because they affect the navigable capacity of navigable waters. But landlocked canals above the mean high tide line, although influenced by the ebb and flow of the tide, were held not subject to the navigation power. In a companion case, Weizmann v. District Engineer, U.S. Army Corps of Engineers, the court held that canals connected indirectly to navigable waters via pre-existing mesne canals are subject to federal navigable waters jurisdiction.

Navigation power. The federal government (through the Corps of Engineers) has the constitutional power under the Commerce Clause to regulate navigation on interstate and federal navigable waters. It may do any act, impose any condition, or require removal of any structure for purposes of maintaining or improving navigation.

See generally supra note 10, 5 WATER AND WATER RIGHTS, section 61.02; note 1, A. TARLOCK, section 3.17.[2][b].

See e.g., Mo. Rev. Stat. § 89.020 (1996); McDonald v. City of Lake Lotawana, 721 S.W.2d 200 (Mo. Ct. App. 1986).


See 33 C.F.R. § 329.4; On the definition of federal jurisdictional waters under the navigation power generally, see supra note 10, WATER AND WATER RIGHTS § 35.02(b); note 1, A. TARLOCK, section 9.03[1].

See The Daniel Ball, 77 U.S. 557 (1870).

See Economy Light & Power Co. v. United States, 256 U.S. 113 (1921). However, federal admiralty jurisdiction extends only to waters presently being used for navigation in interstate commerce. See Three Buoyos Houseboat Vacations U.S.A. Ltd. v. Morts, 921 F.2d 775 (8th Cir. 1990), cert. denied 502 U.S. 898 (1991) (Lake of the Ozarks).

See United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Washington Water Power Co. v. FERC, 775 F.2d 305 (9th Cir. 1985); The Montello, 87 U.S. 430 (1874). The reasonableness of potential navigability under Appalachian is explored in Washington Water Power Co. v. FERC, 775 F.2d 305 (9th Cir. 1985).

See Ex parte Boyer, 109 U.S. 629 (1884).


526 F.2d 1293 (5th Cir. 1976).

See also United States v. DeFelice, 641 F.2d 1169 (5th Cir.), cert. denied, 454 U.S. 940 (1981). For discussion of § 10 permits, see supra notes 85-94 and accompanying text.


526 F.2d 1302 (5th Cir. 1976).

Effect of Kaiser Aetna. In *Kaiser Aetna v. United States*, the Court held that the authority of the federal government under the navigation power and the public right of access on the surface may not be coextensive. It held that exercise of the navigation power extends to waters navigable in fact and the public right of access on the government under the navigation power was held that the authority of the federal government, under the navigation power.


The significance of *Kaiser Aetna* is its interpretation of the scope of the navigation servitude; previously it had been assumed that it extended wherever the navigation power extended. The federal courts have disengaged the lateral extent of the navigation power and the navigation servitude since *Kaiser Aetna*. The Corps of Engineers § 10 permits. The navigation power includes the power to regulate the permanent anchoring of vessels to the beds of navigable waters. The navigation power also includes the power to regulate access to and structures within the waters. First, the Corps of Engineers has established bulkhead and pierhead lines under Rivers and Harbors Act of 1899, § 11. 92 Behind those lines structures erected in the streambed generally are considered not to be obstructions to navigation. Second, it requires riparians to obtain permits for fills and structures within streambeds beyond the ordinary high water mark under Rivers and Harbors Act of 1899, § 10. 95 Unlicensed fills and structures are unlawful obstructions to navigation which the Corps can order to be removed under Rivers and Harbors Act of 1899, § 12.

90 Wetlands fill & dredging permits. Under Clean Water Act § 404, the Corps of Engineers can regulate the filling and dredging of wetlands. Routes of possible access through swamps and marshes will be subject to permitting under this act. Missouri has not assumed any wetlands regulatory responsibility, although some other states have.

92 Federal preemption. Exercise of federal authority under the navigation power preempts any conflicting state law, policy, or permits.

93 Ordinarily, the Corps of Engineers will not grant a § 10 permit unless and until it receives confirmation of favorable state and local governmental determinations under their regulatory statutes.

94 Permit denial. The Corps of Engineers can deny a § 10 permit either on factors related to navigation or the environment.

95 Navigation servitude. The federal government regulates obstructions to federally navigable waters under the navigation power and the navigation servitude. Under the navigation servitude, the federal government need not pay any compensation for adverse effects on private rights resulting from the exercise of federal authority.


83 The Court of Appeals had held that the navigation power and the navigation servitude were coextensive. See *Kaiser Aetna v. United States*, 584 F.2d 378, 383 (9th Cir. 1978), rev'd 444 U.S. 164 (1978).

84 See, e.g., Boone v. United States, 944 F.2d 1489 (9th Cir. 1991); Oregon v. Riverfront Protection Ass'n, 672 F.2d 792 (9th Cir. 1982).


88 See 33 C.F.R. § 320.4(a)(2).


For cases interpreting § 10, see *Sanitary Dist. v. United States*, 266 U.S. 405 (1925); *United States v. Boyden*, 696 F.2d 685 (9th Cir. 1983); *Norfolk & Western Co. v. United States*, 641 F.2d 1201 (6th Cir. 1980); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293 (5th Cir. 1976).


93 33 C.F.R. § 320.4(j)(4).

of its navigation authority. Private titles to the beds of and state-created water use rights in federally navigable waters are impressed with a servitude in favor of the public right of navigation. This federal servitude is paramount to private titles and water rights because the federal government has no authority to convey private titles free of the servitude. Under the navigation servitude, it need not pay any compensation for any injury or impairment to private titles or water use rights related to the navigable watercourse. It authorizes without compensation the destruction of access, changes in the level and course of a navigable stream, changes in bridge elevation, appropriation of or removal of structures on the streambed, and destruction of state-created water rights incident to navigable waters. Exercises of the navigation servitude are not considered to be takings, since the affected private interests have from the beginning of their creation been subject to the paramount and preexisting public rights of navigation and fishery.

The federal navigation servitude does not extend to nonnavigable tributaries, nor to previously nonnavigable waters recently made navigable and connected to navigable waters. Destruction of access to or navigability of nonnavigable waters by the federal government may require payment of compensation.

Taking cases. It is too soon to know whether the Supreme Court's recent reevaluation of regulatory takings in Lucas v. South Carolina Coastal Council and Dolan v. City of Tigard will affect the scope of federal government's regulatory jurisdiction.

IV. ACCESS RIGHTS

Access by riparians. In both


96 See United States v. Commodore Park, 324 U.S. 386 (1945); Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1897).


98 See Louisville Bridge Co. v. United States, 242 U.S. 409 (1917); Union Bridge Co. v. United States, 204 U.S. 364 (1907).


100 Id.


104 See e.g., United States v. Cress, 243 U.S. 316 (1917) (injury to fastlands on nonnavigable tributary). But the United States may affect the flow in nonnavigable tributaries without compensation for the purpose of protecting the navigable capacity of the navigable mainstream. See United States v. Grand River Dam Authority, 363 U.S. 229 (1960). On the impact of the federal navigation servitude on landowners' riparian rights on nonnavigable tributaries, see supra note 67, 4 WATER AND WATER RIGHTS, section 35.02(c)(1); note 67, A. TARLOCK, section 9.04(b); note 95, Morreale, at 60-63.


riparian and prior appropriation states, a riparian landowner has a right of access to the watercourse from his frontage. The riparian’s right includes the right to wharf out, an obvious method of gaining access to the water. The right to wharf out includes a right to place water-related structures, such as rafts, over the bed of the watercourse, even if they do not touch the riparian’s shore, and to place mooring buoys in the stream. Although a riparian may grant an easement of access to another, a mere easement is presumed not to include a right to wharf out. The right of access also includes the right to fill the bed under some circumstances.

Missouri recognizes the riparian rights of access, wharfing out, and mooring.

The rights of access, wharfing out, and filling are subject to the limitation that their exercise may not unreasonably interfere with the correlative rights of other riparians to use the surface and the public rights of navigation and floatage. Such interferences can be abated as public nuisances.

Such public rights do not include the mooring of vessels and fishing rafts by persons other than the riparian shoreowner; they are trespasses. The state, too, as proprietor of the beds of navigable waters, has the same right as private owners of streambeds to exclude trespasses by other riparians and by the public. Hence, the riparian frontage owner cannot construct a pier from his frontage over the state-owned bed; state bed title is dominant to the riparians’ right to wharf out. Therefore, consent of the state is required for private piers extending beyond the boundary onto state-owned beds.

In Missouri, the riparians’ rights of access and wharfing out cannot unreasonably interfere with the correlative rights of other riparians to use the surface for navigation or the public right of navigation. Riparians located


115 See generally supra note 67, A. TARLOCK, section 3.17[2].

116 See e.g., Beelman River Terminals, Inc. v. Mercantile Bank, N.A., 880 S.W.2d 903 (Mo. App. Ct. 1994); Hobart-Lee Tie Co. v. Stone, 117 S.W. 604 (Mo. 1909); St. Louis, K. & N.W.R.R. v. St. Louis Union Stock Yards Co., 25 S.W. 399 (Mo. 1894); Meyers v. City of St. Louis, 8 Mo. App. 266 (Mo. 1880).


119 See Smart v. Aroostook Lumber Co., 68 A. 527 (Me. 1907); State ex rel. Citizens’ Elec. Lighting & Power Co. v. Longfellow, 69 S.W. 374 (Mo. 1902); Reyburn v. Sawyer, 47 S.E. 761 (N.C. 1904); Stevens Point Boom Co. v. Reilly, 49 N.W. 978 (Wis. 1879). See also supra note 189 (cases on enjoİnable purpuestres).


on navigable waters cannot construct piers beyond the ordinary low water mark, 124 unless the consent of the state is obtained. Since Missouri has no statute on licensing wharves, both executive or legislative consent of the state must be obtained under its general power to grant easements. 125

The federal government (the Corps of Engineers) on federal navigable waters and the states on state navigable and floatable waters have regulated access and structures within watercourses in two ways. First, they have established bulkhead and pierhead lines behind which it is lawful to fill the streambed and to erect structures. 126 Second, they have required riparians to obtain permits for fills and structures within streambeds; unlicensed fills and structures are unlawful obstructions to navigation which can be required to be removed. 127

Access by members of the public. Members of the public do not have the right to cross private land to gain access to public waters. 128 To do so constitutes a trespass.

Governmental entities may acquire access to public waters by purchase or condemnation. 129 They must pay compensation for “ takings ”; they may not require transfer of access rights as a condition for a regulatory approval. 130 Acquisition of a public right of access includes the right to construct a public pier. 131

V. STATE LAWS

Water allocation doctrines also influence the extent of private and public uses of water surfaces. In particular, they influence the ability of abutting landowners and the public to protect minimum streamflows needed to maintain river and lake levels.

A. Riparian Rights Law of Eastern States

In the 31 eastern states, 132 water use is governed by the riparian rights doctrine, which allows each water user, old and new, a reasonable share of the water. It was described first in 1827 in the American case, Tyler v. Wilkinson. 133 Under the doctrine each owner of land abutting on a stream is entitled both to receive the natural flow of water and to make reasonable uses of that water. This obvious contradiction has led the courts to emphasize one element or the other.

Most American courts emphasize the right to make a reasonable use. Permissible uses include domestic and livestock water supply, irrigation, manufacturing, and hydropower. 134 No riparian can take all the water, but must share it with other riparians; each is entitled only to a reasonable share. A reasonable share is that which is fair in light of the water uses made by other riparians, their effects on each other, the locations of various uses and diversions, and streamflow characteristics. The riparian right to use water can be exercised at any time; there are no rights based on prior use. Older users must reduce their uses if necessary to accommodate newer users. 135

Missouri is a riparian doctrine state. Although a prior case suggested adoption of the doctrine, 136 the Missouri courts expressly adopted the doctrine in 1964, in Bollinger v. Henry. 137 Adoption

126 See supra note 61.
127 On Corps § 10 obstruction permits, see supra note 89. The Clean Water Act, § 404, also requires permits for dredging and filling wetlands. See supra note 91.
129 See State v. Bollenbach, 65 N.W.2d 278 (Minn. 1954); Branch v. Oconto County, 109 N.W.2d 105 (Wis. 1961).
130 See, e.g., Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987) [permit to reconstruct house on seacoast conditioned on conveyance of beach access easement]; Kaiser Aetna v. United States, 444 U.S. 164 (1979) [Corps permit to dredge channel from nonnavigable lagoon to ocean]. Cf. Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) [permit to construct parking lot conditioned on conveyance of bicycle path easement].
132 These are the states in the eastern United States from the Atlantic Ocean to the tier of states on the western bank of the Mississippi River between Minnesota and Louisiana. All lie east of the 20°-isohyet and have humid climates.
134 See, e.g., Harris v. Brooks, 283 S.W.2d 129 (Ark. 1955); Moore v. California Oregon Power Co., 140 P.2d 798 (Cal. 1943); Prather v. Hoberg, 150 P.2d 405 (Cal. 1944); Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964); Hazeltine v. Case, 1 N.W.66 (Wis. 1879).
135 Harris v. Brooks, 283 S.W.2d 129 (Ark. 1955); Collins v. New Canaan Water Co., 234 A.2d 825 (Conn. 1967); Pyle v. Gilbert, 265 S.E.2d 584 (Ga. 1980); Evans v. Merriweather, 4 Ill. (3 Scam.) 492 (1842); Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964). On the riparian doctrine, see generally supra note 67, 1 WATER AND WATER RIGHTS, sections 6.01(a)-(3)-(4), 7.02.03; note 67, A. TARLOCK, c. 3.
137 375 S.W.2d 161 (Mo. 1964). On Missouri riparian rights generally, see generally supra note 135, 6 WATER AND WATER RIGHTS, at 237. See also Davis, Eastern Water Diversion Permit Statutes: Precedents for Missouri, 47 Mo. L. Rev. 429, 432-39 (1982).
of the doctrine was confirmed in 1972 and 1979,136 where the court accepted the guidelines of the Restatement of Torts.139 All those decisions emphasize the reasonable use element of riparianism.

Sixteen eastern states have enacted diversion permit statutes to supplement riparian rights. They require state permits for diverting or impounding water.140 The statutes are silent on the relationship between diversion permit rights and common law riparian rights when they conflict. Generally, water diversion permits are issued only when there is surplus water available. Because surplus water exists in many locations in the East, water users can acquire water rights whenever other water users would not suffer unreasonable adverse effects.

B. Prior Appropriation Law of Western States

In the 17 western states,141 surface water and groundwater can be acquired only under state prior appropriation permit systems. The prior appropriation doctrine is characterized by the maxim, “first in time, first in right”. Recognized first in 1855 in Irwin v. Phillips,142 it provides that water users are entitled to take their full appropriations of water in chronological order of first use until the water supply is exhausted. In times of shortage, the latest appropriators will be cut off in inverse order until demand equals supply. An appropriation of a specific quantity of water is perfected by applying for a permit and by making a diversion and an application of the water with due diligence to an economically beneficial use.143 The location of water use is not restricted.144 Only surplus water, if any exists, can be acquired by new users.

C. Maintenance of Minimum Streamflows

Riparian (eastern) states. A few riparian cases have recognized recreational uses by riparians as valid riparian uses. Several cases have limited diversions in order to protect lake and river levels needed to maintain fishing opportunities.145 or to prevent frequent level fluctuations.146 One case has prohibited a total diversion, holding that the lower riparian was entitled to sufficient water to launch his boat and to fish on the river abutting his shoreline.147 But if the water level is not altered excessively, courts have denied relief.148 Since so few states have addressed protection of recreational uses by riparians, it is not clear whether the riparian doctrine generally protects them.

This problem can be addressed in diversion permit statutes. Fourteen of the permit statutes in eastern states empower the states to establish minimum protected streamflows and prohibit diversions of those protected flows.149

136 See Higday v. Nickolaus, 469 S.W.2d 859 (Mo. App. 1971) (dictum in groundwater case); Ripka v. Wansing, 589 S.W.2d 333 (Mo. App. 1979).
146 See, e.g., Lake Gibson Land Co. v. Lester, 102 So.2d 833 (Fla. App. 1958); Hoover v. Crane, 106 N.W.2d 563 (Mich. 1960); Meyers v. Lafayette Club, 266 N.W. 861 (Minn. 1936).

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Most of those statutes recite as policy purposes protecting fish and wildlife habitat and recreational uses of watercourses. In the other one-half of riparian states, there are no statutory minimum protected flows. Prior appropriation (western) states. The diversion and beneficial use prerequisites for diversion permits make it difficult, if not impossible, to protect minimum flows for recreational purposes by filing for an appropriation. Water can be appropriated only by making a diversion or impoundment and applying the water to a beneficial use. Since instream uses involve neither, appropriations for instream uses, such as for fish habitat, cannot be made under traditional appropriation law, regardless of the their economic value. For example, recognition of appropriations have been denied for enhancing water levels in a commercial duck hunting marsh or for fish and wildlife habitat. Hence, under traditional appropriation theory there is no basis for preserving minimum streamflows.152

In the past two decades, many western states have addressed that deficiency by empowering state agencies to appropriate water for minimum streamflows to protect fish and aquatic habitat. Other states authorize administrative withdrawals of unappropriated water. A few states also authorize denial of permit applications or imposition of flow maintenance conditions in permits where diversion would interfere with fish and wildlife habitat or with recreational opportunities. But those appropriations require the presence of water supplies surplus to the existing appropriations. In many western watersheds, most or all available water has already been appropriated, and there is no water available to supply minimum streamflows. However, much of the water diverted from fully appropriated streams is diverted in their lower reaches; instream appropriations can protect the water flows in the upper reaches from additional diversions. Note, also, that those flow protection provisions have not been extended to private appropriators.

VI. OTHER DOCTRINES

There are other legal doctrines which protect public rights to use watercourses. They include the public trust doctrine, the doctrine of purpressestures, and the Northwest Ordinance free navigation provisions.

A. Public Trust Doctrine

Origin. Originally the English Crown had a common law obligation to protect the public rights of navigation and fishery. The 13 original states succeeded to that obligation after the Revolution of 1776. The federal government succeeded to it upon cession of the western lands by the eastern states in 1793. Under the equal


152 But see Bank of America v. State Water Resources Control Bd., 116 Cal. Rptr. 770 (Cal. Ct. App. 1974) (limitation on diversion to protect fish habitat); In re Martha Lake Water Co., 277 P.382 (Wash. 1929) (denial of diversion permit in order to protect the level of a recreational lake).


156 Research done by the Second National Water Assessment indicates that most western streams are heavily depleated by diversions during the dry summer months, and have little or no surplus flows. See Bayha, Instream Flows—The Big Picture, 1 Instream Flow Needs 95, 112-18 (American Fisheries Soc’y 1976) (maps show stream depletions exceeding 70 percent in dry years throughout most of the West).


Missouri has decided two cases declaring navigable waters to be held in trust for the public. In 1903 in State ex rel. Citizens' Lighting & Power Co. v. Longfellow, the supreme court refused to allow construction of a power plant over the edge of the bank of the Mississippi River because it would interfere with the public's right of navigation. The court denied a writ of mandamus to compel issuance of a building permit, holding that ownership...
of "the shore below ... belongs to the State as trustee of the public, and ... the people have the absolute proprietary interest in the same." 164 Previously in 1875 in Benson v. Morrow, the supreme court had held the same thing, quoting virtually the same language, in a case involving title to an island created by sedimentation in the middle of the Missouri River. 165

State obligation to protect public waters. The public trust doctrine imposes an obligation on the states, as trustees, to preserve navigable waters for use by the public. It provides that the state owns the beds of public waters and the waters themselves, not as proprietor, but as trustee for the benefit of the public. The state has owned those beds and waters from time immemorial and cannot relinquish such title unless the conveyance would further the purposes of the public trust. Private bed titles derived from the state are subject to the public trust as a servitude. 163 Since the state had original title and the public trust is an incident of that title, exercise of state powers to enforce the public trust does not constitute a taking, regardless of the extent to which the private bed titles are diminished in value or usefulness. 164

The state as public trustee has a minimum obligation to protect the public rights of navigation and fishery. 165 During the twentieth century, the public trust has been expanded to protect recreational boating, swimming, wading, hunting, and other water-related public uses. 166 In many states, the public waters may not be used for public uses unrelated to those waters, such as for highway rights-of-way and building sites. 67 But construction of facilities in public trust waters partly for public trust purposes and partly for other public purposes is permitted. 168

Public trust waters. In all states, the public waters protected by the public trust are navigable waters under the federal definition of commercial navigability. 169 But many states have adopted broader definitions of navigability to include waters navigable by recreational boats. 170 The public trust applies wherever those waters extend laterally. 171

Nonderogation. The state as
public trustee may neither itself take affirmative actions in derogation of the public trust, nor convey away bed titles free of the trust, nor allow private actions which would destroy or substantially impair public rights under the trust. The state cannot allow as part of a planning process in some members of the public, as beneficiaries of the trust. Also, it requires the state to identify impacts upon public trust waters as part of a planning process. In some states, the state has an affirmative obligation to regulate obstructions to navigation and even to enhance their usefulness for public trust purposes by developing facilities and providing improved access. The state as trustee may choose between public trust purposes.

Scope of public trust powers. The public trust empowers the state to regulate obstructions to navigation, water levels, diversions, and dredging, and to protect the public rights of navigation, recreation and fishing. Also, it requires the state to identify impacts upon public trust waters as part of a planning process. In some states, the state has an affirmative obligation to regulate the use of public waters and even to enhance their usefulness for public trust purposes by developing facilities and providing improved access. The state as trustee may choose between public trust purposes.

Enforcement by state and beneficiaries. The state, as public trustee, has standing to enforce the public trust. It is not so clear whether members of the public, as beneficiaries of the trust, can do so. Some courts have held that members of the public can sue the state if it regulates water uses in derogation of the public trust or abdicates its trust obligations. In some states, a member of the public can enforce public


See Village of Menomonee Falls v. Wisconsin Dep't of Natural Resources, 412 N.W.2d 505 (Wis. Ct. App. 1987).


See State v. Public Serv. Comm'n, 81 N.W.2d 71 (Wis. 1957).


See Marks v. Whitney, 491 P.2d 374 (Cal. 1971); Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, 271 N.W.2d 69 (Wis. 1978) (by implication); Muench v. Public Serv. Comm'n, 53 N.W.2d 514 (Wis. 1952).

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trust rights directly against a violator. 187 In other states, however, a private individual cannot enforce the trust. 188

The public trust doctrine is directed to preserving the navigation and recreational characteristics of watercourses for the benefit of the public and has been used extensively by both states and members of the public for that purpose.

B. Doctrine of Purprestures

A purpresture is an enclosure by a private party of that which belongs to and ought to be open and free to the enjoyment of the public at large. Examples include theatre marquees and utility lines along streets and highways. They also include piers, wharves, logging booms, low bridges, and boathouses. The doctrine of purprestures provides that such a private enclosure constitutes a public nuisance and may be abated if it is found to unreasonably interfere with the public’s enjoyment of the public property, easement, or right. Such encroachments on public waters may be enjoined if either (1) they unreasonably interfere with the public’s right of surface use or passage, or (2) the public would benefit more by having the encroachment removed than if left in place. One application of the doctrine of purprestures is to protect the public right of navigation from unreasonable obstructions. It is applied to limit riparian shoreowner’s right to wharfout. 189

Missouri appears to have applied the concept of purprestures, although it did not discuss the doctrine, by declaring as a public nuisance a structure proposed to be placed in navigable waters. 190

Because both the doctrine of purprestures and the public trust doctrine treat private titles to streambeds as subordinate to the preexisting public right of navigation, I would argue that they are two facets of the same doctrine. That an unreasonable purpresture is characterized as a public nuisance probably is a historic development resulting from the type of action used to abate it.

The public trust doctrine and the doctrine of purprestures, while similar, are not completely analogous or coextensive. While the public trust in many states imposes an obligation on the state to protect the public useability of public waters and prohibits substantial impediments to the public rights of navigation and fishery, the doctrine of purprestures authorizes, but does not require, such regulation.

C. Northwest Ordinance

There is another basis for protecting boating rights of the public in a few states. The Northwest Ordinance of 1787, which set the pattern for organizing the federal territories, contained a free navigation clause. It provided:

The navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy without any tax, duty or impost therefor. 191

Some of the statutes organizing other federal territories contained variants of the same clause. Congress included it in the acts of admission to the union of some of the new states and sometimes required them to include it in their state constitutions. 192

A few state cases hold that the Northwest Ordinance free navigation clause and its progeny make navigable waters a public highway and impresses private titles to streambeds with a public easement of passage. 193 It has been interpreted as prohibiting physical obstructions as well as prohibiting taxation of riverborne trade. 194

The Supreme Court has stated in dictum and a state court has held that the Ordinance remains in force even if

189 On purprestures, see generally supra note 158, 1 WATER AND WATER RIGHTS, section 6.01(a)(2), at 111-12; note 163, A. TARLOCK, section 3.17(1)(a); Plager, Interference with the Public Right of Navigation and the Riparian Owner’s Claim of Privilege, 33 Mo. L. Rev. 608 (1968); Murphy, English Water Law Doctrines Before 1400, 1 AM. J. LEGAL HIST. 103, 107, 109 (1957); J. GOULD, LAW OF WATERS § 21 (3d ed. 1900); H. WOLKRYCH, LAW OF WATERS 214-15 (2d ed. 1847); J. ANGELL, TIDEWATERS 196-206 (2d ed. 1847); R. CALLIS, SEWERS 174 (2d ed. 1865).
191 See Northwest Ordinance of 1787, art. IV, 1 Stat. 52 (1789).
192 Missouri’s history of the free navigation clause is illustrative. See Missouri Territorial Act of 1812, § 15, 2 Stat. 743; Missouri Admission Act of 1820, § 2, 3 Stat. 545; Mo. Const. of 1820, art. 10, para. 2; Mo. Const. of 1865, art. 11, para. 2; Mo. Const. of 1875, art. 1. There is no similar provision in the current constitution, Mo. Const. of 1945.
193 See Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954); Muench v. Public Serv. Comm’n, 53 N.W.2d 514 (Wis. 1952), aff’d on reh., 55 N.W.2d 40 (1952). See generally supra note 158, 4 WATER AND WATER RIGHTS, section 30.06(a).
194 See supra note 193. However, one has held that “forever free” means free of political regulations hampering freedom of commerce, but not free of state-authorized physical obstructions. See Captain Soma Boat Line v. City of Wisconsin Dells, 255 N.W.2d 441 (Wis. 1977) (partial obstruction by low fixed bridge).
the clause does not appear in the state constitution or statutes. But the Supreme Court had stated previously and the same state court has held subsequently that the Northwest Ordinance applied only during the territorial period and has no effect after statehood. While the cases conflict whether the Northwest Ordinance free navigation clause continues to have direct effect, it is clear that such constitutional and act of admission provisions remain enforceable.

Five states today have Northwest Ordinance free navigation clauses in their state constitutions. The statehood admission acts of five states also contain Northwest Ordinance free navigation clauses. Since the free navigation clauses of the state admission acts should still be in force, there are a total of ten states, including Missouri, where a free navigation clause remains operative.

VII. CONCLUSION
The rights of boaters are influenced by many federal and state case law doctrines. The federal navigation power is focused primarily on commercial navigation on major watercourses and on coastal waters. The Northwest Ordinance free navigation clause and its progeny grants free navigation rights on major inland waters. Those navigation rights include freedom from unlicensed obstructions. Where commercial navigation rights exist, recreational boaters, too, have coincidental rights.

State law doctrines include the right of the public to use recreational boats on public waters, the right of riparians to wharf out and to use the surface of abutting waters, water allocation doctrines (riparian and prior appropriation in the eastern and western states), the public trust doctrine, and the doctrine of purprestures. Although the scope of rights granted by those doctrines varies between the states, boaters have been granted extensive rights to use the surface and to be free from unreasonable obstructions; they have less extensive rights to flow and water level maintenance.


See Escanaba Co. v. City of Chicago, 107 U.S. 678 (1882); Flambeau River Lumber Co. v. Railroad Comm’n, 236 N.W. 671 (Wis. 1931).

193 Alabama, Minnesota, South Carolina, Tennessee, and Wisconsin. See ALA. CONST., art. 1, § 24 (1901); MINN. CONST., art. 2, § 2 (1974); S.C. CONST., art. 14, § 1 (1970); TENN. CONST. art. 1, § 29 (1870) [free navigation of Mississippi River]; Wis. CONST., art. 9, § 1 (1848).

194 California, Iowa, Louisiana, Missouri, and Oregon. See California Admission Act of 1850, § 3, 3 Stat. 452; Iowa Admission Act of 1845, § 3, 5 Stat. 742; Louisiana Admission Act of 1812, § 1, 2 Stat. 701; Missouri Admission Act of 1820, § 2, 3 Stat. 545; Oregon Admission Act of 1859, § 2, 11 Stat. 383. (State statute codifications often reprint these admission acts.)

195 Missouri’s statehood admission act contains a free navigation clause. See supra note 198. Missouri’s 1945 Constitution does not contain a free navigation clause, although all earlier ones did. See supra note 192.