

11-19-2018

## Don't Go Chasing Waterfalls: The Intrepid, Pioneering, Whitewater Paddler's Right to Stop on Private Land

Jennifer Jolly-Ryan

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Jennifer Jolly-Ryan

## Don't Go Chasing Waterfalls: The Intrepid, Pioneering, Whitewater Paddler's Right to Stop on Private Land

17 U.N.H. L. REV. 129 (2018)

**ABSTRACT.** The river roars from the thunder of waterfalls and swift currents. Its water runs wild between large boulders and steep banks. Kayaks and canoes are designed to navigate whitewater rapids that many people believe are unnavigable. Conflicts often arise between private property owners and the recreating public on some of the best whitewater in America. Private property owners along rivers, creeks, and streams have shot at paddlers for entering their private property. Property owners have obstructed navigation, stringing artificial strainers made of barbed wire across creeks and streams.

The sport of running wild water rapids and waterfalls in a kayak or canoe pushes to the limits both paddlers' sporting skill and the property rights of landowners along the streams upon which paddlers navigate. This Article defines navigability and analyzes whether large waterfalls and rapids are navigable under the legal definitions historically applied by the United States Supreme Court and state courts. Additionally, this Article determines paddlers' permissible incidental or necessary contact with property owners' land when paddlers get out of their kayaks or canoes to safely scout or portage waterfalls or rapids, swim to safety, or rescue themselves or fellow paddlers while standing on private land.

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## INTRODUCTION

*You cannot step twice into the same river, for other waters and yet others go ever flowing on.*

- *Attributed to Heraclitus*<sup>1</sup>

A surprising catalyst causes public and private rights along American rivers, creeks, and streams to collide. Its source is intrepid, pioneering, whitewater kayakers and canoeists, running waterfalls and rapids on waters many people mistakenly believe are unnavigable in once unimaginable places. The river's swift current sweeps the paddler from public launching sites onto private land, placing the paddler in direct conflict with landowners who believe that the paddler is a trespasser.

The conflicts mount as improved paddlers' skills and boat makers' innovations in whitewater kayak and canoe design fuel the growth of the sport. Paddlers' skills and innovations in boat design make it possible for paddlers to navigate features and segments of rivers, creeks, and streams that they could not navigate before.<sup>2</sup>

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<sup>1</sup> William Harris, *Heraclitus: The Complete Fragments*, MIDDLEBURY COLLEGE, No. 21, [<http://wayback.archive-it.org/6670/20161201175137/http://community.middlebury.edu/~harris/Philosophy/heraclitus.pdf>] (last visited Sept. 26, 2018).

<sup>2</sup> Boat design can make it easier to paddle a rapid. Richard J. Pierce, Jr., *What Is a Navigable*

Small streams, challenging rapids, and steep waterfalls that were once impassible are now passible in a small kayak or canoe designed to handle difficult whitewater.<sup>3</sup> Waterfalls and challenging rapids energize, excite, and invite skilled whitewater paddlers—equipped with the proper experience, training, skills, and equipment—to safely run challenging rapids and waterfalls.<sup>4</sup>

As paddlers seek new adventures, they are discovering new whitewater runs in nature's most remote and private areas. Popular whitewater runs often flow through privately-owned property.<sup>5</sup> Heated arguments and litigation emerge between paddlers and private landowners when paddlers invade privately-owned sanctity.<sup>6</sup> To deter paddling activity on or near their private property, landowners have thrown dirt on paddlers, obstructed the navigation of rivers, creeks, and streams by stringing barbed wire across the water, and shot at paddlers.<sup>7</sup> This Article posits that some of the conflicts between paddlers and landowners arise

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*Waterway? Canoes Count but Kayaks Do Not*, 53 SYRACUSE L. REV. 1067, 1077 (2003).

<sup>3</sup> See Leland Davis, *How to Choose a Whitewater Kayak*, NRS: DUCT TAPE DIARIES (May 24, 2014), <https://community.nrs.com/duct-tape/2014/05/23/choose-whitewater-kayak/> [<https://perma.cc/PH39-9GS3>] (describing the different options for kayak designs and how those designs can improve the kayak's performance in whitewater); cf. Pierce, *supra* note 2, at 1077–78 (“It is easy to overestimate the importance of boat design . . . in determining whether a waterway is navigable.”).

<sup>4</sup> For example, running steep waterfalls in small plastic boats is described as the Holy Grail for skillful, elite whitewater kayakers and open boaters in canoes. Hrystina Byrnes, *Most Incredible Waterfalls for Kayaking*, THE ACTIVE TIMES (Aug. 5, 2016, 1:44 PM), <https://www.theactivetimes.com/water/canoe-kayak/most-incredible-waterfalls-kayaking> [<https://perma.cc/MLD3-V9UW>]. Two types of crafts are usually used to descend waterfalls and whitewater rapids: whitewater kayaks and canoes. A paddler in a kayak is a “kayaker.” A paddler in a whitewater canoe is known as an “open boater.” WILLIAM NEALY, *KAYAK: THE NEW FRONTIER: THE ANIMATED MANUAL OF INTERMEDIATE AND ADVANCED WHITEWATER TECHNIQUE* 151 (Menasha Ridge Press 2d ed. 1986).

<sup>5</sup> See, e.g., *South Platte, North Fork River Description*, AM. WHITEWATER, <https://www.americanwhitewater.org/content/River/detail/id/427/> [<https://perma.cc/2ULA-T8YD>] (last visited Oct. 21, 2018).

<sup>6</sup> See generally Aaron Pettis, Note, *Takings and the Right to Fish and Float in Colorado*, 89 IND. L.J. 473, 475 (2014).

<sup>7</sup> On the South Platte River in Colorado:

[A]n exclusive fishing club sought to prevent floaters from floating through its two miles of property by building obstacles in the river, yelling at boaters, shoveling dirt on boaters from a bridge, and seeking criminal trespassing charges. On another stretch of the South Platte, landowners strung barbed wire across the river to stop kayakers.

Pettis, *supra* note 6, at 475; see also Kim Bell, *Meramec Float Trip Ends in Fatal Shooting After Dispute Over Property Rights Along Waterway*, ST. LOUIS POST-DISPATCH (July 23, 2013), [http://www.stltoday.com/news/local/crime-and-courts/meramec-float-trip-ends-in-fatal-shooting-after-dispute-over/article\\_a2774doe-578c-5d01-89e2-d334dbe7c9c3.html](http://www.stltoday.com/news/local/crime-and-courts/meramec-float-trip-ends-in-fatal-shooting-after-dispute-over/article_a2774doe-578c-5d01-89e2-d334dbe7c9c3.html) [<https://perma.cc/6AYU-XX9Q>].

because of misunderstandings about safe whitewater boating.

To whitewater paddlers, running waterfalls and rapids in small plastic boats is the Holy Grail.<sup>8</sup> Waterfall running is described as a perfect blend of science, sport, and art.<sup>9</sup> The paddler uses the science of hydraulics to pick his or her path.<sup>10</sup> Paddling is a popular sport<sup>11</sup> that has spawned a cottage industry of sports film producers and GoPro users capturing paddlers playing and dancing with the power of the water.<sup>12</sup> The adrenaline rush from paddling challenging whitewater has been described as the feeling that “in spite of the raw power of the furious water, . . . the paddler is in control” of both self and boat.<sup>13</sup>

For many non-paddlers, it is difficult to understand how paddlers can navigate dramatic cascades of steep, vertical, whitewater rivers, creeks, or streams using any

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<sup>8</sup> Byrnes, *supra* note 4.

<sup>9</sup> See KEN WHITING & KEVIN VARETTE, *WHITewater KAYAKING: THE ULTIMATE GUIDE* 146–50 (The Heliconia Press 2d ed. 2012) (describing various types of whitewater paddling activities as forms of art and comparing whitewater paddling to a game of chess).

<sup>10</sup> See *Holes and Waves*, PADDLE EDUCATION, <http://paddleeducation.com/whitewater-kayaking/the-anatomy-of-a-river/river-features-2/holes-and-waves/> [https://perma.cc/4Q7J-YZDH] (last visited Oct. 3, 2018) (stating “[h]oles and waves are hydraulics on a river that are created by water running over different obstacles and drops in gradient on the river bed, which has an effect on the current and river flow,” and describing how to recognize different types of holes and waves so a paddler can make informed choices about his or her intended path); see also Mary Anne Potts, *What It Feels Like to Kayak over a Really Big Waterfall*, NATIONAL GEOGRAPHIC ADVENTURE BLOG (Sept. 29, 2011), <http://adventureblog.nationalgeographic.com/2011/09/29/jesse-coombs-reveals-what-it-feels-like-to-kayak-over-a-waterfall/> [https://perma.cc/W9M4-HM3J] (“You have already studied the waterfall and picked out the exact line you want to run.”).

<sup>11</sup> Canoe sprint has been a full medal Olympic sport since 1936, with both canoe and kayak events. *International Canoe Federation*, INT’L OLYMPIC COMM., <https://www.olympic.org/international-canoe-federation> [https://perma.cc/9RPW-MNAR] (last visited Oct. 21, 2018). Women began competing in the Olympics in kayaks in 1948. *Id.* Whitewater slalom in kayaks and canoes was added as an Olympic sport in 1972. Matt Jackson, *Include Freestyle Kayaking in the Olympics*, ODYSSEY (Aug. 22, 2016), <https://www.theodysseyonline.com/include-freestyle-kayaking-in-the-olympics> [https://perma.cc/V4AG-L5EQ].

<sup>12</sup> Jackson, *supra* note 11; see also USA Canoe/Kayak, *What is Freestyle?*, TEAM USA, [https://web.archive.org/web/20170114094130/http://www.teamusa.org/usa-canoe-kayak/disciplines/freestyle] (last visited Oct. 21, 2018). The popularity of freestyle kayaking has led to the creation of an increasing number of whitewater parks. *Whitewater Parks Explained*, S2O DESIGN, <http://s2odesign.com/about/whitewater-parks-explained/> [https://perma.cc/86TY-3K7F] (last visited Oct. 21, 2018) (explaining how whitewater parks are created with man-made alterations to an existing river or water-pump systems connected to artificial channels).

<sup>13</sup> *Whitewater Kayaking*, THE ADRENALINE BEAST, <http://www.adrenalinebeast.com/whitewater-kayaking/> [https://perma.cc/NS3H-N6UJ] (last visited Oct. 21, 2018).

type of watercraft, no less small, plastic, whitewater kayaks or canoes.<sup>14</sup> Landowners may believe the waterways that flow through their private property are not navigable, so paddlers have no right to float the surface or step upon the river bank. This Article is partially an attempt to dispel some of those notions, while balancing private property owners' and paddlers' rights along America's navigable waterways.

Part I of this Article discusses the historic conflicts that arise along rivers, creeks, and streams between private landowners and paddlers. It also discusses the value of owning private property along the water, the growth of whitewater paddling for commerce or recreation, and the inherent conflict between the two.

Part II defines navigability by analyzing the United States Supreme Court's navigation test and recreational use tests adopted by many states. Part II also analyzes and determines whether steep waterfalls or large rapids—the very appeal of many whitewater runs to paddlers—render a waterway unnavigable under most legal definitions of navigation.

Part III concentrates upon paddlers' rights that flow from determining that a waterway is navigable. It discusses the greyer legal questions concerning paddlers' permissible incidental contact with private land that flows from navigability and the very necessary contact with the land that is inherent in paddling challenging whitewater. Part III also attempts to draw a line between incidental contact and the necessity for a paddler to enter another's land when whitewater paddling. While lawful, incidental use may conservatively permit paddlers to use private property very close to the water, this Article argues for a more expansive view of "necessity" to use private property for safe paddling. Significant risks to life may result if trespass laws preclude paddlers from taking necessary safety precautions on land.

## I. TROUBLED WATERS: HISTORIC CONFLICTS BETWEEN PADDLERS AND LANDOWNERS

*Whiskey's for drinking, water's for fighting about.*

- Attributed to Mark Twain<sup>15</sup>

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<sup>14</sup> "A [whitewater] kayak [is] specifically designed for maneuvering in whitewater. Whitewater kayaks are designed to maneuver and turn very easily and to be stable on edge." Anna Levesque, *Glossary of Basic Whitewater Terms*, MIND BODY PADDLE (Nov. 19, 2008), <https://mindbodypaddle.com/508/glossary-of-basic-white-water-kayaking-terms/> [<https://perma.cc/7MR2-J88M>].

<sup>15</sup> This quote is commonly attributed to Mark Twain, but thoroughly questioned. Michael Doyle, *Twain's Whiskey/Water Quote Appears Greatly Exaggerated*, MCCLATCHLY NEWSPAPERS (Jan. 28, 2011, 2:31 PM), <http://www.mcclatchydc.com/news/politics-government/article24609343.html> [<https://perma.cc/8M9K-TB3L>].

The adventure for whitewater paddlers is running challenging whitewater on new rivers, creeks, and streams. The rivers, creeks, and streams with the most beautiful and challenging waterfalls and rapids are recurrently in remote and quiet areas of the United States' wilderness. Few popular whitewater rivers, creeks, and streams run through public land: most run through private lands.<sup>16</sup>

Private landowners along America's waterways often enjoy nature's solitude and understandably, may seek to preserve it as their own. But there is a stirring disruption in private landowners' solitude along rivers, creeks, and streams. As paddling becomes increasingly popular,<sup>17</sup> paddlers' and paddling groups' presence on the water becomes ever more prevalent.

Waterfront landowners' concerns about paddlers' interfering with their private property rights are not insignificant. Paddlers seldom paddle solo for safety and social reasons. For those reasons, many paddlers also join paddling groups of several paddlers or clubs that frequent whitewater runs. When the word becomes known about exciting whitewater runs, the rivers, creeks, or streams become popular and heavily populated by paddlers who often pass by or through private property. Commercial outfitters may also seek to run trips down the river, creek, or stream. Few waterfront-property-owners bargain for a navigable liquid highway full of paddlers in their back yards.

With increased paddling activity, landowners risk seeing flocks of paddlers in brightly colored boats paddling on water that flows through their private property, if the water is navigable. Sharing nature's waterways with the public also entails paddlers occasionally getting out of their boats along the waterway and stepping upon the landowner's private property to use the land to eat lunch, rest, or take advantage of nature's bathrooms behind trees or boulders. Perhaps private landowners fear "cabrewers" on or near their property most of all. Cabrewing is commonly associated with a rowdy group of less-serious paddlers floating down the water in several canoes packed with beer.<sup>18</sup> Some of the beer cans and partying end up on the river's banks.

Paddlers also may unintentionally or necessarily arrive via swift currents on the

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<sup>16</sup> See generally Larry Morandi, *What If a River Runs Through It?*, NCSL (July/Aug. 2010), <http://www.ncsl.org/research/environment-and-natural-resources/water-rights-in-western-states.aspx> [<https://perma.cc/Y8V2-RMQ2>] (discussing the prevalence of state legislation addressing waters running through private land).

<sup>17</sup> See sources cited *supra* notes 12–13.

<sup>18</sup> *Cabrewing*, URBAN DICTIONARY (Apr. 25, 2009), <https://www.urbandictionary.com/define.php?term=Cabrewing> [<https://perma.cc/VB6V-NZBE>] ("The act of floating down a river in a canoe or raft while drinking alcoholic beverages. Usually done in large groups. No paddling [sic] is involved unless absolutely necessary.").

river's bank. Whitewater paddlers in particular are "all 'between swims."<sup>19</sup> They flip over on rapids and swim until the water's current sweeps them to the land alongside the river, creek, or stream. They portage around or scout rapids from land. From land, they also help rescue other paddlers.<sup>20</sup>

Without an understanding of the necessities of whitewater paddling, the difference between the serious whitewater paddler and cabrewer, or clear boundaries between paddlers' rights and landowners' rights, conflicts between paddlers and landowner are frequent and fierce.<sup>21</sup> These conflicts sometimes result in ballot initiatives and legislation to determine paddlers' rights to paddle and access to rivers, creeks, and streams.<sup>22</sup>

Conflicts between paddlers and landowners sometimes turn violent.<sup>23</sup>

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<sup>19</sup> Paul Kothe, *What Happens If I Flip?*, PADDLING, <https://paddling.com/learn/what-happens-if-i-flip/> [<https://perma.cc/96JG-XD8K>] (last visited Oct. 21, 2018).

<sup>20</sup> See, e.g., *Throw Rope Rescues*, PADDLE EDUCATION, <http://paddleeducation.com/whitewater-kayaking/basic-rescues/throw-rope-use/> [<https://perma.cc/5U4G-AWC4>] (last visited Oct. 21, 2018).

<sup>21</sup> The interests of anglers and paddlers also often conflict and frequently compete. Both the angler's tranquility and opportunity to catch a fish are disrupted as kayakers, open boaters, or rafters float downriver. For example, Jackson-Shaw owned land in Colorado that the Taylor River passed through. *Anglers and Rafters Reach Taylor River Agreement*, CRESTED BUTTE NEWS (June 16, 2010), <http://crestedbuttenews.com/2010/06/anglers-and-rafters-reach-taylor-river-agreement/> [<https://perma.cc/6A2A-DBYJ>]. In the fall of 2009, Jackson-Shaw sent a letter to local rafting companies advising them that they could not continue to use the river. *Id.* This led to a number of ballot initiatives created both by groups in favor of access to the river for rafters and by opposing landowners. Jessica Fender, *Gov. Ritter Hopes Rafting Rift Can Be Mended Without Ballot Initiatives*, DENVER POST (May 18, 2010, 3:07 PM), <http://www.denverpost.com/2010/05/18/gov-ritter-hopes-rafting-rift-can-be-mended-without-ballot-initiatives/> [<https://perma.cc/3N7F-ZM N3>]. However, the ballot initiatives were withdrawn when Jackson-Shaw and the rafting companies reached an agreement through mediation. *Anglers and Rafters Reach Taylor River Agreement, supra*. The rafting companies agreed to only run twenty boats per day during the summer months and only if there was a minimum of 200 CFS flowing downriver. *Id.*

<sup>22</sup> See sources cited *supra* note 21. Wealthy landowners in Montana, including musician Huey Lewis of *Huey Lewis and the News*, attempted to restrict boaters' access to streams in Montana, but were not successful. Jim Robbins, *Unhappiness After Stream in Montana is Open to All*, N.Y. TIMES (Nov. 30, 2008), <http://www.nytimes.com/2008/12/01/us/01trout.html> [<https://perma.cc/MQ6R-58F4>]. Mitchel Slough was claimed to be an irrigation ditch rather than a natural waterway. *Bitterroot River Ass'n v. Bitterroot Conservation Dist.*, 198 P.3d 219, 235–36 (Mont. 2008). Even though, without man-made alterations, the waterway would no longer naturally flow, the Supreme Court of Montana declared the Stream Access Law to apply to the waterway because it had originally flowed from the Bitterroot River. *Id.* at 242.

<sup>23</sup> See Bell, *supra* note 7.



Landowners, enraged by paddlers' interference with their land, have shot at paddlers for entering their private property along waterways.<sup>24</sup> In a tragic example, a private landowner along Missouri's Meramec River shot and killed a recreational paddler after he stopped at a gravel bar with his family during a paddling trip.<sup>25</sup> The family stopped on a gravel bar to answer nature's call, using nature's bathroom on the land alongside the water. The landowner confronted the group with a gun, accusing the group of trespassing upon his property. During the argument about property rights, the landowner fatally shot one of the men in the group.<sup>26</sup>

Landowners have also strung barbed wire across streams, attempting to obstruct down-river navigation.<sup>27</sup> On a stretch of the South Platte River in Colorado, landowners strung barbed wire across the river to stop kayakers.<sup>28</sup> Sharp barbed wire on a rushing whitewater river will catch unwary paddlers as the water's swift current propels them downstream, creating a harsh noose if strung just right. On another part of the South Platte in Colorado, "an exclusive fishing club sought to prevent floaters from floating through its two miles of property by building obstacles in the river, yelling at boaters, shoveling dirt on boaters from a bridge, and seeking criminal trespassing charges."<sup>29</sup>

Eschewing the sword for the pen, landowners and government authorities have filed criminal trespass charges against paddlers to deter them from paddling some waterways.<sup>30</sup> For example, two professional kayakers, Dane Jackson and Nicholas Troutman, successfully descended Kentucky's Cumberland Falls in March 2016 and

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Pettis, *supra* note 6, at 475.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> The Federal Energy and Regulatory Commission ordered New York State Electric and Gas to open access to the Ausable Chasm in June of 2010. Kevin Colburn, *Ausable River to Open June 18, 2010!*, AM. WHITEWATER (June 14, 2010), <https://www.americanwhitewater.org/content/Article/view/articleid/30756/> [<https://perma.cc/P8JQ-LMS5>]. On the very first day of access, the Ausable Chasm Company, who owns land along the river, had state police write trespassing tickets for paddlers who touched the shores of the river. Kevin Colburn, *Ausable River Access Update*, AM. WHITEWATER (July 20, 2010), <https://www.americanwhitewater.org/content/Article/view/articleid/ausable-access-update/> [<https://perma.cc/CSR7-6R3J>]. The State of New York did not file trespassing charges. *Id.*; see also Bill Estep, *Two Charged After Going over Cumberland Falls in Kayaks*, LEXINGTON HERALD LEADER (Mar. 14, 2016, 5:16 PM), [<https://web.archive.org/web/20160317060359/https://www.kentucky.com/news/state/article66017212.html>].

were cited for trespassing by a park ranger.<sup>31</sup> The kayakers filmed the descent and posted the videos to their Facebook pages.<sup>32</sup> In discussing the citations, a spokesman for the park system stressed the risk of death or injury that steep waterfall running imposes.<sup>33</sup> The kayakers attempted to explain that their descent over Cumberland Falls was not a stunt.<sup>34</sup> They were both extremely experienced kayakers,<sup>35</sup> who said they would not encourage “just anybody to go out and try it.”<sup>36</sup>

The sport of running waterfalls and large rapids sometimes pushes paddlers' skills to the limits. It pushes the legal conflicts arising from the relationship between paddlers and property owners along the river to the limits as well.<sup>37</sup> Disputes among paddlers, landowners, or local authorities arise with “considerable frequency,” and they are described as typically involving a “shotgun-toting owner of rights riparian to the waterway who threatens to kill any paddler who trespasses on ‘his’ river.”<sup>38</sup> But if the waterway is navigable, the paddlers' navigation is not a trespass.<sup>39</sup> Rather, the paddler is where he has the right to be and the riparian

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<sup>31</sup> See Estep, *supra* note 30; see also Nick Troutman, FACEBOOK (Mar. 13, 2016), <https://www.facebook.com/nicholas.troutman/videos/cumberland-falls-head-cam/577595865742826/> [<https://perma.cc/HUD8-9WZ6>].

<sup>32</sup> See, e.g., Troutman, *supra* note 31.

<sup>33</sup> Estep, *supra* note 30.

<sup>34</sup> See Hillary Thornton, *Professional Kayakers Cited for Riding over Cumberland Falls*, WKYT (Mar. 14, 2016, 5:27 PM), <http://www.wkyt.com/content/news/Professional-kayakers-cited-for-riding-over-Cumberland-Falls-372026312.html> [<https://perma.cc/KB4P-KVYZ>]. The kayakers explained that they investigated the area and crafted a “safety plan” before riding over the Falls. *Id.* Furthermore, from their perspective, their ride was “a personal goal,” and they did not expect spectators or thousands of views of their video of the ride. *Id.*

<sup>35</sup> Dane Jackson, REDBULL, <https://www.redbull.com/us-en/athlete/dane-jackson> [<https://perma.cc/B5QQ-P6EW>] (last visited Oct. 21, 2018); Nick Troutman, OUTDOOR SPORTS TEAM, <https://www.outdoorsportsteam.com/athletes/athletes/nick-troutman/> [<https://perma.cc/T9L9-2FFH>] (last visited Oct. 21, 2018).

<sup>36</sup> Thornton, *supra* note 34.

<sup>37</sup> The American Whitewater Association (AWWA) has played a large role in guaranteeing access for paddlers to public rivers and other waterways. *About AW*, AM. WHITEWATER, <https://www.americanwhitewater.org/content/Wiki/aw:about/> [<https://perma.cc/KB56-P798>] (last visited Oct. 21, 2018). AWWA works with a variety of government agencies to remove dams and has represented the public interest in suits to increase flow days on rivers with federally-licensed hydropower plants. *Id.*; see also *Public Policy Initiatives*, AM. CANOE ASS'N, [http://www.americancanoe.org/page/Public\\_Policy](http://www.americancanoe.org/page/Public_Policy) [<https://perma.cc/GT3F-TSAK>] (last visited Oct. 21, 2018).

<sup>38</sup> Pierce, *supra* note 2, at 1070.

<sup>39</sup> *Id.*

landowner violates the law if he obstructs the paddler's navigation.<sup>40</sup>

The first question in attempting to resolve many conflicts between paddlers and private landowners along the waters is: what is a navigable river, creek, or stream? The second question is: what rights are incidental or necessary to a paddler's right to navigate the river?

## II. MUDDY WATERS: WHAT IS A NAVIGABLE RIVER, CREEK, OR STREAM?

*I started out thinking of America as highways and state lines. As I got to know it better, I began to think of it as rivers.*

- Charles Kuralt<sup>41</sup>

Rivers, creeks, and streams are the roads and highways upon which paddlers travel.<sup>42</sup> These roads are connected to each other in webs of water systems called watersheds.<sup>43</sup>

Establishing paddlers' rights upon and along America's liquid highways begins with establishing the waters' navigability.<sup>44</sup> The property rights of landowners along the river, creek, or stream may be narrower than landowners believe them to be. Private landowners "hold bare technical title" to the river or stream bed.<sup>45</sup> If a waterway is deemed navigable, the public has the right to float on it, and that right usually includes running the river, creek, or stream in kayaks, canoes, and rafts.<sup>46</sup>

### A. The Federal Navigation Test

The federal test for navigability of a waterway applies in cases where the federal government has an interest in regulating interstate commerce.<sup>47</sup> In *Scranton v.*

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<sup>40</sup> *Id.*

<sup>41</sup> John Cronin, *Local Waterways as Classrooms and Laboratories: A Conversation with Professor Joseph Rachlin*, HUFFINGTON POST (Dec. 6, 2017), [https://www.huffingtonpost.com/johncronin2/americas-waterways\\_b\\_8448150.html](https://www.huffingtonpost.com/johncronin2/americas-waterways_b_8448150.html) [<https://perma.cc/H2VW-UA8V>].

<sup>42</sup> Their utility, for example, as "highways for commerce" has long been recognized. See *United States v. Utah*, 283 U.S. 64, 76 (1931); *The Montello*, 87 U.S. (20 Wall.) 430, 439 (1874).

<sup>43</sup> "There are three types of watersheds. The rivers and streams in a closed watershed empty into an inland body of water like a lake. Open watersheds empty into the ocean from one source. Multiple open watersheds empty into the ocean from [sic] more than one source." Nature Works, *Rivers and Streams*, NHPBS, <http://www.nhptv.org/natureworks/nwep7j.htm> [<https://perma.cc/7SMV-7DPK>] (last visited Oct. 21, 2018).

<sup>44</sup> See *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900).

<sup>45</sup> *Id.*

<sup>46</sup> See *infra* Part II, section D.

<sup>47</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892).

*Wheeler*,<sup>48</sup> the United States Supreme Court described riparian landowners' property rights in relation to the public's rights to use America's navigable waters as follows:

The primary use of the waters and the lands under them is for purposes of navigation. . . . Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable river, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all time subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.<sup>49</sup>

The federal navigation test focuses upon the waterway's historic commercial use or susceptibility for commercial use,<sup>50</sup> as the United States' power over waterways used as interstate highways arises under the Commerce Clause.<sup>51</sup> The Commerce Clause gives Congress the power to regulate "commerce . . . among the several states."<sup>52</sup> In *Gibbons v. Ogden*,<sup>53</sup> the United States Supreme Court made clear that the power to regulate commerce extends to the federal government's regulation over navigable waterways. The historical use of the waterway is the primary focus under the federal navigability test.<sup>54</sup>

The United States Supreme Court established the federal navigability test in *The Daniel Ball*.<sup>55</sup> To be navigable under the federal navigability test, first, the waterway must have been navigable in fact.<sup>56</sup> Second, the waterway must have been navigable

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<sup>48</sup> 179 U.S. 141 (1900).

<sup>49</sup> *Id.* at 141.

<sup>50</sup> In the context of environmental pollution cases, *The Daniel Ball* definition for "navigable waters" has been superseded by the definition provided in the Clean Water Act. However, *The Daniel Ball* test continues to apply in federal cases that do not involve the Clean Water Act. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), *superseded by statute*, Clean Water Act, 33 U.S.C. § 1362(7) (2014), *as recognized in* *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>51</sup> U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States."); U.S. CONST. art. III, § 2; *see also* J.W. Looney & Steven G. Zraik, *Of Cows, Canoes, and Commerce: How the Concept of Navigability Provides an Answer If You Know Which Questions to Ask*, 25 U. ARK. LITTLE ROCK L. REV. 175, 183 (2002).

<sup>52</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>53</sup> 22 U.S. (9 Wheat.) 1, 22 (1824).

<sup>54</sup> *The Daniel Ball*, 77 U.S. (10 Wall.) at 563.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

in fact at the time of the relevant state's admission into the Union.<sup>57</sup>

Under the latter part of the federal navigability test, known as the "Equal Footing Doctrine," new states entering the Union were placed on "equal footing" with the original thirteen colonies.<sup>58</sup> As each of the original thirteen colonies declared independence, they "became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soils under them; for their own common use."<sup>59</sup> States entering the Union after 1789 did so on equal footing with the original thirteen and had the same ownership over sovereignty lands.<sup>60</sup>

The concept of "navigable in fact" under the first part of the federal navigability test is quite broad. The Supreme Court in *The Daniel Ball*<sup>61</sup> held that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."<sup>62</sup>

The Supreme Court's decision in *The Daniel Ball* rejected the prior common law "tidal flow" test for determining the navigability of inland streams, rivers, and lakes, and established a workable test in its place.<sup>63</sup> Under the tidal flow test, a waterway was navigable if it was affected by the coastal tides.<sup>64</sup> The Court noted that in England, nearly any river that was navigable in fact was affected by the ebb and flow of the coastal tides, making the terms interchangeable.<sup>65</sup> However, the Court concluded that the tidal flow test was not suited to the expansive United States where rivers and smaller creeks and streams, interconnected within watersheds, are navigable for hundreds of miles inland from any coast.<sup>66</sup>

*The Daniel Ball* involved a large steamship transporting goods on the Grand River in Michigan, which neatly fit the description of a highway for commerce.<sup>67</sup> The United States Supreme Court in *The Montello*, however, clarified that the federal

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<sup>57</sup> See *Utah v. United States*, 403 U.S. 9, 10 (1971).

<sup>58</sup> See *Shively v. Bowlby*, 152 U.S. 1, 49 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 222 (1845).

<sup>59</sup> *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

<sup>60</sup> *Pollard*, 44 U.S. at 228–29.

<sup>61</sup> 77 U.S. (10 Wall.) 557 (1870).

<sup>62</sup> *Id.* at 563.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 565.

definition of navigability was much broader than bodies of water used in their ordinary condition as highways for commerce.<sup>68</sup> The company had charged tolls for river access, claiming that the river was not navigable in fact under *The Daniel Ball* test because it was not continuously navigable in its ordinary condition prior to the improvements.<sup>69</sup> The Court clarified that the phrase “used in their ordinary condition” is not limited to a natural condition that would accommodate steam vessels, like the large steamship, *The Daniel Ball*.<sup>70</sup> Rather, “[t]he capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.”<sup>71</sup> Therefore, the Court reasoned that even if a river in its natural state has impassable rapids or obstacles requiring portage, it is navigable so long as “the natural navigation of the river is such that it affords a channel for useful commerce.”<sup>72</sup>

Thus, the federal navigation test has broad reach and has positive implications for whitewater paddlers in small boats. If a waterway was historically used for the smallest of boats or floating the smallest of logs for commerce in the logging or fur trade, it passes the federal navigability test.<sup>73</sup> If a river was historically floated by canoes carrying goods in the fur trade or used in logging, it is navigable for commercial as well as recreational purposes, and by all boats.<sup>74</sup>

As examples of the broad reach of the term navigability, the United States Supreme Court held that the Fox and Wisconsin Rivers, both in Wisconsin, are navigable in fact “in their ordinary condition,” before human intervention of the rivers’ flow with locks and dams.<sup>75</sup> The Court explained that although Northwest fur traders traveling the Fox River experienced challenging portages around

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<sup>68</sup> In *The Montello*, Wisconsin granted rights in the Fox River to a private company. The company removed rapids and added canals, to make the Fox River navigable for larger steamships. 87 U.S. (20 Wall.) at 435–36, 441.

<sup>69</sup> *Id.* at 434, 439–40 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) at 557).

<sup>70</sup> *Id.* at 437–38 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) at 563).

<sup>71</sup> *Id.* at 441.

<sup>72</sup> *Id.* at 442–43 (establishing a river’s navigability through its historical use by fur trading boats).

<sup>73</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 405–06 (1941) (explaining that rivers with rapids are navigable if once used for floating out logs).

<sup>74</sup> Shallow rivers used in the past to transport furs by canoe are navigable, even if obstructed. *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 117 (1921).

<sup>75</sup> *The Montello*, 87 U.S. at 443; see *Pierce*, *supra* note 2, at 1086–87 (discussing some of America’s most boated whitewater and arguing that the FERC erroneously adopted a navigability test that, at least in part, depended upon the craft used by the paddler—canoe versus kayak—and is owed no deference as an expert in energy, in assessing the navigability of whitewater streams).

difficult rapids and waterfalls, the Fox and Wisconsin Rivers are part of a navigable, “uninterrupted highway.”<sup>76</sup>

The United States Supreme Court, in *Economy Light & Power Co. v. United States*,<sup>77</sup> likewise held that the Desplaines River flowing through Wisconsin and Illinois to the Mississippi River is also navigable in fact, despite its many “boulders and obstructions,” which may make navigation quite difficult in segments. Historically, fur traders floated furs down the Desplaines River in canoes to the Mississippi River, and so it is a navigable river.<sup>78</sup> The Court concluded that a waterway is navigable, despite “occasional obstructions” or low water, making portaging necessary or rendering it seasonally not floatable by canoe.<sup>79</sup>

In *United States v. Utah*,<sup>80</sup> the Court concluded that the Green, Grand, San Juan, and Colorado Rivers flowing through Utah are navigable waterways, even in the absence of a history of navigation during the fur trade or other commercial activity, as “[t]he extent of existing commerce is not the test.”<sup>81</sup> Rather, susceptibility to commercial use is the test for navigability.<sup>82</sup> Significantly for whitewater kayakers and open boaters, the Court in *United States v. Utah* reiterated that a waterway is navigable even if it contains challenging rapids or is impassable because of low water during certain parts of the year.<sup>83</sup>

The navigability of the New River in West Virginia and Virginia, with its Class IV rapids and waterfalls, was the subject in *United States v. Appalachian Electric Power Co.*<sup>84</sup> The United States Supreme Court further clarified that waterways capable of being navigable only after planned improvements are forever navigable in fact, even if the improvements were never made.<sup>85</sup> In *Appalachian Electric Power Co.*, a private

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<sup>76</sup> See *The Montello*, 87 U.S. at 443; Pierce, *supra* note 2, at 1083.

<sup>77</sup> 256 U.S. 113, 118 (1921); see Pierce, *supra* note 2.

<sup>78</sup> *Econ. Light & Power Co.*, 256 U.S. at 117.

<sup>79</sup> *Id.* at 122.

<sup>80</sup> 283 U.S. 64, 90 (1931).

<sup>81</sup> *Id.* at 82, 89.

<sup>82</sup> *Id.* at 82.

<sup>83</sup> *Id.* at 84.

<sup>84</sup> 311 U.S. 377 (1940), *superseded by statute*, Clean Water Act, 33 U.S.C. § 1362(7) (2014), *as recognized in* *Rapanos v. United States*, 547 U.S. 715 (2006).

<sup>85</sup> *Id.* at 407–08. The New River stretched for 111 miles between Virginia and West Virginia with multiple waterfalls and rapids in its middle section. *Id.* at 410. The Government had made improvements to sections of the river, but ultimately did not finish the planned improvements as the necessity for commerce on the river disappeared. *Id.* at 407. Nevertheless, the Court reasoned that the planned improvements established the river as navigable in fact despite scant evidence

company sought to build a hydro-electric dam on the New River, flowing between Virginia and West Virginia, but the Federal Power Commission declared it a navigable river and prevented construction of the dam.<sup>86</sup> Two of the three sections of the New River were traditionally used to transport lumber and tobacco by keelboats and were not at issue.<sup>87</sup> However, the third section of the New River contained multiple waterfalls, with one over eleven feet high.<sup>88</sup> There was little evidence of commercial use of the third section of the New River, although residents reportedly occasionally saw boats on segments of the river and the government brought boats down the river to sell after improvements to the other sections were stopped.<sup>89</sup> Thereafter, a government survey indicated the New River could be improved to allow for sluice navigation.<sup>90</sup> The Court determined that the evidence of prior use, when considered with the potential for improvements, made the New River navigable in fact.<sup>91</sup>

Many of the historic cases in which the Court defined navigability, for a variety of purposes, demonstrate that steep waterfalls and challenging whitewater rapids

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of the river being used widely for commerce throughout its history. *Id.* at 407–08. However, the Court did note that there is a reasonableness standard to apply to improvements, and there “must be a balance between the cost and need at a time when the improvement would be useful.” *Id.*

<sup>86</sup> *Id.* at 401.

<sup>87</sup> *Id.* at 411.

<sup>88</sup> *Id.* at 412. The Court described the “crucial stretch from Radford to below Wiley’s Falls” as follows:

Eighteen of these miles have grades falling, gradually or abruptly, more than four feet in the mile. Several of these where there are rapids or falls show drops of eight, nine and in one instance 11 ½ feet. The higher footage represents, of course, miles in which small falls are found. Between these more precipitous sections are many miles of what is called “good water,” with a gradual fall of 4 feet or less. Even in miles where the declivity is rapid, the fall is apparently largely in sections containing obstructions. For instance, the 51st mile reads “Rapid, over bowlders [sic] and gravel, 1,500 feet long; fall, 8 ½ feet,” and the 100th mile “Neilley’s Falls and rapids; whole fall, 11 feet, 6 of it nearly vertical. A sluice 500 feet long, along left bank, will pass them, with 50 feet of rock excavation and 450 feet of bowlders [sic] and gravel.” Quite frequently where the fall is moderate, other obstructions appear, as the 78th mile “Rapids, 500 feet long, over bowlders [sic] and gravel; fall, 2 feet.” Large isolated rocks are scattered abundantly throughout the stretch. A geologist testifying for the respondent tells strikingly how the faulting and folding of the surface at this stretch has resulted in the tilting of the rock strata to a steep degree. In its flow, the water of New River moves along and up the slopes of successive rock strata or ledges . . . this results in a river with numerous ledges of rock strata, some partly submerged, some exposed, which are substantially vertical or standing on end, and which extend across the stream at right angles to the line of flow . . . The slope of the strata is downward in an upstream direction rather than in a downstream direction,” contrary to the usual condition.

*Id.* at 412–13 (quotations omitted).

<sup>89</sup> *Id.* at 415.

<sup>90</sup> *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 417–18 (1940).

<sup>91</sup> *Id.* at 418.



do not render a waterway unnavigable.<sup>92</sup> Indeed, the entirety of the Niagara River, including its huge, cascading Niagara Falls, is a navigable river.<sup>93</sup> Although it is questionable whether mere-mortal paddlers can safely descend Niagara Falls' 176-foot-high drop,<sup>94</sup> the Niagara Falls can be portaged by those who wish to paddle that section of the Niagara River.<sup>95</sup> Moreover, just downstream from the Falls, the Class IV and V rapids can be paddled,<sup>96</sup> and the Maid of the Mist and commercial rafting companies conduct commercial business on the Niagara River.<sup>97</sup>

The National Organization for Rivers (NOR) most clearly explains navigability in paddlers' terms:

A river that is small yet navigable may contain many rocks and shallow spots, but there is still a route down it, a small channel that is passable in small boats. . . . The bed of a non-navigable river or creek, on the other hand, is an undifferentiated jumble of rocks. In steeper terrain, the water is spilling over the rocks in a sort of cascade, while in flatter terrain, the water is threading its way between the rocks. In either case, there is no route down it. . . . A key difference between the two is that higher water flows on a navigable river or creek make it easier to navigate, by making the route down it wider and deeper. . . . But higher flows on a non-navigable river or creek do not help navigation much--they just bring more water spilling over or around the rocks, making more noise and spray, but still not creating any distinguishable route. On a non-navigable river or

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<sup>92</sup> See *id.* at 408–09, 412–13; *United States v. Utah*, 283 U.S. 64, 82 (1931); *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118–19 (1921); *The Montello*, 87 U.S. (20 Wall.) 430, 442 (1874).

<sup>93</sup> See *Pierce*, *supra* note 2, at 1071, 1077; *Sawzyk v. U.S. Coast Guard*, 499 F. Supp. 1034, 1039 (1980) (“[T]he Corps of Engineers and the Coast Guard consider the Niagara River navigable in its entirety. . . . Similarly, the New York courts, in determining the Congressional Commerce Clause powers with respect to the Niagara River, have held that the river is navigable in its entirety.”).

<sup>94</sup> Niagara Falls is actually the collection of three distinct falls: the 176-foot-high American and Bridal Veil Falls, as well as the 167-foot-high Canadian Horseshoe Falls. *Facts About Niagara Falls*, NIAGARA FALLS LIVE, [https://www.niagarafallslive.com/facts\\_about\\_niagara\\_falls.htm](https://www.niagarafallslive.com/facts_about_niagara_falls.htm) [<https://perma.cc/EMW3-Z7PP>] (last visited Oct. 21, 2018).

<sup>95</sup> See *generally Boating, Kayaking, and Canoeing in Niagara Falls, U.S.A.*, NIAGARA FALLS U.S.A., <https://www.niagarafallssusa.com/things-to-do/outdoor-adventure/water-activities/> [<https://perma.cc/BLU3-FLVL>] (last visited Oct. 21, 2018) (describing the different kayak or canoe runs that paddlers may take around Niagara Falls).

<sup>96</sup> See *Pierce supra* note 2, at 1071 (citing *Sawzyk*, 499 F. Supp. at 1039).

<sup>97</sup> *Sawzyk*, 499 F. Supp. at 1039. The Court noted:

[A]lthough the evidence of actual commercial use before the court is not extensive, there is some evidence of such use. For at least a limited portion of the lower section of the river, that nearest the Falls, the Maid-of-the-Mist has operated a commercial venture for a number of years. Moreover, in 1972 for a period of two to three weeks, the Niagara River White Tours, Inc. operated four raft trips each day from the Maid-of-the-Mist docks in Niagara Falls, New York, to Lewiston, at a charge of \$20.00 per person. Finally, the raft venture at issue in these cases evidences the continuing effort to exploit the river commercially.

*Id.*

creek, even a skilled boater using a good canoe or kayak would be continuously blocked by some combination of rocks, logs, and overhanging brush from the banks. . . . It is, simply stated, “not navigable in fact.”<sup>98</sup>

The broad concept of navigability is significant to whitewater paddlers, because many whitewater paddlers’ favorite rivers, creeks, and streams are rain-dependent.<sup>99</sup> The water flows between jumbled rocks through which paddlers choose the best line down an often narrow path.<sup>100</sup> Paddlers can only run some whitewater streams in kayaks or canoes after a hard rain or during certain times of the year when there is at least a narrow path to navigate downstream.<sup>101</sup> Moreover, some waterways contain shallow stretches or dangerous, man-made, low-head dams that paddlers must portage. These submerged, concrete dams are found along many American rivers and they are particularly dangerous for paddlers. Historically built to harness the “power of rivers to run grain mills, generate electricity and keep lakes and ponds full of water as a hedge against drought,” today, low-head dams are traps for unwary paddlers.<sup>102</sup> They are drowning machines.

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<sup>98</sup> Nat’l Org. for Rivers, *So How Do You Tell the Difference Between a Navigable River and a Non-Navigable River, for Title Purposes?*, NATIONALRIVERS, <http://nationalrivers.org/how-do-you-tell-the-difference-between-a-navigable-river-and-a-non-navigable-river.html> [https://perma.cc/VD7S-X98X] (last visited Oct. 21, 2018) [hereinafter Nat’l Org. for Rivers, *So How Do You Tell*].

<sup>99</sup> See generally *National Whitewater Inventory*, AM. WHITEWATER, <https://www.americanwhitewater.org/content/River/view/> [https://perma.cc/8M8K-FH82] (last visited Oct. 21, 2018) (providing a list of the current depth of rivers across the United States and advice on whether the river is floatable at the current depth which is dependent on rainfall).

<sup>100</sup> Anna Levesque, *The Basics on How to Read Whitewater*, MIND BODY PADDLE (Sept. 30, 2008), <https://mindbodypaddle.com/253/the-basics-on-how-to-read-whitewater/> [https://perma.cc/L4YV-D7BM].

<sup>101</sup> See generally KIRK EDDLEMON, 1 *WHITEWATER OF THE SOUTHERN APPALACHIANS: THE PLATEAU* (2014). Among several other factors, rain gauge and drainage are important characteristics of whitewater runs. “Drainage figures also strongly correlate with how much rainfall (in inches) is required to bring a stream up to a runnable flow.” *Id.* at 24. The author describes the relationship between rainfall and the runnable nature of a stream as follows:

Generally, the smaller the stream, the more rainfall it takes to come up to a runnable level, and the shorter the time-frame within which it will rise and fall. Timing is critical, and the accuracy of the data collection must be higher, as smaller watersheds by definition occupy smaller areas on the map. Larger streams typically but not always take less rain to get cranking[] and take longer to drop out. Some streams are unusually narrow or wide, which will throw off estimates of how much rain is required that are solely based on watershed size. Finally, the steeper the run, the quicker it will rise and fall, and the more concentrated the peak flow will be.

*Id.* at 39.

<sup>102</sup> *Hidden Dams Outdated, but a Deadly Threat in U.S.*, CBS NEWS (Apr. 15, 2015, 3:08 PM), <https://www.cbsnews.com/news/hidden-dams-outdated-deadly-threat-to-americans/> [https://

Once a paddler goes over a calm horizon line, it may be impossible for the paddler to get out of recirculating water at the bottom of the low-head dam.<sup>103</sup> These rivers are navigable by small whitewater kayaks and canoes nonetheless.<sup>104</sup>

The end result of the broad federal definition of navigability is that many rivers, creeks, and streams with challenging rapids and steep waterfalls that appeal to whitewater paddlers are navigable. Waters historically susceptible to flotation by small craft or even seasonal log floats satisfy the federal test of navigability, despite a river or stream's obstructions, steep waterfalls, or large rapids.<sup>105</sup> A broad definition of navigability bodes well for whitewater paddlers who seek to run rivers, creeks, or streams, regardless of obstructions, large waterfalls, challenging rapids, rain dependence, or seasonal access.

### **B. The Public Trust**

*Thus, the following things are by natural law common to all—the air, running water, the sea and consequently the sea-shore.*

- *Institutes of Justinian* 2.1.1.<sup>106</sup>

Determining the navigability of a waterway helps determine paddlers' rights on the land along the water, as many rights flow from navigability.<sup>107</sup> Under federal law, and in many states, navigable waterways are held in "public trust" for the benefit of the whole community, to be used by all for navigation, including recreation.<sup>108</sup>

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[//perma.cc/WLQ5-JEHR](https://perma.cc/WLQ5-JEHR)]. See the dam safety video, *The Drowning Machine*, for a detailed explanation about low-head dams, their dangers, and the training required to potentially save lives. Dale Briggs, *The Drowning Machine*, YOUTUBE (Nov. 14, 2015), <https://www.youtube.com/watch?v=E3ZRL2d5FtU> [<https://perma.cc/42G9-ZM3P>]. For additional resources on dam safety, see Charlie Walbridge, *Useful Links to Low-Head Dam Safety Issues*, AM. WHITEWATER (May 12, 2017), <https://www.americanwhitewater.org/content/Article/view/articleid/33790/display/full/> [<https://perma.cc/Q9Y8-9ARZ>].

<sup>103</sup> See *The Drowning Machine*, *supra* note 102.

<sup>104</sup> See generally sources cited *supra* notes 75–97.

<sup>105</sup> Michael C. Blumm & Erika Doot, *Oregon's Public Trust Doctrine: Public Rights in Waters, Wildlife, and Beaches*, 42 ENVTL. L. 37, 379 (2012); see *Utah v. United States*, 403 U.S. 9, 10 (1971) (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870)).

<sup>106</sup> THE INSTITUTES OF JUSTINIAN 35 (J. B. Moyle trans., 4th ed. 1906).

<sup>107</sup> J. N. G., Annotation, *Rights, Privileges, or Easements of Public, its Grantees or Licensees, on Land Bordering on Navigable Water*, 53 A.L.R. 1191, at § III(a) (2018).

<sup>108</sup> Nat'l Org. for Rivers, *Freedom to Use Rivers*, NATIONALRIVERS (July 4, 2014), <http://www.nationalrivers.org/freedom-to-use-rivers.html> [<https://perma.cc/A9XC-JTKD>]; see *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 460 (1892). *But see* *People v. Emmert*, 597 P.2d 1025, 1027 (Colo.

The roots of the Public Trust Doctrine in the United States are thought to originate in Roman law and later, English common law.<sup>109</sup> The Magna Carta restricted the king and nobility from excluding the public from using England's estuaries and navigable waterways.<sup>110</sup> Those roots became engrained in United States British Colonies' views, and they are based on eliminating exclusivity on America's waterways.<sup>111</sup>

The United States Supreme Court officially embraced the Public Trust Doctrine in *Illinois Central Railroad Co. v. Illinois*,<sup>112</sup> rejecting the idea that any nobility can exclude the public from using America's waterways and eschewing private interests' efforts to harness the navigable surface of wild water.<sup>113</sup> The Supreme Court decision in *Illinois Central Railroad* reaffirmed that each state holds permanent title to all submerged lands within its borders and holds them in public trust.<sup>114</sup> The Supreme Court determined that the Public Trust Doctrine applies to the Great Lakes, even though the Great Lakes were not subject to the ebb and flow of tides, like the oceans.<sup>115</sup> The Court stated,

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right

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1979) (en banc) (rejecting the Public Trust Doctrine in Colorado).

<sup>109</sup> See Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); see also Kip Tabb, *Public Trust Doctrine: Who Owns the Beach?*, COASTAL REV. ONLINE (Sept. 29, 2016), <https://www.coastalreview.org/2016/09/public-trust-doctrine-owns-beach/> [https://perma.cc/8RND-ZB8H]. But see James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENVTL. L. 337, 343 (2015) [hereinafter Huffman, *Liberating the Public Trust Doctrine*]. Huffman questions the ancient Roman Law origin of the Public Trust Doctrine, and reiterating a point that:

Roman law was innocent of the idea of trusts, had no idea at all of a "public" (in the sense we use the term) as the beneficiary of such a trust, allowed no legal remedies whatever against state allotment of land, exploited by private monopolies everything (including the sea and the seashore) that was worth exploiting, and had a general idea of public rights that is quite alien to our own.

*Id.* (citing James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 18 (2007) [hereinafter Huffman, *Speaking of Inconvenient Truths*] (quoting Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 17 (1976))).

<sup>110</sup> See sources cited *supra* note 109.

<sup>111</sup> See Huffman, *Liberating the Public Trust Doctrine*, *supra* note 109, at 344–45.

<sup>112</sup> 146 U.S. 387, 463–64 (1982).

<sup>113</sup> *Id.* at 460.

<sup>114</sup> *Id.* at 435, 455.

<sup>115</sup> *Id.* at 435.

to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.<sup>116</sup>

The Public Trust Doctrine, therefore, creates a flotage easement for the benefit of commercial navigators, and in many cases recreational users, of the United States' waterways.<sup>117</sup> Significant to all recreational users of rivers, creeks, and streams, riparian landowners' property rights are "subject to the public right of navigation."<sup>118</sup>

The Public Trust Doctrine and the flotation easement it creates, are essential to resolving many disputes between private landowners and paddlers over waterways. Private landowners violate federal law when they obstruct navigable rivers in an effort to prohibit the public from floating them.<sup>119</sup> For example, the National Organization for Rivers suggests that a farmer or rancher violates the law when he attempts to prevent paddlers from floating downstream on a waterway that cuts through the farmer or rancher's private property.<sup>120</sup> The organization also notes that disputes along rivers, creeks, and streams between private landowners and paddlers seldom involve the "gray area"<sup>121</sup> between navigable and non-navigable characteristics of the waterway. "Instead, [disputes] usually involve rivers [or creeks or streams] that are obviously navigable by small boats, and are in fact regularly navigated," but a farmer or rancher "erect[s] a fence across a river and expect[s] boaters coming down the river to terminate their trip at that point and leave the river, even though the river is every bit as navigable downstream from the fence as it is upstream."<sup>122</sup> Such a dispute over the right to navigate the water should be resolved in favor of the paddler and against the landowner, if litigated.<sup>123</sup>

### **C. *The State Navigation Tests***

In the absence of a federal interest, states can create their own tests for

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<sup>116</sup> *Id.*

<sup>117</sup> See Sax, *supra* note 109; see also Tabb, *supra* note 109.

<sup>118</sup> See *Scranton v. Wheeler*, 179 U.S. 141, 181 (1900).

<sup>119</sup> 33 U.S.C.A § 403 (Westlaw through Pub. L. No. 115–231).

<sup>120</sup> Nat'l Org. for Rivers, *So How Do You Tell*, *supra* note 98.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See *id.*

navigability.<sup>124</sup> States also retain all rights to determine ownership to land adjacent to and under waterways within their borders.<sup>125</sup>

State laws can be murkier than federal law about landowners' rights because private property interests may vary depending upon the state through which the river, creek, or stream flows.<sup>126</sup> For instance, landowners' technical title may extend to the high water mark, low water mark, or to the middle of the waterway.<sup>127</sup> Some states have adopted an even broader standard of navigability than the commercial test used to determine navigability under federal law. Some states determine navigability of waterways based on a waterway's capacity for recreational use, directly applicable to recreational paddlers.<sup>128</sup>

This recreational use test applied by some states allows states to define navigability to reflect current uses of waterways, even absent any historic commercial use or susceptibility for it.<sup>129</sup> For instance, California's Recreational Use Doctrine provides that the public has "the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below the high water mark on waters . . . capable of being navigated by oar or motor-propelled small craft."<sup>130</sup>

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<sup>124</sup> *Donnelly v. U.S.*, 228 U.S. 243, 260 (1913). If federal law does exist, states may still legislate so long as the federal law does not conflict or preempt the considered state law. A state law conflicts with a federal law when it is not possible to comply with both the state and federal law at the same time, or when the state law prevents implementation of the federal law. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

<sup>125</sup> *Donnelly*, 228 U.S. at 261–62.

<sup>126</sup> *Id.* at 262; see also Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1, 25 (2007).

<sup>127</sup> *Packer v. Bird*, 137 U.S. 661, 669–70 (1891).

<sup>128</sup> ANTHONY DAN TARLOCK & JASON ANTHONY ROBISON, *LAW OF WATER RIGHTS AND RESOURCES* 534–40 (John Damico & Mary B. Donk eds., 2018).

<sup>129</sup> So. Idaho Fish & Game Ass'n v. *Picabo Livestock Inc.*, 528 P.2d 1295, 1297, 1298 (Idaho 1974); see also TARLOCK & ROBISON, *supra* note 128. The evolution of the recreational use test varies among states. In Ohio, for example, the recreational use test evolved through the common law. See *Coleman v. Schaeffer*, 126 N.E.2d 444, 447 (Ohio 1955) (holding that a thickly vegetated stream that required dredging was navigable in fact, even though a bridge with a low five and one-half foot clearance crossed it). The Ohio Supreme Court reasoned that even though the stream required maintenance to remain navigable, it was clearly navigable as evidenced by the plaintiffs' use of the river for their business of fourteen years. *Id.*; see also *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373 (Ohio 1959) (clarifying that navigability does not depend at all upon commercial activity because recreational boating is equally important as any commercial purpose).

<sup>130</sup> *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448, 454 (1971).

Similarly, in Ohio, the definition of navigability includes the availability of a river or other watercourse for boating and recreation.<sup>131</sup> Under the Ohio recreational use test, as opposed to commercial use test, the very “appearance of a boater upon a watercourse, coupled with his factual ability to navigate his boat thereon [compels] the conclusion that the watercourse he navigates is, in law, a navigable watercourse.”<sup>132</sup>

The presence of recreational activities such as paddling determines navigability, as long as the public can access the waterway without trespassing on private property.<sup>133</sup> In these states, navigability does not depend at all upon commercial activity because recreational use of the waterways is deemed as equally important as any commercial use of the waterways.<sup>134</sup>

Other states conclude that the public has a right to use the waterways within the states for recreational purposes because the state holds ownership of all of the surface waters in trust for the public, independent of the issue of navigability.<sup>135</sup> For example, in *Day v. Armstrong*,<sup>136</sup> the Wyoming Supreme Court held that the public

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<sup>131</sup> *Coleman*, 126 N.E.2d at 446.

<sup>132</sup> Letter from William J. Brown, Attorney Gen., Ohio, to Robert W. Teater, Dir., Ohio Dep’t of Nat. Res. (Dec. 23, 1980).

<sup>133</sup> See *Ryals v. Pigott*, 580 So. 2d 1140, 1145–46, 1168 (Miss. 1990); *Dycus v. Silers*, 557 So. 2d 486, 500–01 (Miss. 1990); Clinton Lancaster, Note, *Property Law - The Recreational Navigation Doctrine - The Use of the Recreational Navigation Doctrine to Increase Public Access to Waterways and its Effect on Riparian Owners*, 33 U. ARK. LITTLE ROCK L. REV. 161, 165 (2011); see also *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1195–96 (N.Y. 1998).

<sup>134</sup> See, e.g., *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373 (Ohio 1959).

<sup>135</sup> See *TARLOCK & ROBISON*, *supra* note 128. But see *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (en banc) (rejecting the Public Trust Doctrine and upholding the criminal trespass conviction of fishermen whose feet touched the bottom of a streambed as they attempted to control their raft). The court in *Emmert* stipulated to the stream’s non-navigability and more broadly, Colorado courts presume that Colorado streams are non-navigable, based upon the natural characteristics of streams within the state. *Colorado Navigability Report*, AM. WHITEWATER, <https://www.americanwhitewater.org/content/Wiki/access:co> [https://perma.cc/5KSG-S4UX] (last visited Oct. 28, 2018) (citing *In Re German Ditch & Reservoir Co.*, 139 P. 2, 9 (Colo. 1913) (en banc)) (discussing the *Emmert* decision and other adjudications in Colorado); see also *United States v. Dist. Court In and For the County of Eagle*, 458 P.2d 760, 762 (Colo. 1969) (Eagle River); *Hall v. Brannan Sand & Gravel Co.*, 405 P.2d 749, 750 (Colo. 1965) (South Platte River); *Stockman v. Leddy*, 129 P. 220, 222 (Colo. 1912), *overruled on other grounds by Denver Ass’n for Retarded Children, Inc. v. Sch. Dist. No. 1 of Denver*, 535 P.2d 200 (Colo. 1975); *Smith v. Town of Fowler*, 333 P.2d 1034, 1036 (Colo. 1959) (Arkansas River); *Platte Water Co. v. N. Colo. Irrigation Co.*, 21 P. 711, 713 (Colo. 1889) (South Platte River).

<sup>136</sup> 362 P.2d 137, 144 (Wyo. 1961).

has the right to use all surface waters in the state, regardless of whether the waterway is defined as navigable.<sup>137</sup> Beyond such court decisions, recreational use statutes make many states' waterways broadly navigable for recreational use.<sup>138</sup> Indeed, the trend among the states is to define navigability broadly, adopt recreational use tests by statute or common law, and protect the public's rights to enjoy its waters.<sup>139</sup>

#### ***D. Implications of the Navigation Tests for Whitewater Paddlers***

Under the federal navigability test, a waterway's status as a navigable river depends upon its commercial use or susceptibility for commercial activity at the time a state was admitted to the Union.<sup>140</sup> Although the federal concept of navigability is quite broad, the disadvantage of the federal test is its focus on historical commercial use, forever stagnating the non-navigable status of a waterway, despite changes in the waterway's use after a state's admission to the Union. Popular smaller creeks or streams used for whitewater kayaking or canoeing may not qualify as navigable under the federal test if there were no historical commercial uses, despite increasing innovations in kayak or canoe

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<sup>137</sup> *Id.* at 144.

<sup>138</sup> See, e.g., N.Y. GEN. OBLIG. LAW § 9-103 (McKinney, Westlaw through L. 2018 ch. 1-205)); 68 PA. CONS. STAT. ANN. § 477-4 (West, Westlaw through 2018 Reg. Sess. Act 76); WASH. REV. CODE ANN. § 4.24.210 (West, Westlaw through 2018 Reg. Sess.) (mentioning both kayaking and rafting, limiting a landowner's liability to intentional acts). Recreational use statutes also protect landowners along the waterways who fear that they will be liable to paddlers if they open up their land to the public. For example, Pennsylvania's and New York's recreational use statutes protect landowners who open their properties to recreational users from any liability except in cases of willful or malicious actions or where a fee is charged.

<sup>139</sup> See Lancaster, *supra* note 133, at 161-68 (surveying states and recreational uses of their waterways); see also, e.g., So. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 528 P.2d 1295, 1298 (Idaho 1974) (defining navigable streams as those that could float six inch in diameter logs and extending the scope of an existing recreational use statute that included fishing, to all recreational purposes). *But see* Natcher v. City of Bowling Green, 95 S.W.2d 255, 259 (Ky. Ct. App. 1936) (rejecting the argument that recreational use alone is sufficient for a river to be navigable and reaffirming that the "true criterion of navigability of a river is whether it is generally and commonly useful for some purpose of trade or commerce of a substantial and permanent character."); Pa. Power & Light Co. v. Mar. Mgmt., 693 A.2d 592, 595-96 (Pa. Super. Ct. 1997) (holding that commercial use of a lake for recreation and tourism was not enough to make it navigable in law because it was not of the scale of the transport of goods across the Great Lakes or other large rivers in the state).

<sup>140</sup> See *Utah v. United States*, 403 U.S. 9, 10 (1971); *Shively v. Bowlby*, 152 U.S. 1, 57-58 (1894); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).



design, improving paddler skills, and swiftwater training that allow paddlers to run more difficult rapids and descend higher waterfalls.

Paddlers may need to turn to state law definitions of navigability to run smaller whitewater creeks or streams, if the broad federal test will not apply. The status of a waterway's navigability in some states and recreational use jurisdictions does not depend upon any history of commercial uses.<sup>141</sup> Rather, the fact that recreational paddlers are kayaking or canoeing on a river, creek, or stream may make it navigable, even with its huge rapids or steep waterfalls, because kayaking or canoeing is a recreational use.<sup>142</sup> In other states, the public may gain a "prescriptive easement" through continuous, long-term use of a river or stream, or through custom, or the Public Trust Doctrine.<sup>143</sup>

The determination as to whether a waterway is navigable, no matter what theory or test is used, determines the ownership rights of the riverbed.<sup>144</sup> The determination also goes far to define the lawful surface-use rights of the public.<sup>145</sup> But even if the legal question of navigability is solved, most often in the paddlers' favor, conflicts will still arise between private property owners along the waterway and paddlers when the paddlers step upon the land.<sup>146</sup>

Although private property interests along the waterways are important and valuable, limiting whitewater paddlers' activities to the surface water during a down river or stream run is impractical, unworkable, and unsafe, as discussed in the next section of this Article. Once private property owners fully understand that it is sometimes necessary for paddlers to enter private property for safety reasons, many conflicts between private landowners and paddlers on America's waterways can be avoided.

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<sup>141</sup> See TARLOCK & ROBISON, *supra* note 128.

<sup>142</sup> *Id.*

<sup>143</sup> Nat'l Org. for Rivers, *Can States Sell or Give Away Rivers, or Riverside Land?*, NATIONALRIVERS, <http://www.nationalrivers.org/can-states-sell-or-give-away-rivers,-or-riverside-land.html> [https://perma.cc/LHR8-TA2Q] (last visited Oct. 21, 2018); see Mary Shields, *Public Easements in Spectrum: A Solution to Protect the Public Interest*, 66 FED. COMM. L. J. 177, 189 (2013).

<sup>144</sup> The public may gain a "prescriptive easement" through continuous, long-term use of a river or stream, or through custom. State courts and legislatures may use a number of theories to confirm public rights on waterways, including "federal definitions of navigability" and consistent state law definitions of navigability, "the Public Trust Doctrine, the Laws of Nature, and the doctrines of custom, prescription, dedication by adverse use." *Id.*

<sup>145</sup> See TARLOCK & ROBISON, *supra* note 128.

<sup>146</sup> Bell, *supra* note 7.

### III. TOSS ME A THROW ROPE: WHEN IS A PADDLER A TRESPASSER?

*You don't drown by falling into water. You drown by staying there.*

- Edwin Cole<sup>147</sup>

Trespass law is at the heart of conflicts between paddlers and private property owners along popular whitewater runs when paddlers are out of their boats and step onto private, dry land.<sup>148</sup> The broad, paddler-friendly tests and doctrines favoring a paddlers' rights to use navigable waterways must be balanced against a landowner's bundle of rights, which notably includes the right to exclude others and reasonably defend privately-owned property from trespassers.<sup>149</sup>

The United States Supreme Court recognizes that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>150</sup> Indeed, one scholar argues:

[T]he right to exclude others is more than just "one of the most essential" constituents of property—it is the *sine qua non*. Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.<sup>151</sup>

Thus, the rights of private landowners to exclude the intrepid, pioneering, whitewater paddler must be respected.

One who intentionally enters another's land without permission or authorization is ordinarily deemed a trespasser, whom the landowner has the right to exclude.<sup>152</sup> In the private landowner's eyes, the definition of trespass applies to

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<sup>147</sup> *Coleisms*, ED COLE LIBRARY, <http://www.edcole.org/index.php?fuseaction=coleisms.search> Coleisms [<https://perma.cc/XQ2H-99F3>] (last visited Oct. 21, 2018).

<sup>148</sup> See *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); 75 AM. JUR. 2d *Trespass* § 18, Westlaw (database updated Aug. 2018).

<sup>149</sup> See sources cited *supra* note 148.

<sup>150</sup> *Kaiser Aetna*, 444 U.S. at 176; see e.g., *Dolan*, 512 U.S. at 384; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 826, 831 (1987).

<sup>151</sup> Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (referencing the oft-cited language of *Kaiser Aetna*).

<sup>152</sup> A trespasser, at common law, is one who intentionally enters onto a landowner's property unlawfully and without authority. See, e.g., *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157 (Wis. 1997) (holding that intentional trespass occurred when Steenberg Homes delivered a mobile home across another's land because the only road to the site was covered in seven feet of snow and had a sharp curve that would have been difficult to navigate). An ordinary trespasser is one who comes upon the land without the land occupier's express or implied permission or without legal privilege. *Blakely v. Camp Ondessonk*, 38 F.3d 325, 328 (7th Cir. 1994) (affirming the lower court's determination that the plaintiff was a trespasser as a matter of law because she "had no permission to be on the premises" even though the campground was open to visitors, explaining

that intrepid, pioneering, and intruding whitewater paddler, touching private land while running waterfalls and rapids. But contrary to the landowner's perceptions, the whitewater paddler may exceed the surface use of the waterway and lawfully step upon private property without the owner's permission in several circumstances.<sup>153</sup> The more difficult question is how far the paddler's right to enter and use private land along the water extends.

### **A. Whitewater Paddlers' Unintentional Use of Land**

It is always safer for a kayaker or canoeist to stay in his or her boat than to swim.<sup>154</sup> Once out of the boat, a paddler is at the mercy of the water's currents and jumble of rocks. For that reason, the whitewater paddler's first defense is the self-rescue technique called the Eskimo roll.<sup>155</sup> A paddler executes an Eskimo roll and safely remains in the boat, despite capsizing, with a "coordinated hip snap and paddle stroke to bring the boat back upright."<sup>156</sup> But even the most skilled paddler's attempts at self-rescue sometimes fail and the paddler joins "the swim club." The water's swift currents dictate where the paddler lands.

An unintentional act such as tipping out of a kayak or canoe and being carried with swift current to the river or stream bank would not be a trespass onto the land at all, particularly when the navigable river or stream is analogized to a public highway. For example, in *Garner v. Kovalak*,<sup>157</sup> a motorist was forced to swerve off the road to avoid an oncoming vehicle that had crossed the center line.<sup>158</sup> The motorist entered the landowner's property and damaged two small trees.<sup>159</sup> The Court of Appeals of Indiana held that the motorist's entry was unintentional, as the other driver entering his lane caused him to swerve.<sup>160</sup> Therefore, the motorist's entry onto the land was not a trespass.

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that visitors were only permitted access via certain means by which the plaintiff failed to abide).

<sup>153</sup> See discussion *infra* Part III, sections A.–C.

<sup>154</sup> 10 *Whitewater Rafting Safety Tips from Raft Masters*, RAFTMASTERS, <https://raftmasters.com/10-whitewater-rafting-safety-tips/> [<https://perma.cc/65ZN-GL3Y>] (last visited Oct. 21, 2018).

<sup>155</sup> "Roll—Recovering from a capsize while remaining in the boat, requiring a coordinated hip snap and paddle stroke to bring the boat back upright. Kayakers often use a sweep roll or an Eskimo roll." *A Dictionary of Paddling Terms*, KEELHAULERS CANOE CLUB, [http://www.keelhauler.org/khcc/Paddling\\_Dictionary.htm](http://www.keelhauler.org/khcc/Paddling_Dictionary.htm) [<https://perma.cc/Z5CL-ZABN>] (last visited Oct. 21, 2018).

<sup>156</sup> *Id.*

<sup>157</sup> 817 N.E.2d 311 (Ind. Ct. App. 2004).

<sup>158</sup> *Id.* at 312–13.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 314–15.

Like the motorist on a highway, forced to swerve off the road to avoid an oncoming vehicle that had crossed the center line, the swimming paddler on America's liquid highways is not a trespasser because his entry onto the land of another is unintentional when the water's currents take him there.<sup>161</sup> The more difficult question is how far the paddler's right to enter and use private land along the water extends. The paddler's unintentional use of the land, precipitated by the river's swift currents carrying him safely to shore, will not save the paddler from trespass for all subsequent acts on private land.<sup>162</sup> The line between trespass and permissible use is drawn by determining a whitewater paddler's incidental and necessary use of private land.<sup>163</sup>

### **B. Whitewater Paddlers' Incidental Use of Land**

A determination of navigability not only establishes the public's right to navigate the surface waters of a river, creek, or stream, but it also helps to establish the activities in which paddlers may lawfully engage on the banks of such waterways, incidental to navigation.<sup>164</sup> Like the highway system over land, the paddling public has a right-of-way to use the waterways and to a more limited extent, the river, creek, and stream banks without the permission of a private landowner.<sup>165</sup>

Navigation down any waterway—no less a challenging whitewater river, creek, or stream—would be unimaginable without the paddler's ability to stop along the bank to eat lunch, stretch his or her legs, or rest. The law should allow the paddler to stop on the property along a navigable river, creek, or stream to a reasonable and limited extent, as reasonable use of the land is derivative or incidental to the right to navigate.

A paddler, to some extent, may enter land along the waterway for uses incidental to paddling, as long as his entry is reasonable and does not cause

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<sup>161</sup> See generally *Ruiz v. Forman*, 514 S.W.2d 817, 818 (Tex. App. 1974) (dictum) (discussing a hypothetical scenario in which a canoeist encounters a sudden storm and is permitted to trespass, but the canoeist is still liable for damage).

<sup>162</sup> See 75 AM. JUR. 2D *Trespass* §§ 4, 18, Westlaw (database updated Aug. 2018) (defining common law trespass as "direct physical interference" with private property, and "every unauthorized, and therefore unlawful, entry" onto private property).

<sup>163</sup> See *Scranton v. Wheeler*, 179 U.S. 141, 164 (1900) (discussing the distinction between necessary and incidental use of private land).

<sup>164</sup> *Id.*

<sup>165</sup> *Utah v. United States*, 403 U.S. 9, 10–11 (1971).

unnecessary injury to the landowner.<sup>166</sup> “Incidental contact” is contact that is “reasonably necessary and convenient for the effective enjoyment of the public’s easement [to enjoy recreational activities].”<sup>167</sup> Riparian rights are subordinate to the public’s right to utilize navigable waters.<sup>168</sup> Thus, the public has the right to contact private property to a limited extent, while conducting lawful recreational activities, such as whitewater paddling.<sup>169</sup>

Although the definition of incidental contact varies some from state to state, it directly derives from the expansiveness of the public’s right to use navigable waterways in each state.<sup>170</sup> The expansiveness of a state’s right of navigation determines what contact is incidental in the exercise of that right. For example, in Kentucky, riparian property owners own to the center of the stream or river.<sup>171</sup> Thus in Kentucky, even if the definition of navigability may be somewhat more narrow or property rights along waterways more generous,<sup>172</sup> incidental contact with private riverbeds definitively includes the right of temporary anchorage and likely includes minimal contact with the riverbed resulting from fishing, swimming, and boating.<sup>173</sup>

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<sup>166</sup> See, e.g., *Conatser v. Johnson*, 194 P.3d 897, 902–03 (Utah 2008) (explaining that the incidental right of touching the water’s bed is “reasonably necessary and convenient”), *superseded by statute*, Public Waters Access Act, UTAH CODE ANN. § 73-29-101, as recognized in *Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553 (2017); *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984). The Supreme Court of Montana held that:

[T]he public has a right to use the state-owned waters to the point of the high water mark except to the extent of barriers in the waters. In case of barriers, the public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder’s rights.

*Curran*, 682 P.2d at 172.

<sup>167</sup> See *Conatser*, 194 P.3d at 902.

<sup>168</sup> *Dep’t. of Highways v. Thomas*, 427 S.W.2d 213, 215–16 (Ky. 1968). For example, in *Murray v. Preston*, Murray owned property on both sides of Chestnut Creek in Kentucky and created fencing and water gaps across the river which prevented the Prestons from floating staves down the creek. 50 S.W. 1095, 1095 (Ky. 1899). The creek was declared navigable, and the court determined that the public has the right in navigable waterways when “driving logs . . . [to] go upon the banks of our public streams and rivers as necessity may require.” *Id.* at 1096.

<sup>169</sup> See *Conatser*, 194 P.3d at 903.

<sup>170</sup> See generally Stephen D. Osborne, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 *Env’tl. L.* 399, 409–10 (2003) (discussing trends in general state laws regarding navigability and how those laws may differ).

<sup>171</sup> *Pierson v. Coffey*, 706 S.W.2d 409, 411 (Ky. Ct. App. 1985).

<sup>172</sup> See *id.* at 412 (defining “the public right of navigation” as one that “includes the right to navigate the waterways in the strictest sense, that is, for travel and for transportation”).

<sup>173</sup> *Id.*; see also *Conatser*, 194 P.3d at 898 (holding that the public’s easement in Utah’s waters

Lawful, incidental contact with the land also includes the right to portage. For example, in Montana, permissible incidental contact means that the public has the right to use the waterway for recreational purposes,<sup>174</sup> including the right to enter private land to portage around barriers, as long as the entry is accomplished in the least intrusive manner and does not cause unnecessary harm to the property.<sup>175</sup> Similarly, in Ohio, a paddler's entry on private land to portage around a dam "obstructing a navigable watercourse" is "reasonably necessary" and a "privileged intrusion on the property of the landowner."<sup>176</sup>

The balance between private property rights and the public's limited, reasonable incidental use of private land may be marked by such boundaries as the waterway's ordinary high water mark.<sup>177</sup> Under the federal test, applicable to many waterways and adopted by many states, navigable waterways are held in the public trust to what is known as the high water mark.<sup>178</sup> Up to this ordinary high water mark, the public can legally do many things, including stand on the river, creek, or stream bank, eat lunch, rest, or even fish from the bank.<sup>179</sup>

The ordinary high water mark, however, is not always easily determined. It is also something that paddlers are unlikely to consider while navigating whitewater. Determining the ordinary high water mark involves many factors.<sup>180</sup> For example, the United States Army Corp of Engineers' regulations define the "ordinary high

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included any lawful activity that utilized the water and any touching of privately-owned river beds incidental to those activities).

<sup>174</sup> *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984).

<sup>175</sup> *Id.* Professor Huffman criticizes the *Montana Coalition for Stream Access, Inc.* opinion in that it broadly extended the Public Trust Doctrine to all Montana waters susceptible of recreational use. See Huffman, *Liberating the Public Trust Doctrine*, *supra* note 109, at 373 (noting that the court "accomplished this massive extension of the [recreational use] doctrine's geographical reach, impacting thousands of property owners, by the simple expedient of declaring a new recreation test for navigability").

<sup>176</sup> Ohio Att'y Gen., Opinion Letter No. 80-093 (Dec. 23, 1980), 1980 WL 117428, at \*3.

<sup>177</sup> *Pollard v. Hagan*, 44 U.S. 212, 215-16 (1845); see also sources cited *supra* notes 130-32.

<sup>178</sup> *Pollard*, 44 U.S. at 216.

<sup>179</sup> See Kundis Craig, *supra* note 126; see also sources cited *supra* notes 134-36.

<sup>180</sup> Definition of Waters of the United States, 33 C.F.R. § 328.3(c)(6); see also Definition of Navigable Waters of the United States, 33 C.F.R. § 329.11(a)(1) (describing the lateral extent of federal jurisdiction over non-tidal traditional navigable waters of the United States subject to § 9 and § 10 of the Rivers and Harbors Act of 1899). For additional factors used to determine the ordinary high water mark, see U.S. ARMY CORPS OF ENGINEERS, Regulatory Guidance Letter on Ordinary High Water Mark Identification (Dec. 7, 2005), <http://www.nap.usace.army.mil/Portals/39/docs/regulatory/rxls/rgl05-05.pdf> [<https://perma.cc/WG28-LUR5>].

water mark” for purposes of the Clean Water Act as:

[T]hat line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.<sup>181</sup>

The ordinary high water mark is never a static line because of the natural, physical characteristics of an individual river, creek, or stream.<sup>182</sup> Although the elevation of the ordinary high water mark may not change, “the physical location of the ordinary high water mark moves with the erosion and deposit (called ‘accretion’) of sand [or soil] along the shoreline [or stream or river bank] due to natural causes.”<sup>183</sup> Additionally, water boundaries may change. Thus, the ordinary high water mark,

is . . . found by examining the bed and banks[] and ascertaining where the presence and action of water are so common and usual . . . as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.<sup>184</sup>

Although the ordinary high water mark may be as elusive as the natural characteristics on the river’s bank,<sup>185</sup> the public may float the waterway and walk upon the water’s abutting land, up to the ordinary high water mark.<sup>186</sup> In simple

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<sup>181</sup> U.S. ARMY CORPS OF ENGINEERS, *supra* note 180.

<sup>182</sup> See Ind. Dep’t of Nat. Resources, *Ordinary High Water Marks*, IN.GOV, <https://www.in.gov/dnr/water/3658.htm> [<https://perma.cc/Q6HZ-5ZHB>] (last visited Oct. 21, 2018) (describing changes in location for the ordinary high water mark for Lake Michigan for purposes of IDNR’s jurisdiction).

The ordinary high water mark (OHWM) is the line on Lake Michigan and other navigable waterways used to designate where regulatory jurisdiction lies and in certain instances to determine where public use and ownership begins and/or ends. In general terms, ‘ordinary high water mark’ (OHWM) has been defined to be the line on the shore of a waterway that is

1. established by the Fluctuations of water; and
2. indicated by physical characteristics such as a clear and natural line impressed on the bank, shelving, changes in the character of the soil, the destruction of terrestrial vegetation, or the presence of litter or debris.

*Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Howard v. Ingersoll*, 54 U.S. 381, 427 (1851) (Curtis, J., concurring) (describing how to measure the ordinary high water mark of the Chattahoochee River, which formed the boundary between the States of Georgia and Alabama).

<sup>185</sup> See U.S. ARMY CORPS OF ENGINEERS, *supra* note 180.

<sup>186</sup> Nat’l Org. for Rivers, *River Law: Fact of Fiction*, NATIONALRIVERS, <http://nationalrivers.org>

terms, the area “where the vegetation and soil show the effects of water” is open to the public to “use this land for walking, fishing, resting, camping, and other non-destructive visits.”<sup>187</sup> That is the paddlers’ boundary for reasonable incidental contact of private property along the waterway.

Swimming to the bank, portaging, or emptying a boat of water so that the paddler can continue safely downstream are, at the very least, incidental activities in whitewater paddling. Stopping to rest or eating lunch are also incidental to a trip downstream. Whether the paddlers arrived on land unintentionally by swift currents or to make incidental use of private land, they should be mindful of private landowners’ interests and respect reasonable boundaries, usually by making reasonable use of the land only up to the ordinary high water mark. Otherwise, the paddlers risk trespass charges brought by private landowners. That is a reasonable balance between paddlers’ rights to navigate waterways with incidental use and private property rights.

### C. *Whitewater Paddlers’ Necessary Use of Land*

This section argues that whitewater paddlers may lawfully make greater use of the land along the water, even above typical boundaries like the ordinary high water mark, where safety dictates. In greater part, whitewater paddlers use land on private property along rivers, creeks, and streams because of the necessities inherent to safe whitewater paddling.<sup>188</sup> Paddlers touching the bank of the river, creek, or stream is inevitable and a necessity in many circumstances during whitewater paddling. When necessary, whitewater paddlers’ contact with private land along the water may transcend boundaries established by the strictly construed incidental use contemplated by most landowners and courts, such as the ordinary high water mark.<sup>189</sup>

The area to the ordinary high water mark on a boulder-filled, whitewater river, creek, or stream may only be a matter of feet, depending on its natural characteristics.<sup>190</sup> However, paddlers’ very necessary activities on the river, creek,

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/river-fact-or-fiction.html [https://perma.cc/C8DZ-XHPV] (last visited Oct. 21, 2018) (explaining that the land along legally navigable rivers is public up to the ordinary high water mark).

<sup>187</sup> *Id.*

<sup>188</sup> See generally WHITING & VARETTE, *supra* note 9 (describing various techniques and methods that paddlers should consider in order to navigate water safely).

<sup>189</sup> See sources cited *supra* note 173.

<sup>190</sup> See U.S. ARMY CORPS OF ENGINEERS, *supra* note 180 (describing how the high water mark is greatly dependent upon several natural characteristics of the stream or river bank, such as the presence of litter or debris, shelving, and sediment sorting).



or stream bank, including portaging or scouting rapids—potentially life-saving rescue maneuvers—and preparing their boats to safely continue down the waterway, may require greater space than the ordinary high water mark provides. When safety is at issue, private property interests must bend for reasonable actions paddlers take on land, even above typical boundaries like the ordinary high water mark. In essence, necessity transcends the water’s ordinary high water mark and what private-property owners along the water might expect.

Necessity creates a privilege to do what otherwise would be trespass upon another’s land.<sup>191</sup> For the privilege to apply, the paddlers’ entry onto another’s land must be, or reasonably appear to be, necessary to prevent harm to himself or to his equipment, or harm to another paddler or his equipment.<sup>192</sup>

The classic example of the privilege of necessity is *Ploof v. Putnam*.<sup>193</sup> In *Ploof*, a family moored its boat to a landowner’s dock during a violent tempest to save their lives and the boat from property damage.<sup>194</sup> The landowner’s servant unmoored the family’s boat free from the landowner’s dock.<sup>195</sup> The family members were injured when they were tossed into water, and their boat was destroyed.<sup>196</sup> The court held that necessity justifies entries upon land and interferences with personal property that would otherwise constitute trespass.<sup>197</sup> According to the privilege of necessity, one may sacrifice the personal property of another to save his or her own life or the lives of others. Saving human life always trumps preserving property interests.<sup>198</sup>

A defense of private necessity also exists to a charge of criminal trespass if the conduct is justifiable to prevent a greater harm from occurring.<sup>199</sup> The person must

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<sup>191</sup> See 75 AM. JUR. 2D *Trespass* § 69, Westlaw (database updated Aug. 2018). As a defense to trespass:

[O]ne is privileged to enter and remain on land in the possession of another if that entry is, or reasonably appears to be, necessary to prevent serious harm to the actor, or the actor's land or chattels, or to the other or a third person, or to the land or chattels of either.

*Id.*

<sup>192</sup> *Id.*

<sup>193</sup> 71 A. 188 (Vt. 1908).

<sup>194</sup> *Id.* at 188.

<sup>195</sup> *Id.* at 188–89.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 189.

<sup>198</sup> *Id.*

<sup>199</sup> See CHARLES E. TORCIA, 1 WHARTON’S CRIMINAL LAW § 90 (15th ed.), Westlaw (database updated Aug. 2018) (analogizing the common law defense of necessity—which posits that conduct normally considered unlawful becomes justifiable when that conduct is necessary to prevent some

reasonably believe that the conduct is immediately necessary to avoid imminent harm, and that avoiding this imminent harm reasonably outweighs the harm sought to be prevented by the trespass law.<sup>200</sup> Thus, necessity must be “an objectively reasonable response to an extreme situation.”<sup>201</sup> For example, the Tennessee legislature, balancing private landowners’ rights to exclude others and the privilege for outdoor adventurers to trespass, gave the following example: “the necessity defense would bar a trespass conviction for a hiker, stranded in a snowstorm, who spends the night in a vacant cabin rather than risking death sleeping in the open.”<sup>202</sup>

Despite landowners’ objections to the contrary, many whitewater paddlers’ activities on land are necessary, or reasonably appear to the paddler to be necessary, for safe paddling, depending on the circumstances. As described below, there often are no reasonable, safe alternatives available to paddlers faced with unsafe situations.

### 1. Safe Portaging and Scouting

If the public’s liquid highways are analogized to public roads, paddlers have a limited privilege to enter private property as a matter of public right in continuing their journey safely down the river, creek, or stream.<sup>203</sup> Private property interests are balanced by considering whether the paddler has a safe alternative route down the water, and if he or she does, the privilege will not apply.<sup>204</sup> Regardless of whether the privilege applies, the court, in awarding damages, will consider whether the entry was reasonable and may hold the paddler liable for any actual harm he or she causes to the land, even while exercising the privilege.<sup>205</sup>

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type of harm—to the “choice of evils” or “competing harms” doctrines).

<sup>200</sup> See, e.g., TENN. CODE ANN. § 39-11-609 (LEXIS through 2018 Reg. Sess.).

<sup>201</sup> *City of Townsend v. Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453, at \*6 (Tenn. Ct. App. May 17, 2014).

<sup>202</sup> TENN. CODE ANN. § 39-11-609, Sentencing Commission Comments (LEXIS through 2018 Reg. Sess.). But see *State v. Watson*, 1 S.W.3d 676, 678 (Tenn. Crim. App. 1999) (finding that necessity is not available as a defense to driving with a revoked license when vehicle’s owner was ill and unable to drive).

<sup>203</sup> See RESTATEMENT (SECOND) OF TORTS § 195 (AM. LAW INST. 1965) (using the analogy of a traveler on a public highway to explain that the traveler is privileged to enter another’s land in a reasonable manner when the traveler “reasonably believes that such highway is impassable”).

<sup>204</sup> See *id.* (clarifying that the traveler on the impassable public highway is not privileged to enter another’s land if the traveler “has had a reasonable opportunity to avoid [the highway’s] use”).

<sup>205</sup> *Id.*; see also *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) (finding the defendant liable for damages after the defendant tied his boat to the plaintiff’s dock to ride out a

To protect private property interests, rights that are incidental to the right to navigate, including the limited incidental privilege to enter private land to portage or scout rapids, are typically strictly construed.<sup>206</sup> The right to portage, as an incidental use of a waterway, requires that the paddlers take the most direct route that does not damage private property.<sup>207</sup> *Townsend v. Damico*<sup>208</sup> is a case that demonstrates the strict view of the limited right to portage. In *Townsend*, the court held that a person floating the Smoky Mountain's Little River in Tennessee in a rented inner tube exceeded the limited privilege to enter private land to portage around Wear's Dam.<sup>209</sup> The "tuber" and his friends encountered the dam after missing the outfitter's designated takeout where their cars were parked.<sup>210</sup> Believing that the dam was unsafe to float over, the tuber exited the river onto a private campground.<sup>211</sup>

A heated argument ensued between the tuber and the campground's manager, ending with the tuber carrying his inner tube across the campground to a public

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storm).

<sup>206</sup> See *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1197–98 (N.Y. 1998) (holding that despite the right to portage around an obstacle on riparian lands, "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").

<sup>207</sup> See *Mont. Coal. for Stream Access, Inc.*, 682 P.2d at 172 ("[T]he public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights.").

<sup>208</sup> *City of Townsend v. Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453, at \*6 (Tenn. Ct. App. May 17, 2014).

<sup>209</sup> *Id.* at \*1, \*4; see also Iva Butler, *Townsend City Commission Approves Appeal of Little River Ruling*, THE DAILY TIMES (July 30, 2013), [http://www.thedailytimes.com/news/townsend-city-commission-approves-appeal-of-little-river-ruling/article\\_3a1ac300-2cb1-550d-9546-82d48db87a61.html](http://www.thedailytimes.com/news/townsend-city-commission-approves-appeal-of-little-river-ruling/article_3a1ac300-2cb1-550d-9546-82d48db87a61.html) [<https://perma.cc/FZ78-AYKB>] (describing how the citizens of Townsend, a city of only 448 people, planned to appeal a circuit court ruling declaring Little River a navigable waterway, as the community experienced problems from thousands of tubers). Judge Duggan, the trial judge, wrote:

Wears Dam "is an 8-to-10-foot 'low-head' dam, meaning that it has dangerous backwash below the dam which can circulate a person in the water." He also listed other possible obstructions, such as large trees that fall across the river or "being confronted with a sudden emergency, whether it be a thunderstorm or a copperhead snake rapidly swimming toward a tuber."

*Id.*

<sup>210</sup> *Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453, at \*1.

<sup>211</sup> *Id.*

sidewalk.<sup>212</sup> The police cited the tuber for criminal trespass.<sup>213</sup> In upholding the trespass charge, the Tennessee Court of Appeals reasoned that the right to portage was not at issue, explaining that the tuber “did not merely carry his inner tube around the dam, utilizing the most direct route that was least harmful to the private landowner.”<sup>214</sup> The court noted that “[h]ad [the plaintiff] merely walked around the dam and returned to the river,” a different analysis would apply.<sup>215</sup> In essence, as a reasonable portage incidental to using the stream, the Tennessee court would require the tuber to get back into his inner tube and into the river below the dam, despite the resulting inconvenience of floating even further from the rental company’s—the outfitter’s—permitted take-out upstream.<sup>216</sup>

A whitewater paddler’s typical portage around a waterfall or rapid may appear to a landowner or court to be comparable to the tuber carrying his inner tube across the campground to the public sidewalk. A landowner may think that the paddler carrying a boat on his shoulder through the landowner’s property is a pointless, intrusive act. Moreover, a landowner may demand a more direct route, even if he recognizes the paddlers’ right to portage. The question is whether the whitewater paddler exceeded a limited privilege to enter private property to portage.<sup>217</sup>

In pursuit of this question, the whitewater paddler may first assert that, to any safety-conscious paddler, a portage around a challenging waterfall or rapid that the paddler is not prepared to run is a necessity to prevent possible serious bodily harm or even death. It is a vital safety precaution. The right to make the safe choice becomes more necessary the more difficult or unfamiliar whitewater becomes to descend.

The right to portage allows a paddler to get out of his or her boat to “scout” difficult waterfalls or rapids for safety reasons.<sup>218</sup> Even the most skilled paddler

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at \*2.

<sup>214</sup> *Id.* at \*6.

<sup>215</sup> *Id.* at \*7.

<sup>216</sup> *See id.*

<sup>217</sup> *See generally* 75 AM. JUR. 2D *Trespass* § 68 Westlaw (database updated Aug. 2018) (explaining that conduct is not trespass if it is privileged, but a trespass may occur when “the holder of the privilege acts unreasonably or unnecessarily”).

<sup>218</sup> Nantahala Outdoor Center, *A Glossary of Whitewater Terminology*, NOC PADDLING SCHOOL BLOG (Aug. 28, 2007), <http://nocpaddingschool.blogspot.com/2007/08/glossary-of-whitewater-terminology.html> [<https://perma.cc/XTB2-Y6AX>] (defining “scouting” as “the act of looking ahead at a rapid either in the boat or on foot to find the line”); *see* KEELHAULERS CANOE CLUB, *supra* note 156. Scouting means:

occasionally scouts rapids from the river, creek, or stream bank before running an unfamiliar rapid, or when the rapids' difficulty changes depending on water flow. No paddler can always reliably predict the intensity of a rapid on a given day without looking at it, even if the paddler has run the rapid many times before. Truly, "[n]o man ever steps in the same river twice, for it's not the same river . . .,"<sup>219</sup> meaning the characteristics of the river are constantly changing. The saying, and the reality it describes, bolsters the intrepid, pioneering, whitewater paddler's argument for the application of the privilege of necessity because he or she should not be required to speculate on the power of upcoming whitewater.

The same waterfall or rapid run by the same paddler in the same boat many times before "can offer a totally different situation if water levels change or if the path of the water is altered in any way."<sup>220</sup> The whitewater paddler considers hydraulics and the water's speed, velocity, and flow before picking a line or path through the water.<sup>221</sup> Picking a good, safe line through whitewater often requires scouting from land.<sup>222</sup> The right to portage would also allow a paddler to walk around the waterfall or rapid on the adjacent river or stream bank, even if privately owned, if the paddler reasonably decides to abandon his or her plan to run the waterfall or rapid.

Second, the whitewater paddler may assert that there is often not a direct route to portage directly along a whitewater river, creek, or stream. In the process of portaging or scouting a rapid, necessity and privilege should allow the paddler to transcend the ordinary high water mark on private land if the features of the land are not reasonably conducive to portaging or scouting close to the water.

Large boulders, steep banks, and fluctuating water levels can make portaging around a rapid or scouting very difficult, and perhaps impossible very close to

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To disembark and look over a section of river before running it. Or portaging it, if you happen to espy a large waterfall with sharp rocks at the base. Not to be confused with Boat Scouting, in which you convince yourself that it isn't necessary to get out of the boat to have a look, and so don't see the large waterfall before plunging over the edge.

*Id.*

<sup>219</sup> See Harris, *supra* note 1.

<sup>220</sup> Ken Whiting, *Running Waterfalls*, PADDLING, <https://paddling.com/learn/running-waterfalls/> [<https://perma.cc/YZ42-YEDP>] (last visited Oct. 21, 2018).

<sup>221</sup> See generally Potts, *supra* note 10 (describing kayaker Jesse Coomb's experienced paddling through a waterfall run at Abiqua Falls).

<sup>222</sup> See *Scouting & Portaging*, PADDLE EDUCATION, <http://paddleeducation.com/whitewater-kayaking/whitewater-maneuvering/scouting/> [<https://perma.cc/4ZDZ-X4XU>] (last visited Oct. 21, 2018) (explaining that "in most situations a bank based inspection is used" because "it gives a better view and perspective of the rapid").

boulder-lined water. If the paddler attempts to portage a waterfall or rapid, he or she may have no reasonable alternative but to climb to the top of a steep bank or over high boulders to reach a path where the paddler can carry a boat on a shoulder or pull it behind with a rope attached to a carabiner. Although likely not the most direct route, the safe area to scout or portage around the rapid is often beyond the ordinary high water mark and on a landowner's private property.

## 2. Swiftwater Rescue

Despite all of paddlers' precautions and safety measures, things can go wrong fast on a whitewater river, creek, or stream. It is during those times when a whitewater paddler's swiftwater rescue skills and the privilege to trespass upon another's land become imperative. Out of necessity, paddlers running whitewater rapids at times traverse private land to self-rescue or rescue their fellow paddlers.<sup>223</sup> A familiar cliché in the sport of paddling is, "We are all between swims," meaning that swimming is an inevitable part of paddling, so a paddler should not have her ego bruised over a swim.<sup>224</sup> Paddlers unsurprisingly swim and try to reach the bank of the river, creek, or stream when they accidentally capsize, and their self-rescue attempts fail.

Once a kayaker or canoeist separates from her small boat on raging whitewater, torrents of water dictate the paddler's path as she pushes off sharp rocks and boulders in the middle of the swiftwater. Powerful hydraulics may recirculate the boat and paddler, over and over.<sup>225</sup> The power of the water can pin a paddler and her boat between rocks scattered in a whitewater river, creek, or stream, until she is

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<sup>223</sup> See generally Ken Whiting, *Using a Throw Rope*, PADDLING, <https://paddling.com/learn/using-a-throw-rope/> [<https://perma.cc/4RT3-CLEJ>] (last visited Oct. 21, 2018) (describing the safest methods for a throw-rope-rescue performed from land).

<sup>224</sup> Leland Davis, *Swims and Beatdowns: Finding Your Threshold for Kayaking Carnage*, NRS: DUCT TAPE DIARIES (Sept. 7, 2012), <https://community.nrs.com/duct-tape/2012/09/07/swims-and-beatdowns-finding-your-threshold-for-acceptable-carnage/> [<https://perma.cc/5RL5-Q2KW>]. When describing the challenges that many paddlers face, the author notes:

"We are all between swims." Almost every whitewater enthusiast has heard this paddling cliché – usually offered up as salve for egos bruised and battered from recent out-of-boat adventures. A corollary adage states, "if you're not swimming, you're not pushing yourself hard enough." Both are reminders that swimming is a necessary and inevitable part of our sport, and reassurances that we're not going through it alone.

*Id.*

<sup>225</sup> See Virginia Marshall, *How to Escape a Hydraulic*, RAPID (Summer/Fall 2010), <https://www.rapidmedia.com/rapid/categories/skills/976-how-to-escape-a-hydraulic> [<https://perma.cc/UC2G-H33R>] (describing a paddler's experience stuck in the recirculating waters of the Petawawa River's Suicide Rapid).

able to free herself or fellow paddlers free her through swiftwater rescue techniques.<sup>226</sup> Drowning is the leading cause of deaths in kayaking.<sup>227</sup> Therefore, when a kayaker comes out of the boat, fellow paddlers are aware of the dangers and immediately shift into rescue mode.<sup>228</sup>

The whitewater paddlers' creed is to self-rescue whenever possible, and also rescue fellow paddlers on the river, creek, or stream if they get into troubled waters.<sup>229</sup> Rescuers focus on saving the swimmer first and equipment second.<sup>230</sup> In saving human lives, rescuers, who are usually the paddler-turned-swimmer's fellow

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<sup>226</sup> See generally *Saving a Pinned Canoe*, PADDLING (Mar. 2017), <https://forums.paddling.com/discussion/2934806/saving-a-pinned-canoe> [<https://perma.cc/E2EQ-9WNE>] (capturing public discussion sharing helpful tools and methods for unpinning canoes with Z-drag techniques); Charlie Walbridge, *The Dynamics of Pinning*, CHARLIE WALBRIDGE (Apr. 5, 2014), <http://charliewalbridge.com/the-dynamics-of-pinning/> [<https://perma.cc/8AWD-MD2F>] (describing safe rescue techniques for unpinning paddlers in distress).

<sup>227</sup> In its annual report on boating statistics that cover waters in the U.S. and its territories, drownings (eighty-four percent) were the leading cause of deaths in kayaking accidents. DEPT. HOMELAND SECURITY & U.S. COAST GUARD, *2014 Recreational Boating Statistics*, 47 (May 8, 2015), <https://www.uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2014.pdf> [<https://perma.cc/D5GL-ULB5>].

<sup>228</sup> See generally Tyler Williams, *Rush Sturges: The Athlete and the Artist*, CANOE & KAYAK (Dec. 9, 2014), <http://www.canoe kayak.com/photos/rush-sturges-athlete-artist/> [<https://perma.cc/SM9M-35UT>]. In an interview, a kayaker at the top of his sport describes “the inexplicable disappearance” or “bad luck” of his paddling friends in the water. *Id.* As “the macabre recollections trail off,” it is noted that “[a]mong elite whitewater paddlers, death is always lurking in the background.” *Id.*

<sup>229</sup> Eugene Buchanan, *20 Things Every Paddler Needs to Know*, CANOE & KAYAK (May 12, 2015), <http://www.canoe kayak.com/canoe/20-things-every-paddler-needs-to-know-essential-kayak-paddling/> [<https://perma.cc/8X33-SH85>]. Many paddlers learn safety skills by taking swiftwater rescue courses. *Id.* Paddlers also wear special safety equipment designed for whitewater kayaking, including helmets, PFDs, and clothing designed for cold weather. *Id.*

Paddlers look out for each other. Your first responsibility as a paddler is to know how to react in a rescue situation. Learn basic safety skills by taking a swiftwater rescue course, available at such venerable paddling schools as the Nantahala Outdoor Center and official swiftwater rescue sources. Bonus: Classes are a great way to meet other paddlers.

*Id.*; see Kevin Lindberg, *Letter: Unfair to Kayakers*, CONCORD MONITOR (May 24, 2017), <http://www.concordmonitor.com/Unfair-to-kayakers-10264047> [<https://perma.cc/QFU6-VYHK>]. “People in the whitewater community are some of the most safety-conscious people you will find on the water. We look out for one another and will question anyone we feel may put themselves or others in the group at risk, and will send them away if necessary.” *Id.*

<sup>230</sup> Jackson Kayak, *Boat and Paddle Rescue*, PADDLE EDUCATION, <http://paddleeducation.com/whitewater-kayaking/basic-rescues/boat-rescue/> [<https://perma.cc/S7DP-GBCP>] (last visited Oct. 21, 2018).

paddlers, often necessarily enter another's land.<sup>231</sup>

Many successful rescues are shore-based.<sup>232</sup> For example, one of the lowest-risk and most common swiftwater rescue techniques is to throw the swimmer a throw rope attached to a throw bag<sup>233</sup> while rescuers securely and safely stand on the bank. The rescuers standing on the bank must be “ready to handle the load of a swimmer grabbing onto [a throw rope]. In the best-case scenario, . . . someone with a throw line [is] in a good spot downstream. In other cases, [the rescuers] may have to act quickly by running down the bank . . . .”<sup>234</sup>

Although the best rescue may be the simplest one, some situations call for more advanced maneuvers than simply throwing a rope to the swimmer and intrusions of a single rescuer upon another's land along the river or stream. Multiple rescuers may be required to stand on the river or stream bank and perform a “tethered rescue . . . in which a rescuer swims out to the victim, manually frees them, and then holds onto the victim as they get pulled back into shore.”<sup>235</sup> This team of rescuers may set up a Z-drag on land to more safely attempt to pull the victim and his or her water-rescuer to land, a process that requires many ropes and pulleys positioned over a relatively wide area.<sup>236</sup> An effective rescue may require paddlers to climb out of the

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<sup>231</sup> See generally DEP'T. OF INTERIOR, *National Park Service Swiftwater Rescue Manual*, 8 (Sept. 2012), <http://mra.org/wp-content/uploads/2016/07/nps-swiftwater-rescue-manual-revo9-23-2012-SMALL.pdf> [<https://perma.cc/XZ2E-3FJM>]. The manual states:

Swiftwater rescue is a specialized rescue discipline, which has principles and techniques that are employed in moving water . . . . [Swiftwater] is informally understood to refer to water over two feet deep that is flowing at a minimum rate of one knot (1.15 mph) and occurring in a natural water course, flood control channel, or a flood-related environment.

*Id.*

<sup>232</sup> See Hare Mountain Rescue, *Shore Based Water Rescue*, YOUTUBE (Jan. 22, 2015), <https://www.youtube.com/watch?v=-tdr4aRFFIg> [<https://perma.cc/N8UV-QAVY>].

<sup>233</sup> Paddlers prepared to rescue fellow paddlers carry a throw bag inside their boat or around their waist. The throw bag contains a “throw rope;” that is a “rope coil made out of a high flotation rope preferred by raft guides for its ease to throw and recoil quickly.” Nantahala Outdoor Center, *supra* note 218; see also *A Dictionary of Paddling Terms*, *supra* note 156 (defining a throw rope as a “[f]loating rope in a throwable bag used for rescue”).

<sup>234</sup> Whiting, *supra* note 223.

<sup>235</sup> Ken Whiting, *Advanced Rescue-Tethered Rescue*, PADDLING, <https://paddling.com/learn/advanced-rescue-tethered-rescue/> [<https://perma.cc/K5FR-ENWW>] (last visited Oct. 21, 2018).

<sup>236</sup> A Z-Drag is “a mechanical advantage system involving carabiners, rope, prussiks, and pulleys to aid in removal of a pinned object. A typical Z-drag gives a 3:1 ratio, meaning for every pound you enter [in] the system it multiplies the force by 3.” Nantahala Outdoor Center, *supra* note 218; see also Nantahala Outdoor Center, *The Mythical Z-Drag*, NOC PADDLING SCHOOL BLOG (June 24, 2007), <http://nocpaddlingschool.blogspot.com/2007/06/mythical-z-drag.html> [<https://perma.cc/>]



water to a secure space on land, which may be private and above the ordinary high water mark.<sup>237</sup> Swiftwater rescues may require steady paddlers to fight the strong current to pull the distressed paddler or water filled boat in the opposite direction.<sup>238</sup> These rescue activities should be expected to place rescuers above the ordinary high water mark or beyond places where private property owners expect them to be out of necessity.

Effective swiftwater rescues, whether self-rescues during a swim on whitewater or one performed by a swimmer's fellow paddlers from land, often require fast action and contact with the bank of the river, creek, or stream.<sup>239</sup> These rescue and safety activities on and along whitewater may place the paddler, and his or her equipment onto private property.

## CONCLUSION

Whitewater paddling is a popular sport and recreational activity, fueled at least in part by the excitement of skilled paddlers running challenging waterfalls and rapids on rivers, creeks, and streams. Modern whitewater boat design, paddling skills, and paddlers' swiftwater rescue training enable whitewater paddlers to navigate more challenging waterfalls and rapids than ever before. Some of these waterfalls and rapids are in remote places that paddlers with more primitively designed boats and equipment could not access. Many whitewater runs at least partially flow through or along private property.

What makes the popular whitewater runs exciting is often exactly what would cause people to question their navigability. For example, the run contains large boulders that create exciting, beautiful rapids and waterfalls. Additionally, some rivers, creeks, and streams are so shallow that paddlers can only run them after a hard rain or during certain times of the year. However, most rivers, creeks, and streams, no matter how remote, seasonal, or rocky, are navigable in small, technically designed whitewater kayaks and canoes nonetheless.

Even the best paddlers are always between swims, finding themselves at the mercy of the rivers' swift currents. Their contact with private property is unintentional when they float with the current to shore and trespass is not implicated. The legality of their activities beyond unintentional access, however, is limited.

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YZT7-5EHD] (describing the necessary tools and procedures for setting up a Z-drag).

<sup>237</sup> See sources cited *supra* note 236.

<sup>238</sup> See generally sources cited *supra* notes 231–35.

<sup>239</sup> See generally sources cited *supra* notes 231–35.

Paddlers have many incidental rights that flow from navigability. Paddlers may reasonably use the abutting land even if it is privately owned. They may stop to eat lunch, rest, or stretch their legs as an incidental use of the waterway. They may also portage around rapids they choose not to run and conduct rescue operations from the banks of the river or stream. These activities are, at the very least, incidental to whitewater paddling, even if the permissible incidental use is strictly construed to limit their boundaries to the ordinary high water mark.

When life and safety are at risk, whitewater paddlers' rights to use the land along the river, creek, or stream are best understood as a matter of reasonable necessity. Although the courts should balance the whitewater paddlers' rights with the rights of private landowners to exclude trespassers, the privilege of necessity should still allow the paddler to transcend ordinary boundaries such as a waterway's ordinary high water mark and reasonably enter on private land when safety is an issue.

Conflicts between paddlers and landowners will no doubt continue with sometimes tragic results, but a better understanding of the underlying legal issues should reduce or dispel those conflicts driven by misplaced notions about the balance between paddlers' and landowners' rights. Additionally, an enhanced appreciation for the safety needs of paddlers compels a recalibration between landowners' interests in their property and paddlers' interests in their lives. When one looks behind instinctual perceptions of what constitutes a navigable waterway, a landowner's right to exclude, and the skill and danger involved with whitewater boating, the balance tips in favor of the intrepid, pioneering, whitewater paddler.