

Public Navigation Rights in New York State: Questions and Answers

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Abstract

The public right of navigation has existed in New York as a common law right since New York became a state. This right allows vessels of all kinds, including small boats and canoes, to navigate for commercial and recreational purposes on New York's waterways that are navigable-in-fact. Legally, the courts have said that the State of New York, in accordance with public trust doctrine, holds an easement on such waterways in trust for the people of the state, making them public highways for navigational purposes. The privately-owned bed and banks of such waterways are subject to this easement or servitude when used for purposes of navigation. This paper describes and explains this public right.

Introduction

The purpose of this paper is to inform waterway recreationists, owners of land along New York's waterways, law enforcement officials and other interested parties, about the longstanding common law right of the public to travel on New York's freshwater rivers, streams, lakes, and other waterways that are navigable-in-fact.

The common law right of people to navigate freely on navigable freshwater

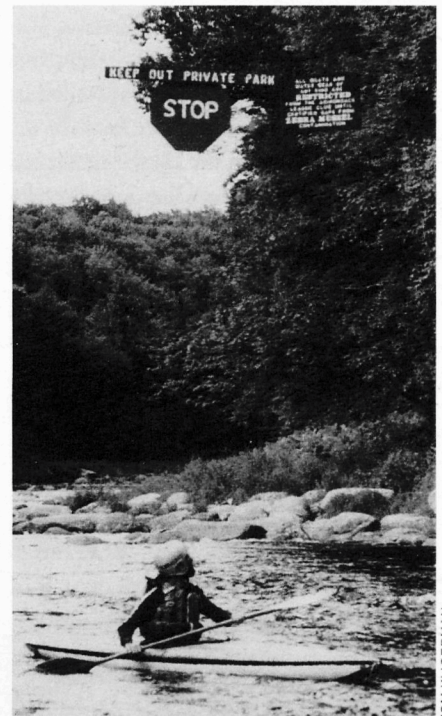
streams and lakes has existed in New York ever since it became a state. The courts have consistently upheld this right. All of the state's navigable waterways were open throughout most of the 1800s and people could travel for hundreds of miles in all directions.

Then, in the 1880s, a Court of Appeals decision that reaffirmed the public right of navigation also gave away, to adjoining riparian owners, all of the land under water on freshwater streams and small lakes in the state (excepting on the very large lakes, interstate boundary waters and the Hudson and Mohawk rivers), reversing a decision it made on this same matter two decades earlier. After this decision, owners of some large properties, particularly in the Adirondacks, closed off navigable waterways, illegally. For 100 years the State did nothing about it. The public right of navigation was neglected and forgotten until the 1970s.

The history of recent activity, from 1970 to 2000, to reaffirm and clarify the public right of navigation can be summed up in a few words: (1) Paul Jamieson's role; (2) John Humbach's role; (3) DEC's initiatives; (4) the role of the Moose River Five and the Adirondack League Club in a nine-year lawsuit; (5) the 1998 Court of Appeals decision in that case; (6) the court-sanctioned voluntary agreement between parties to that decision on the navigability of the Moose River, in 2000.

Paul Jamieson, an English professor at St. Lawrence University, known as the dean of Adirondack canoeing as a result of his very popular canoeing guidebook covering waterways in the north-flowing rivers of the Adirondack Park, started writing letters in 1969 to State officials about the public right of navigation. In

preparing the first edition of his book, he found that twenty-five major north-flowing rivers in the Adirondacks had been blocked, illegally, by riparian landowners. He knew that they had been open during most of the previous



Adirondack League Club signs on the South Branch of the Moose River, 1991.

century and he knew that navigable rivers in the New England states and in other states had been open continuously. He persisted with his campaign to prod the State to action for a couple of decades. Jamieson, now 102 years old and still very interested in this subject, is rightfully recognized as the father of contemporary initiatives to reaffirm and clarify the public right of navigation.

In 1988, prompted by Jamieson's inquiries, the Department of Environmental Conservation asked John Humbach, the co-author of this paper and a

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professor of law at Pace University's School of Law who specializes in property rights law, to undertake a thorough analysis of the case law on this subject. This analysis was absolutely essential to any progress on this matter since this common law public right is defined in case law decisions, not in State statutory law. In preparing his report, Professor Humbach reviewed about 100 cases, each of which in some way defined the public right. He also drafted legislation to codify the right in a single State law. It was introduced as a bill in the State Legislature in early 1989 by Assemblyman Bill Hoyt and Senator John Sheffer. The bill passed the Assembly in 1990, but after reintroduction in 1991 it stalled in the Senate.

DEC supported the Hoyt-Sheffer bill and drafted its own bill for introduction through the Governor's Office. DEC also drafted a regulation to promulgate a statewide list of navigable waterways and establish a procedure for adding to the list. The Governor's staff, however, decided not to proceed with either of these initiatives, largely because the Hoyt-Sheffer bill had become controversial. DEC did issue an enforcement policy memorandum advising all enforcement personnel throughout the state not

to arrest paddlers for trespass in situations where they have a right to navigate on navigable waterways.

The Hoyt-Sheffer bill might have passed eventually, but by 1990 Tom Kligerman and Per Moberg, as co-chairmen of the Adirondack Committee of the Atlantic Chapter of the Sierra Club, had become frustrated with the inaction by the Legislature on the bill and by the Governor's staff with respect to DEC's initiatives. They decided to pursue a solution in the courts. After several trial runs on other rivers, Kligerman and four other paddlers went down the South Branch of the Moose River on June 15, 1991. Two weeks later, the Adirondack League Club sued on civil trespass charges for paddling through a 12-mile reach of the river that had been closed to the public for 100 years. The League Club asked for compensatory damages to be set by the Court and \$5.0 million in punitive damages. The State of New York and the Adirondack Mountain Club intervened on the side of the Sierra Club and the paddlers. Thus began a nine-year court case that ended in the State's highest court, the Court of Appeals, with a landmark decision on December 15, 1998.

At least four significant results came out of the lawsuit. First, the right of the public to navigate on navigable waterways was unanimously reaffirmed and clarified by the State's highest court in a landmark case.

Second, the Court of Appeals made clear that the capacity of waterways to accommodate recreational uses may be considered as evidence of navigability.

Third, the Court of Appeals unequivocally reaffirmed that "in order to circumvent ... occasional obstacles, the right to navigate carries with it the incidental privilege to make use, when absolutely necessary, of the bed and banks, including the right to portage on riparian [private] lands."

Fourth, rather than go through a trial on the facts of navigability of the South Branch of the Moose River as directed by the Court of Appeals, the parties (including the State of New York) entered into a Court-sanctioned voluntary agreement in June, 2000 that allows paddlers to go down the river under certain conditions of water levels and time of the year.

Because *Adirondack League Club v. Sierra Club* was a landmark case that produced definitive results, one might ask why it is necessary to do more. Why is there a need to inform riparian landowners, paddlers, enforcement and court officers and others about the existence and nature of the public right of navigation? Also, State land acquisition in recent years has opened some navigable rivers that previously had been illegally closed to public navigation, thereby presumably eliminating some problems.

Even so, the right of the public to navigate freely on navigable waterways is not permanently assured. As with other rights that are not well understood, squarely in public view and duly exercised, this one could easily be forgotten again, as it was between the 1880s and 1970. Further, despite the definitive results of the Moose River case, some rivers currently are still illegally closed to the public and, because of lack of information about the right, others conceiv-



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Four of the "Moose River Five" after their victory paddle down the South Branch of the Moose River on July 20, 2000.

ably might be closed illegally in the future, not just in the Adirondacks but also in other parts of the state.

This situation exists in part because it is still difficult to find any clear, definitive statement about the nature of this right. It is still defined in scattered court decisions rather than being described in State statutory law. Most paddlers, riparian landowners and enforcement officers don't know the significance of the Moose River decision, where to find it and how it relates to earlier decisions in the case, in the lower courts. If they find it, they also would need to access other related cases to comprehensively understand the nature of the right. People who are interested in this right should not have to go through this same kind of analysis that Professor Humbach undertook, even in the unlikely event that they have the legal experience to do so.

Since the Moose River case ended, the State has taken no initiative to explain this public right to the people of New York State. Nor has any step been taken to enact legislation to codify the right in State statutory law, taking care to include only provisions that are declaratory of the basic common law right and not to include provisions that would diminish the right in any way.

The Moose River decision was not the end of activity to clarify and reaffirm the public right of navigation. Rather, it is an important step along the way, hopefully marking the beginning of the continuing effort that is needed to make the public aware of the existence and nature of this right.

The questions and answers provided below are designed to help accomplish this purpose.

Questions and Answers

1. What is the "public right of navigation" and how was it established?

This right allows vessels of all kinds, including small boats and canoes, to navigate for commercial and recreational purposes on New York's freshwater rivers, streams, lakes, ponds, and other water-

ways that are navigable-in-fact. The courts have said that the State of New York, in accordance with the public trust doctrine, holds an easement on such waterways in trust for the people of the state, making these waterways public highways for navigational purposes. The privately-owned bed and banks of such waterways are automatically subject to this easement or servitude when used for purposes of navigation, without need of any special judicial declaration or finding about the particular waterway. This right has existed in New York since it became a state.

2. Has this public right changed over time?

No, the basic right has remained the same: In order to be navigable-in-fact, a waterway must provide practical utility to the public as a means for transportation and travel. However, over the years, court decisions have further detailed and described aspects of the right. Thus, the courts have recognized recently that utility for log drives has become a largely anachronistic form of commercial use test for determining whether a waterway is navigable in fact, whereas recreational use has become an important contemporary factor in the determination. Water-based tourism in small boats, kayaks and canoes is a major commercial activity now and a major contributor to the State and local economies of New York State.

3. Is there any State statutory law that sets forth this common law right?

There is no State statutory law that embodies and describes the public right of navigation. A bill to enact such a law was introduced in the State Legislature in 1989, two years before the start of the *Adirondack League Club v. Sierra Club* case concerning the navigability of the South Branch of the Moose River. It passed in the Assembly in 1990 and was re-introduced in the Senate and the Assembly in 1991, but it was not enacted into law and has not been re-introduced since the Court of Appeals issued its landmark decision in 1998 on the Moose River case.

4. What does "navigable-in-fact" really mean?

According to the Court of Appeals in the seminal case on this subject, a waterway is navigable-in-fact "if it is so far navigable or floatable in its natural state and its ordinary capacity, as to be of public use in the transportation of property (*Morgan v. King*, 35 N.Y. 454, 458-59; (1866))." "[T]he public claim to such use" the court added, "ought to be liberally supported." To determine whether a particular stream is navigable-in-fact requires a consideration of the conditions or facts that would make it navigable, i.e., primarily whether the water levels are high enough to support navigation for a reasonable length of time under natural conditions of flow. Also relevant is the extent to which the waterway has obstacles to passage (such as shallows, rapids or waterfalls) and, if so, whether portages are feasible so as to allow passage of vessels for commercial or recreational purposes.

For a waterway to be open to public use, it just has to be navigable-in-fact. It doesn't have to be declared navigable-in-fact by a court. In other words, if a waterway is in fact navigable for a significant part of the year and for a substantial distance, it is ordinarily safe to assume that it is legally "navigable-in-fact."

5. Is there a specific length of time each year during which water levels must support navigation for a waterway to be considered navigable-in-fact?

No. As established by the Court of Appeals in *Morgan v. King*, it is not necessary "that the capacity of the stream... should be continuous" or "that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is ordinarily subject to periodic fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement."

6. Does this public right allow paddlers and other waterway travelers to portage around natural obstacles, such as falls and rapids, even if that means walking on private land?

Yes. The Court of Appeals has made clear that, "to circumvent ... occasional obstacles, the right to navigate carries with it the incidental privilege to make use, when absolutely necessary, of the bed and banks, including the right to portage on riparian lands.... On the other hand, any use of private river beds or banks that is not strictly incidental to the right to navigate gives rise to an action for trespass." (*Adirondack League Club v. Sierra Club*. 92 N.Y.2d 591, 706 N.E.2d 1192, 684 N.Y.S.2d 168 [1998]). It is, of course, a matter of interpretation as to when use of the bed and banks would be "absolutely" necessary, varying with the particular physical circumstances of the case. However, it may be observed that, when, in general, a paddler takes a boat out of water and puts it on his or her back to portage, it's because there's no other choice — and it would be common sense to conclude that it was "absolutely" necessary. Also, scouting ahead for obstacles, as necessary, usually is considered to be a part of safe boating.

In confirming the right to make use of the bed or banks of a waterway that is navigable-in-fact, the Court of Appeals did not limit such use to the area within the high water line, but rather it limited such use to that which is "strictly incidental" to the right to navigate.

7. Is this public right applicable to waterways in all parts of the state in the same way?

Yes. This right applies to freshwater waterways in every part and every region of the state in the same way, to waterways of all sizes, whether they are called rivers, streams, creeks, lakes, ponds or by some other generic name, whether they flow on public land or on private land, whether they flow through cities, towns or villages, whether they are inside or outside the boundaries of the Catskill

and Adirondack Parks and whether the land on one bank is in one ownership and that on the opposite bank is in a different ownership or both banks and the underwater land between the banks are in the same ownership, as long as the waterways are navigable-in-fact.

As stated, this paper pertains to freshwater waterways. With regard to waters and lands affected by the ebb and flow of the tides, they are generally in public ownership up to the mean high water line and therefore publicly accessible. Also, the beds of certain large lakes, such as Lake George, are owned by the State below the mean low water line, as are the beds of the Hudson, Mohawk and St. Lawrence Rivers.

8. Does the public right of navigation allow access to remote ponds surrounded by private land via their navigable inlets or outlets?

The answer to this question varies with the facts of each specific situation. Although an inlet or outlet may be capable of providing access to the pond, this does not necessarily make the inlet or outlet stream or the pond itself, navigable-in-fact. As noted above, a waterway is navigable-in-fact if it has practical utility to the public as a means for transportation and travel. Small ponds with no significant feeder or draining streams have no such practical utility and are therefore not likely to be navigable-in-fact. However, small ponds which do have significant feeder or draining streams may be navigable-in-fact, especially if the pond and connecting streams, in turn, are part of a large system of interconnected waterways.

9. If a waterway is known to be navigable-in-fact, yet there are no formal access sites where a vessel (canoe or kayak) can be put into or taken out of the waterway, what are the options for paddlers?

The public right of navigation does not give the public the right to traverse private property in order to access waterways that are navigable-in-fact. The usual

recourse in these circumstances would be for the paddlers to try to find informal access points for putting in or taking out, such as where a bridge crosses the waterway, being certain to pull their vehicle safely off the roadway while still parking within the public right-of-way and not on private land. To reiterate, crossing private land without permission in order to access a waterway is a trespass.

Apart from issues about where to park and leave a car safely while paddling, it is generally allowable to access a waterway from any public bridge or roadway, as long as one does not trespass on adjacent private land. In situations where there is no formal or informal access site, paddlers or paddlers' organizations also should approach private landowners for permission to access the waterway through their land. If that doesn't work out, State agencies or non-profit land trust organizations should be requested to evaluate public access needs with a view towards acquiring and developing formal public access sites, including safe off-road parking areas.

Most public fishing access sites administered by the State Department of Environmental Conservation have been purchased with public funds to meet the needs of fishermen. They are subject to the rules and regulations of the Department for that purpose. The same is true of easements purchased along the banks of streams for use by fishermen. They were not obtained to provide access for paddlers.

10. What was the Court of Appeals decision in the case involving the Adirondack League Club and the Sierra Club?

This important case began on June 15, 1991 when members of the Atlantic Chapter of the Sierra Club and a reporter, in two canoes and a kayak, paddled 27 miles on the South Branch of the Moose River, from the Moose River Plains Wild Forest to the public highway bridge on NY Route 28 at

McKeever. Part of the trip included a 12-mile segment of the South Branch of the Moose River that flows through private land owned by the Adirondack League Club (ALC). For 100 years this part of the river had been posted by the Club as being "closed" to river travel. Two weeks after the canoe trip, the ALC sued each paddler, individually, and the Sierra Club, in State Supreme Court, charging civil trespass and asking for five million dollars in punitive damages. Thus began a series of arguments and motions that ultimately led to a decision by the highest court in the state and a settlement between the parties on the issue of access to the river.

The State of New York, represented by the Attorney General, intervened on behalf of the paddlers and in support of the public right of navigation, as did the Adirondack Mountain Club.

On December 17, 1998, the Court of Appeals ruled that the usefulness of a stream for recreational travel, not just traditional commercial use, is an important factor in deciding whether the stream is "navigable-in-fact" and, therefore, open for public recreational use. The court declined, however, to issue a final ruling that the South Branch of the Moose River is "navigable-in-fact" because there were issues of fact that were required to be decided at the trial court level. (The decision is on-line at the web site for the Cornell Legal Information Institute.) Subsequently, rather than go through an expensive trial about the facts in the Supreme Court with a potentially uncertain outcome, in June, 2000, the parties settled by means of a judicially-approved agreement. Although the agreement is silent on the issue of whether the river is navigable-in-fact, it provides that the river is open for public navigation from May 1 to October 15 (or the opening of the Big Game Season, whichever is later), provided that the water level at the McKeever gauge has been at least 2.65 feet during the 24 hours prior to a canoe trip. The put-in is at the Moose River Plains launching site, where paddlers must fill out a registration form.

Although by its very existence and nature the agreement seems to recognize that the Moose River is navigable-in-fact, paddlers would be best advised (at least for the present) to use the relevant segments of the river within the limitations that the agreement prescribes.

11. Does this public right allow paddlers and other waterway travelers to enter upon private land? What are paddlers' responsibilities to landowners?

Yes, but, as stated in Question 6 above, only for purposes "incidental" to navigation, such as portaging, scouting the waterway, lining or poling a vessel, and seeking temporary refuge from passing storms, and then only when "absolutely necessary." Apart from such absolutely necessary incidental uses, waterway travelers have no right to beach their vessel or to walk on or enter upon private land in any way, including the banks and bed of the stream.

Ownership of the bed and banks of a waterway is difficult to determine without a review of relevant deeds. Ownership of the beds and banks of rivers, lakes and ponds in New York varies from waterway to waterway. Most are privately owned, but some are owned by the State of New York. Where the banks and bed of a river are in private ownership and there are different owners on each side of the navigable river, each usually owns to the centerline, although deeds may specify otherwise. With regard to lakes or ponds having multiple owners, ownership usually is to the center point of the waterbody in a pie-shaped arrangement, although deeds may again specify otherwise.

Paddlers should be respectful of the rights of private property owners at all times as they travel on a waterway that is navigable-in-fact, particularly when scouting the waterway or portaging. Care also should be taken to avoid littering, excessive noise or damaging property (private or public) and to respect the privacy of landowners in every way. Engaging in camping, picnicking, hiking or other activities on private land which are

not essential to and directly related to navigation, constitute trespassing unless done with the permission of the owner.

12. What are a landowner's responsibilities to paddlers? Can landowners prevent paddlers from using waterways that are navigable-in-fact?

Landowners on waterways that are navigable-in-fact should recognize that they have no legal right to impede paddlers who are availing themselves of the public easement on the waterway in order to exercise their right of navigation. Such landowners acquired their property subject to the public's pre-existing right to navigate on any waterways on the property that are navigable-in-fact, much as a property owners acquire title subject to the right of the public to continue to use any pre-existing public highways which might cross their property.

A landowner's attempt to restrict the public's right of navigation on navigable-in-fact waterways would be illegal because it would constitute interference with a property right, *i.e.*, the easement that the State holds in trust for the public for use as a public highway. Riparian landowners also should recognize that it is the State's common law, not their permission, that confers on the public the right to travel on navigable waterways. Landowners and enforcement officers who interfere with this public right or try to arrest paddlers who are lawfully exercising it, are opening themselves to the possibility of a law suit for false arrest.

If a landowner has questions about the navigability of a waterway flowing on his/her property, he or she should not attempt to make that determination alone but, rather, should seek advice and assistance from others with first hand knowledge of such matters, particularly from paddlers' organizations.



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13. If a freshwater river, pond or lake is navigable-in-fact, but has been posted with "No Trespassing" or other such signs or has been physically blocked with a cable or some other man-made obstruction, what should paddlers do?

The Court of Appeals has said that a person who "honestly believes" that he is permitted to enter another's property is not guilty of any degree of criminal trespass. (*People v. Basch*, 36 NY2d 154 (1975)). Also, under NY Penal Law, Section 140.05, "a person is not guilty of trespass unless he knowingly enters or remains unlawfully" on the property in question.

Nevertheless, the prudent paddler, if possible, will avoid confrontation and will talk with the landowner to ascertain the reasons for "closing" the waterway. If it seems that the landowner has taken an illegal action in closing what appears to be a public right-of-way, i.e., a waterway that is navigable-in-fact, and the landowner will not reconsider his/her action, the paddler should inform local, county and State (including the district DEC ranger and Environmental Conservation Officer) enforcement authorities about the landowner's abrogation of the public's right of passage. The closing should be documented, preferably with photos, as to how travel on a public right-of-way has been impeded or prohibited, and a description of the facts of navigability should be included, including historic use of the waterway. Remedial action should be requested.

If the matter is not resolved with the landowner in due time, the Commissioner of Environmental Conservation should be informed, because that agency is responsible for management of water resources in the state, and the Attorney General also should be informed about the situation. They should be asked to defend the public's right of passage on a State-owned easement. Again, if possible, it would be beneficial to work with

established paddling groups and conservation organizations, not just as an individual.

As a last resort, it may be necessary to present evidence of navigability in the proper court and request a declaratory judgment stating that the waterway is navigable-in-fact and subject to the public easement. This also is something that is best done in concert with paddling and conservation organizations rather than as an individual, because of the potential for cost sharing and the opportunity to draw on their expert knowledge, if for no other reasons.

14. Are landowners liable for injuries suffered if paddlers have an accident while portaging on their property?

Under Section 9-103 of the State General Obligations Law, landowners are generally not liable for injuries sustained by recreational users of private property while engaging in certain recreational activities, including canoeing, unless the landowner has created some sort of unusual or purposeful hazard on the land.

15. Is fishing allowed on waterways that are navigable-in-fact, and if so, under what conditions?

The Court of Appeals has held that, although the public right of navigation is protected by law, private owners of stream banks and beds may have "exclusive" fishing rights in non-tidal, navigable-in-fact waterways. Although the answer to this question may depend to some extent upon the specific language of the landowner's deed and the specific facts of the situation, it appears that as a general rule fishing is not included within the public right of navigation and, therefore, fishing without the permission of the landowner is not allowed on navigable waterways that cross private property. Where the riparian land is publicly owned, fishing is allowed, of course.

16. Where can paddlers obtain a list or maps or guidebooks showing and describing waterways that are navigable-in-fact, including access points?

Several regional canoeing guidebooks, pamphlets and canoeing maps have been published and, together, they cover most of the state. Some are out of print, but may be found through used bookstores. Paddlers should be aware that older guidebooks may have erroneous information about which rivers are "closed" and which are "open."

Numerous articles describing various canoe routes have appeared in periodicals such as *Adirondack Life*, *Adirondack Explorer*, the Adirondack Mountain Club's magazine titled *Adirondac* and others. The NYS Department of Environmental Conservation publishes several pamphlets/maps for Adirondack canoe routes. The American Whitewater Affiliation lists, on-line on their website, the main "runnable" rivers, by canoe or kayak, in NYS. An indication of the level of difficulty is assigned to each river in accordance with AWA's familiar classification scheme. AWA's web site also includes a separate page showing real-time information on water levels for each listed river. This information is also available on the U.S. Geological Survey's website.

¹This paper was first presented at the ARC's 12th Annual Conference on the Adirondacks, Lake Placid, NY, May 25-26, 2005, sponsored as an education project of The Association for the Protection of the Adirondacks. The original paper also includes appendices about (a) the recent history of activity to clarify and reaffirm this public right, (b) draft legislation to codify this right in a single State statute, (c) a copy of a DEC memorandum on enforcement policy with respect to this right, and (d.) a bibliography of paddling guides for NYS. and may be accessed on-line at www.protectadks.org/navigation_rights.pdf