

DON'T GO CHASING WATERFALLS: NAVIGABILITY AND PADDLERS' NECESSITY TO STOP ON PRIVATE LAND

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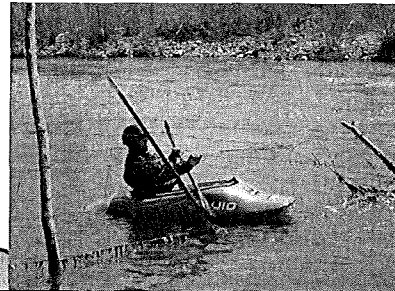


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TROUBLED WATERS:

CONFLICTS BETWEEN PADDLERS AND LANDOWNERS

Whiskey's for drinking, water's for fighting about.
– Mark Twain



WHAT WATERS ARE NAVIGABLE?

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

Private landowners "hold bare technical title . . . subordinate to . . . the public right of navigation." *Scranton v. Wheeler*, 179 U.S. 141 (1900).

Even if a river has impassable rapids or obstacles requiring portage, it is navigable so long as "the natural navigation of the river . . . affords a channel for useful commerce." *The Montello*, 87 U.S. 430, 436 (1874).

FEDERAL NAVIGABILITY TEST

- 1. The waterway must be **navigable in fact**.
• (used, or are susceptible of being used, in their ordinary condition, as highways for commerce).
- ▶ 2. The waterway must have been **navigable when a State was admitted to the union**.
- ▶ *The Daniel Ball*, 77 U.S. 557, 563 (1870).



Ohio's Recreational Use Test

- ▶ based on a waterway's capacity for recreational use, even in the absence of historic commercial use.
Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 163 N.E.2d 373 (Ohio 1959).
- ▶ "[A] ppearance 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." See 1980 Ohio Att'y Gen. Op. No. 2-362 (Dec. 23, 1980).

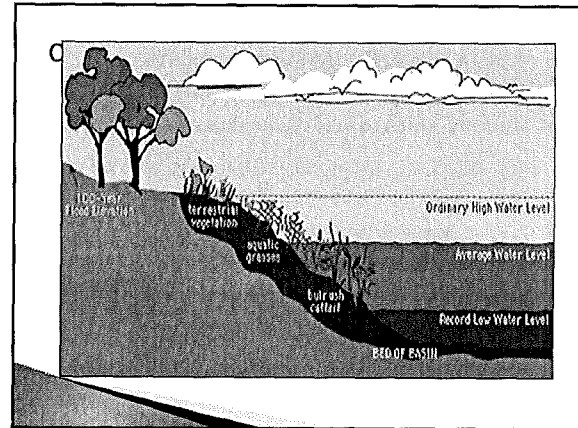
WHEN DO PADDLERS TRESPASS?

- ▶ **Incidental rights to use private property.**
- ▶ Paddlers can step upon private property, so long as reasonable and no unnecessary injury to the landowner.
- ▶ "[I]ncidental contact" is contact that is "reasonably necessary and convenient for the effective enjoyment of the public's easement [to enjoy recreational activities]."
- ▶ *Whitson v. Morris*, 201 S.W.2d 193 (Ky. Ct. App. 1946).
- ▶ *Conatser v. Johnson*, 2008 UT 48, ¶ 28, 194 P.3d 897, 903 (2008).

How Far Do Incidental Rights Extend? Ordinary High Water Mark

- ▶ For purposes of the Clean Water Act:
- ▶ that 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.

▶ see U.S. Army Corps of Engineers Guidance Letter, Dec. 7, 2005, available at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-05.pdf> (last visited Nov. 9, 2017), and 33 C.F.R. § 328.3(e). See also 33 C.F.R. § 329.11(a)(1).



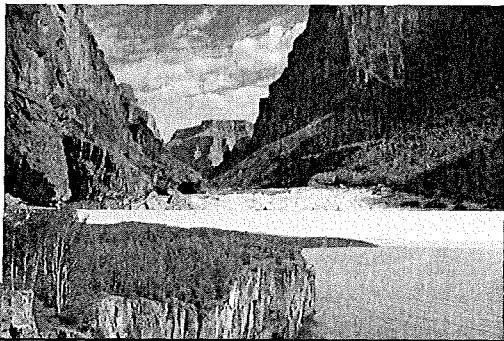
Ohio Right to Portage on Land

- ▶ 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." *Robert W. Teeter*, 1980 Ohio Op/ Atty. Gen. 2-362 (1980).

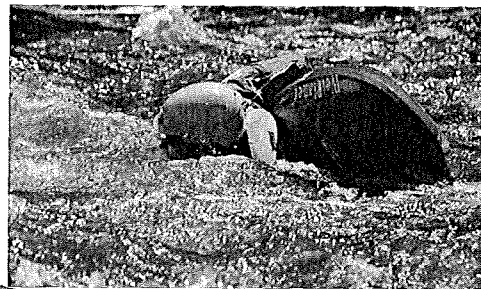
Paddler's Necessity to Use Land

- ▶ Necessity is a defense to trespass to land
- ▶ Entry onto another's land must be (or reasonably appear to be) necessary to prevent harm.
- ▶ Harms include: harm to the actor or his chattels, or harm to a third party or his chattels.
- ▶ See 75 AM. JUR. 2D *Trespass* § 69, Westlaw (database updated Nov. 2017).

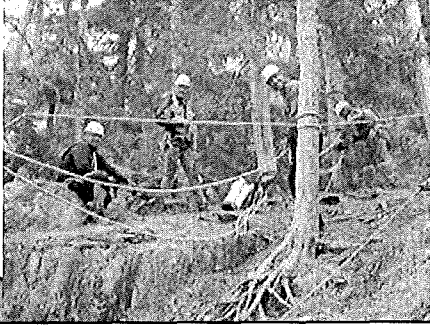
Where is a Paddler's Safe Shelter on Whitewater or the Great Lakes?



<https://www.youtube.com/watch?v=DvzumGifKPA>



Swiftwater Rescuers Practice Setting up a Z Drag



Conclusion

- ▶ 1. If a kayak can get down river, the water is navigable.
- ▶ 2. Paddlers **have many rights on land that flow from navigability.**
 - **Incidental rights:** eating lunch or taking breaks,
 - Limited to below OWHM and what is reasonably necessary.
 - **Necessity:**
 - Paddlers may lawfully portage rapids and rescue others
 - May be reasonably necessary for them to exceed the ordinary high water mark.

Thank You

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I. TROUBLED WATERS: CONFLICTS BETWEEN PADDLERS AND LANDOWNERS

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

- Attributed to Mark Twain ¹

Conflicts often arise between private property owners and the recreating public. Private property owners have shot at paddlers for entering their private property and have even strung barbed wire across creeks and streams.

Conflicts mount as improved paddlers' skills and boat makers' innovations in kayak and canoe design fuel the growth of the sport and make it possible for paddlers to navigate waters that they could not navigate before. ²

Recreational boaters, including kayakers, occasionally get out of their boats and step upon private property to eat lunch, rest, or take advantage of nature's bathrooms. Sometimes kayakers need to wait out storms on private land, until they can safely cross the Great Lake's waters. Commercial outfitter rent out small boats to people referred to as "cabrewers." Some of the beer cans and partying end up on the water's shore.

Conflicts between paddlers and landowners sometimes turn violent. The first question in attempting to resolve many conflicts between paddlers and private landowners along the waters is, what is navigable water? The second question is, what rights are incidental or necessary to a paddler's right to navigation?

II. MUDDY WATERS; WHAT IS NAVIGABLE?

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 Kuralt³

Private landowners "hold bare technical title" to the river or stream bed. ⁴ If a waterway is deemed navigable, the public has the right to float on it, and that right usually includes paddling the water in kayaks, canoes, and rafts. ⁵

¹ 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>.

² Boat design can make it easier to paddle a rapid. Richard J. Pierce, Jr. *What is a Navigable Waterway? Canoes Count but Kayaks Do Not*, 53 SYRACUSE L. REV. 1067, 1077 (2003).

³ John Cronin, *Local Waterways as Classrooms and Laboratories: A Conversation with Professor Joseph Rachlin*, HUFFINGTONPOST.COM (Dec. 6, 2017), https://www.huffingtonpost.com/johncronin2/americas-waterways_b_8448150.html.

⁴ See *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900).

⁵ See *infra* Section IV.

A. The Federal Navigation Test

The federal test for navigability applies in cases where the federal government has an interest in regulating interstate commerce.⁶ In *Scranton v. Wheeler*,⁷ 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. . . . [T] riparian owner[']s title . . . is . . . a bare technical title, . . . subordinate to such use of the submerged lands and of the waters flowing over them as may be . . . demanded by the public right of navigation.⁸

The federal navigation test, arising under the Commerce Clause, focuses upon the waterway's historic commercial use or susceptibility for commercial use.⁹ In *Gibbons v. Ogden*,¹⁰ the United States Supreme Court made clear that the power to regulate commerce extends to the federal government's regulation over navigable waterways.¹¹

The United States Supreme Court established the federal navigability test in *The Daniel Ball*.¹² First, the waterway must have been navigable in fact.¹³ Second, the waterway must have been navigable in fact at the time of the relevant state's admission into the Union.¹⁴

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.¹⁵ As each of the original thirteen colonies declared independence, they "became . . . sovereign; and . . . hold the absolute right to all their navigable waters and the soils under them for their own common use."¹⁶

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*¹⁷ held that rivers are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for

⁶ Ill. Cent. R. Co. v. Illinois, 146 U.S. 387, 435 (1892).

⁷ 179 U.S. 141 (1900).

⁸ *Id.*

⁹ *The Daniel Ball*, 77 U.S. 557, 563 (1870). U.S. CONST. art. 1, § 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 and Steven G. Zraik, *Of Cows, Canoes, and Commerce: How the Concept of Navigability Provides an Answer if You Know Which Questions to Ask*, 25 ARK. LITTLE ROCK L. REV. 175, 176 (2002).

¹⁰ 22 U.S. 1 (1824).

¹¹ *The Daniel Ball*, 77 U.S. at 563.

¹² *Id.*

¹³ *Id.*

¹⁴ See *Utah*, 403 U.S. at 10 (1971).

¹⁵ See *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845); *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894).

¹⁶ *Martin v. Waddell*, 41 U.S. 387, 410 (1842).

¹⁷ *The Daniel Ball*, 77 U.S. at 563.

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commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”¹⁸

The United States Supreme Court in *The Montello*,¹⁹ 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*.²⁰ 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.”²¹ 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.”²²

Thus, the federal navigation test has broad reach. If a waterway was historically used for the smallest of boats or floating the smallest of logs or furs for commerce, it passes the federal navigability test.²³ It is deemed navigable for commercial as well as recreational purposes, and by all boats.²⁴

Indeed, the entirety of the Niagara River, including Niagara Falls, is a navigable river.²⁵ Niagara Falls can be portaged. Moreover, the Class IV and V rapids downstream can be paddled, and the Maid of the Mist and rafting companies conduct commercial business on the Niagara River.

B. The Public Trust

By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.

*- Institutes of Justinian 2.1.1.*²⁶

Determining the navigability of a waterway helps determine paddlers’ rights on the land along the water, as many rights flow from navigability.²⁷ Under federal law, and in many states,

¹⁸ *Id.*

¹⁹ *The Montello*, 87 U.S. 430, 436 (1874).

²⁰ *Id.* at 441.

²¹ *Id.*

²² *Id.* at 442-43 (This is a fact based inquiry which can be shown through historical use. In this case the river was used by fur trading boats.).

²³ *United States v. Appalachian Elec.*, 311 U.S. 377 (1941) (rivers with rapids are navigable if once used for floating out logs).

²⁴ *Economy Light v. United States*, 256 U.S. 113 (1921) (shallow rivers used in the past to transport furs by canoe are navigable, even if obstructed).

²⁵ See *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.”).

²⁶ JUSTINIAN INST. 35 § 2.1.1 (J. B. Moyle trans., 5th ed. 1913).

²⁷ 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 (1928).

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navigable waterways are held in “public trust” for the benefit of the whole community, to be used by all for navigation, including recreation.²⁸

The roots of the Public Trust Doctrine in the United States are thought to originate in Roman law and later, English common law.²⁹ The Magna Carta restricted the king and nobility from excluding the public from using England’s navigable waterways.³⁰

The United States Supreme Court officially embraced the Public Trust Doctrine in *Illinois Central Railroad Co. v. Illinois*, rejecting the idea that any nobility can exclude the public from using America’s waterways.³¹ 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.³² 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 oceans³³.

C. The State Navigation Tests

In the absence of a federal interest, states can create their own tests for navigability.³⁴ States also retain all rights to determine ownership to land adjacent to and under waterways within their borders.³⁵

Under state laws,³⁶ landowners’ technical title may extend to the high water mark, low water mark, or to the middle of the waterway.³⁷ Some states have adopted a much broader

²⁸ See *Illinois Central v. Illinois*, 146 U.S. 387, 460 (1892). See also National Organization for Rivers *supra* note 82 (citing *Martin v. Waddell*, 41 U.S. 367 (1842)). But see *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (*en banc*) (rejecting the Public Trust Doctrine in Colorado).

²⁹ 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 Review Online, <https://www.coastalreview.org/2016/09/public-trust-doctrine-owns-beach/> (Sept.29, 2016). But see James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 Env’tl. L. 337, 340 (2105) See also James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Env’tl. L. & Pol’y F. 1, 18 (2007) (quoting Patrick Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 Sea Grant L.J. 13, 17 (1976)).

³⁰ See *id.*

³¹ 146 U.S. 387, 460 (1892).

³² *Id.*

³³ *Id.* at 435.

³⁴ *Donnelly v. U.S.*, 228 U.S. 243, 260 (1913). 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. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190 (1983).

³⁵ *Donnelly v. U.S.*, 228 U.S. 243, 260 (1913).

³⁶ *Id.* 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, 48 (2007).

³⁷ *Packer v. Bird*, 137 U.S. 661 (1891). Because state governments manage the river’s resources, including its “water, fish, sand, and gravel, . . . , State law determines whether riparian landowners own to the high water mark, low water mark, or middle of the river.” National Organization for Rivers, *What are the Public’s Rights on Rivers*, http://riverwatch.org/legal/case_pdfs/articles/RiverLawHandout-1.pdf (citing *Illinois Central v. Illinois*, 146

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navigability test than the commercial use test. Ohio is among the states that determine navigability of waterways based on a waterway's capacity for recreational use.³⁸ The recreational use test defines navigability to reflect current uses of waterways, even absent any historic commercial use.³⁹

Under the recreational use test in Ohio, 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."⁴⁰ In Ohio, 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.⁴¹

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.

- Robert Allen⁴²

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.⁴³ The 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.⁴⁴

U.S. 387 (1982) (states must provide public access even if privately owned); *in accord* *Gion v. Santa Cruz*, 465 P.2d 50 (Cal. 1970)).

³⁸ A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 8:28 (2017).

³⁹ *So. Idaho Fish & Game Ass'n v. Picabo Livestock Inc.*, 528 P.2d 1295, 1297, 1298 (Idaho 1974). *See also* Tarlock, *supra* note 103. 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 its business of fourteen years. *Id.* *See also Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373 (Ohio 1959) (later clarifying that navigability does not depend at all upon commercial activity because recreational boating is equally important as any commercial purpose).

⁴⁰ 1980 Ohio Att'y Gen. Op. No. 2-362 (Dec. 23, 1980).

⁴¹ *Mentor Harbor Yachting Club v. Mentor Lagoons, Inc.*, 163 N.E.2d 373 (Ohio 1959) (navigability does not depend at all upon commercial activity because recreational boating is equally important as any commercial purpose).

⁴² *Coleisms*, ED COLE LIBRARY, <http://www.edcole.org/index.php?fuseaction=coleisms.searchColeisms> (last visited Jan. 12, 2018).

⁴³ The private landowner's right to exclude others from his property "is one of the most essential sticks in the bundle of rights that is commonly characterized as property." *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. 2017).

⁴⁴ *Id.*

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“[T]he right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁴⁵ Indeed, one scholar argues that

the 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.⁴⁶

The line between trespass and permissible use is drawn by determining a paddler’s incidental and necessary use of private land.⁴⁷

A. Paddlers’ Incidental Use of Land

A determination of navigability not only establishes the public’s right to navigate the surface waters, but it also helps to establish the activities in which paddlers may lawfully engage on the banks of such waterways, incidental to navigation.⁴⁸ 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 water’s shore or banks without the permission of a private landowner.⁴⁹

Navigation down any waterway—would be unimaginable without the paddler’s ability to stop along the bank to eat lunch, stretch his or her legs, or rest. The paddler may stop on the property to a reasonable and limited extent. As long as his entry is reasonable and does not cause unnecessary injury to the landowner.⁵⁰ “Incidental contact” is contact that is “reasonably necessary and convenient for the effective enjoyment of the public’s easement [to enjoy recreational activities].”⁵¹

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.⁵² Thus in Kentucky, even if the definition of navigability may be somewhat narrow or property rights along waterways more generous,⁵³ “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.⁵⁴

⁴⁵ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). See e.g. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Comm’n.*, 483 U.S. 826, 831 (1987).

⁴⁶ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

⁴⁷ See *Scranton v. Wheeler*, 179 U.S. 141 (1900).

⁴⁸ *Id.*

⁴⁹ *Utah v. United States*, 403 U.S. 9, 10 (1971).

⁵⁰ See *Conatser v. Johnson*, 2008 UT 48, ¶ 28, 194 P.3d 897, 903 (2008).

⁵¹ *Id.* at ¶ 23.

⁵² *Pierson v. Coffey*, 706 S.W.2d 409, 412 (Ky. Ct. App. 1985) (The court held that the public’s right to use the waterways for navigation also included a right of use for recreational purposes. The court confirmed that this necessarily includes a right of temporary anchorage and the right of incidental use of the riverbed).

⁵³ *Id.*

⁵⁴ *Id.* See also *Conatser*, 2008 UT 48, ¶ 1 (The public’s easement in Utah’s waters includes any lawful activity that utilizes the water and any touching of privately owned river beds incidental to these activities).

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Lawful, incidental contact with the land also includes the right to portage, as long as the entry is accomplished in the least intrusive manner and does not cause unnecessary harm to the property.⁵⁵ 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."⁵⁶

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.⁵⁷ Under the federal test, navigable waterways are held in the public trust to what is known as the high water mark.⁵⁸ 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.⁵⁹

The ordinary high water mark, however, is not always easily determined. Determining the ordinary high water mark involves many factors.⁶⁰ For example, the United States Army Corp of Engineers regulations define the "ordinary high water mark" for purposes of the Clean Water Act as:

that 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.⁶¹

The ordinary high water mark is never a static line because of the natural, physical characteristics⁶² 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

⁵⁵ *Id.*

⁵⁶ Robert W. Teeter, 1980 Ohio Op/ Atty. Gen. 2-362 (1980).

⁵⁷ Pollard v. Hagan, 44 U.S. 212, 215-16 (1845). *See also infra* note 106-108.

⁵⁸ Pollard v. Hagan, 44 U.S. 212, 216 (1845).

⁵⁹ *See* Kundis Craig *supra* note 97. *See also infra* note 110-112.

⁶⁰ 33 C.F.R. § 328.3(e). *See also* 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 OHWM, *see* U.S. Army Corps of Engineers Guidance Letter, Dec. 7, 2005, available at <http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05-05.pdf> (last visited Nov. 9, 2017).

⁶¹ *Id.*

⁶² Ind. Dep't of Nat. Resources, *Ordinary High Water Marks*, In.gov., <https://www.in.gov/dnr/water/3658.htm> (last visited Dec. 26, 2017) (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 established by the Fluctuations of water; and 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.*

'accretion') of sand or [soil] along the shoreline [or stream or river bank] due to natural causes."⁶³ Thus, the ordinary high water mark "is found by examining the bed and banks and ascertaining where the presence and action of the water mark a distinct character in respect to vegetation as well as the nature of the soil itself."⁶⁴

Although the ordinary high water mark may be as elusive as the natural characteristics on the river's bank,⁶⁵ the public may float the waterway and walk upon the water's abutting land, up to the ordinary high water mark.⁶⁶ In simple 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."⁶⁷ 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 paddling. Stopping to rest or eating lunch are also incidental.

B. Paddlers' Necessary Use of Land

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. Paddlers touching the bank or shore is inevitable and a necessity in many circumstances during paddling.

The area to the ordinary high water mark may only be a matter of feet, depending on its natural characteristics.⁶⁸ However, paddlers' very necessary activities, including portaging or—potentially life-saving rescue maneuvers—, may require greater space than the ordinary high water mark provides

Necessity creates a privilege to do what otherwise would be trespass upon another's land.⁶⁹ 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.⁷⁰

⁶³ *Id.*

⁶⁴ *Howard v. Ingersoll*, 54 US 381 (1851) (measuring the ordinary high water mark of the Chattahoochee River that was the boundary between the States of Georgia and Alabama).

⁶⁵ See U.S. Army Corps of Engineers Guidance Letter, *supra* note 147.

⁶⁶ National Organization for Rivers, *River Law: Fact of Fiction*, <http://nationalrivers.org/river-fact-or-fiction.html> (last visited Jan. 11, 2018). *Ill. Central*, 146 U.S. at 460.

⁶⁷ National Organization for Rivers, *River Law: Fact of Fiction*, <http://nationalrivers.org/river-fact-or-fiction.html> (last visited Jan. 11, 2018). *Ill. Central*, 146 U.S. at 460.

⁶⁸ The high water mark is greatly dependent upon the natural characteristic of the stream or river bank. See U.S. Army Corps of Engineers Guidance Letter, *supra* note 147.

⁶⁹ See 75 AM. JUR. 2D *Trespass* § 69, Westlaw (database updated Nov. 2017).

⁷⁰ *Id.* (For the defense of necessity to apply, the entry onto land of another must be (or reasonably appear to be) necessary to prevent harm a certain category of harms. These harms include: harm to the actor or his chattels, or harm to a third party or his chattels).

**Jennifer Jolly-Ryan, DON'T GO CHASING WATERFALLS: THE INTREPID, PIONEERING,
WHITEWATER PADDLER'S RIGHT TO STOP ON PRIVATE LAND, _ U. N.H. L. Rev. __
(forthcoming 2018 and available at https://scholars.unh.edu/unh_lr/)**

Excerpt from Draft

The classic example of the privilege of necessity is *Ploof v. Putnam*.⁷¹ 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.⁷² The landowner's servant unmoored the family's boat free from the landowner's dock.⁷³ The family members were injured when they were tossed into water, and their boat was destroyed.⁷⁴ The court held that necessity justifies entries upon land and interferences with personal property that would otherwise constitute trespass.⁷⁵ 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.⁷⁶

A defense of private necessity also exists to a charge of criminal trespass.⁷⁷ The person must 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.⁷⁸ Thus, necessity must be "an objectively reasonable response to an extreme situation."⁷⁹ For example, "[T]he 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."⁸⁰ Similarly a recreational boater might be stranded on another's private island until a life threatening storm in the middle of a Great Lake subsides, allowing the paddler to safely do the Great Lake crossing.

CONCLUSION

So private property interests are balanced by considering whether the paddler has a safe alternative route, and if he does, the privilege will not apply.⁸¹ 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.⁸²

⁷¹ 71 A. 188 (Vt. 1908).

⁷² *Id.* at 188-189.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See WHARTON'S CRIMINAL LAW § 90 (5th Ed.) (noting that the common-law defense of necessity is the "choice of evils" or "competing harms" doctrine).

⁷⁸ TENN. CODE ANN. § 39-11-609.

⁷⁹ *Townsend v. Damico*, A 2014 WL 2194453 (Tenn. Ct. App. 2014).

⁸⁰ TENN. CODE ANN. § 39-11-609, Sentencing Commission Comments (*citing* *State v. Davenport*, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998). *But see* *State v. Watson*, 1 S.W.3d 676 (Tenn. Crim. App. 1999) (not available as a defense to driving with a revoked license when vehicle's owner was ill and unable to drive).

⁸¹ *Id.*

⁸² *Id.* See also *Vincent v. Lake Erie Transportation Co.*, 124 N.W. Minn. 1910 (Defendant tied his boat to Plaintiff's dock to ride out a storm and was liable for damages to dock).

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Excerpt from Draft**

To protect private property interests, incidental rights to navigation, including the privilege to enter private land, are typically strictly construed.⁸³ 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.⁸⁴ *Townsend v. Damico*⁸⁵ 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. The "tuber" and his friends encountered the dam after missing the outfitter's designated takeout where their cars were parked. Believing that the dam was unsafe to float over, the tuber exited the river onto a private campground.

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 sidewalk.⁸⁶ The police cited the tuber for criminal trespass.⁸⁷ 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."⁸⁸

So in summary, 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 obstacles and conduct rescue operations from the water's shores and banks. These activities are, at the very least, incidental to paddling, even if they necessarily may occur above the ordinary high water mark.

When life and safety are at risk, paddlers' rights to use the land are best understood as a matter of reasonable necessity. Although the courts should balance the 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.

When one looks behind instinctual perceptions of what constitutes a navigable waterway, a landowner's right to exclude, and recreational boating, the balance tips in favor of the intrepid, pioneering, paddler.

⁸³ See *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192 (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).

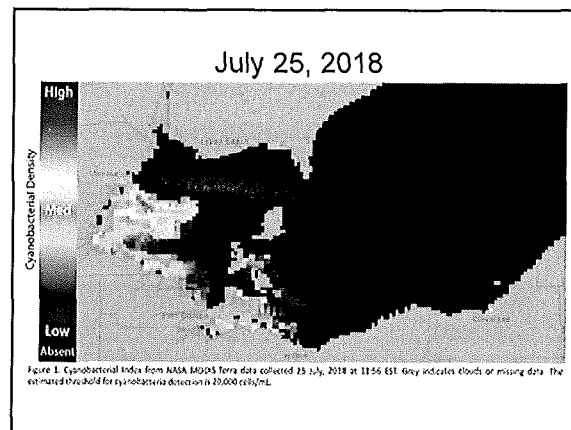
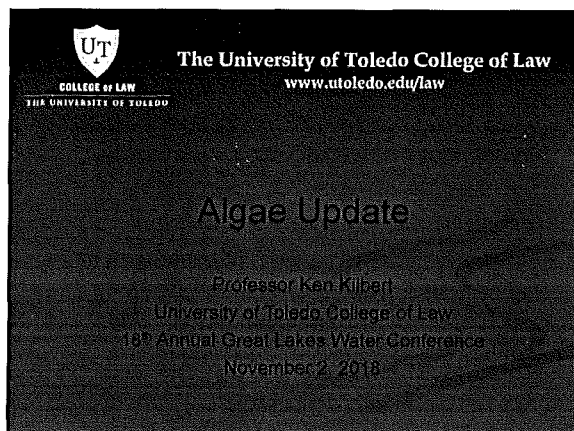
⁸⁴ See *Montana Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984) ("[T]he public is allowed to portage around such barriers in the least intrusive way possible, avoiding damage to the private property holder's rights.").

⁸⁵ *Townsend v. Damico*, A 2014 WL 2194453 (Tenn. Ct. App. 2014).

⁸⁶ *Id.* at *1-2.

⁸⁷ *Id.*

⁸⁸ *Id.* at *6.



Ohio Legislation 2018

- SB 299 – Clean Lake 2020 Plan
- Signed by Governor in July
- Appropriates \$36 million to fight algae in Lake Erie
 - \$20 million for state programs to help farmers
 - Balance for research, monitoring, soil & water conservation districts

Impaired Water

- This spring Ohio EPA designated Lake Erie as "impaired" water under Clean Water Act § 303(d)
- Impaired water = not meeting water quality standard
- State must submit list of impaired waters to USEPA every two years (Integrated Report)
- Impaired water designation triggers obligation to do TMDL

Total Maximum Daily Load

- Maximum amount of pollutant that can enter water daily without exceeding water quality standard
- Sum of wasteload allocations (point sources) and load allocations (nonpoint & background sources) plus margin of safety
- Incorporated into state's continuous planning process under CWA § 303(e)
 - Water Quality Management Plan

TMDL (continued)

- Is a very useful planning tool ; can guide and justify state taking steps to reduce pollution loading from point and nonpoint sources
- Is not a silver bullet
 - Not much of a new legal stick
 - No additional federal money
 - No requirement to regulate nonpoint sources

State & Federal Roles Under CWA § 303

- State's duty to submit list of impaired waters and develop TMDL
- USEPA's duty to approve or disapprove list and TMDL
- If disapproves, USEPA must identify impaired waters and establish TMDL
 - 30 days
 - But still state continuing planning process

Env'tl. Law & Policy Center v. U.S. EPA (N.D. Oh.)

- Prompted USEPA to withdraw its approval of Ohio EPA's list of impaired waters that omitted Lake Erie (Jan. 2018)
- And prompted Ohio EPA to amend its list of impaired waters to include Lake Erie, which was approved by USEPA (May 2018)

Distressed Watershed Rules

- Issued in 2010 per Ohio Agriculture Pollution Abatement program
 - Today, statute is Ohio Revised Code ch. 939 and rules in Ohio Administrative Code ch. 901:13
- Impose additional nutrient management requirements in watersheds designated as "in distress"

Requirements in Distressed Watersheds

- Restricts application of manure in winter; on frozen/snowy/wet soils; or when precipitation likely
- Requires approved Nutrient Management Plan for those producing or applying more than threshold amount of manure (350 tons or 100,000 gallons annually)
 - E.g., NMP specifies volume, method and location of manure being applied

Designation as Distressed

- Factors considered by Director of Department of Agriculture include
 - Listed as impaired
 - Threat to public health
 - Evidence of algae capable of producing toxins
 - Threat of contaminants in water supplies
 - Threat of contaminants in primary contact water
- Needs consent by majority of Ohio Soil & Water Conservation Commission
- Grand Lake St. Marys designated in 2011

Maumee River Watersheds July 2018

- Spurred by Governor's Executive Order, Director of Department of Agriculture proposed designation of 8 subwatersheds in Maumee River basin as "in distress"
- Ohio Soil & Water Conservation Commission did not consent to designation

Lake Erie: Impaired But Not Distressed (Yet)

*By Kenneth Kilbert, Professor and Director of the Legal Institute of the Great Lakes,
University of Toledo College of Law*

Lake Erie has been turning green due to algae every year, with varying severity, for the past two decades. The algal blooms discourage use of the lake, harm aquatic life, cause economic loss and, as the Toledo area was reminded in August 2014, produce toxins that can threaten our drinking water supply. This year the legal battle against algae in Lake Erie has been a tale of two designations – “impaired” under federal law and “distressed” under Ohio state law.

Scientists say the key to solving the algae problem in Lake Erie is reducing the amount of nutrients, especially phosphorus, entering the lake. There are various sources of phosphorus, including human sewage, but by far the largest contributor is agricultural stormwater runoff of fertilizer and manure. Point sources of pollution (e.g., end-of-pipe discharges from treatment plants) are rigorously regulated under the federal Clean Water Act. By contrast, current laws rely largely on incentives to encourage voluntary reduction of pollution from nonpoint sources such as agricultural runoff. And that voluntary approach has not been effective.

Impaired

This spring the Ohio Environmental Protection Agency, prompted by a growing crescendo of criticism and a federal public interest lawsuit, overcame its long-standing reluctance and designated the Ohio portion of Lake Erie as an “impaired” water under section 303 of the federal Clean Water Act. Basically, “impaired” means the water body is not meeting water quality standards. For each water designated as “impaired” (more than 1000 waters in Ohio have been so designated, including virtually every major water in the state), the state must prepare a Total Maximum Daily Load (TMDL). A TMDL is a calculation of the maximum amount of a pollutant, such as phosphorus, that can be discharged daily into the water without exceeding the water quality standard. If the U.S. Environmental Protection Agency disapproves of a state’s TMDL, the federal agency itself must prepare the TMDL.

Ideally a TMDL can guide and spur a state to take steps to reduce the amount of pollution in order to achieve the TMDL and in turn achieve the water quality standard. So the “impaired” designation of Lake Erie, because of the TMDL that will follow, is a welcome step in the fight against algae. But a TMDL is not a silver bullet for solving the algae problem in Lake Erie. A

TMDL basically reinforces existing water quality standards. It does not set forth new regulations, and it does not require the state to impose new restrictions on nonpoint sources. A TMDL is more a useful planning tool than a stick. In order to regulate phosphorus pollution from nonpoint sources, it is up to state law, not the federal Clean Water Act.

Distressed

One such state law is Ohio's "distressed watershed" rules. Codified at Ohio Admin. Code 901:13-1-11, -19, -20, the rules were issued in 2010 in the aftermath of a severe algae outbreak in Grand Lake St. Marys. Where a watershed is designated as "distressed," two mandatory requirements aimed at reducing agricultural nutrient pollution are triggered: (1) application of manure is restricted during winter; on snowy, frozen or saturated soils; or when precipitation is likely; and (2) anyone producing or applying more than a threshold amount of manure must develop and conform to a nutrient management plan approved by the Ohio Department of Agriculture (ODA). Essentially, the nutrient management plan sets forth the best management practices the farm must follow with respect to manure.

The ODA Director is empowered to designate a watershed as "distressed" based on consideration of seven factors, including whether it exhibits evidence of toxin-producing algae. To take effect, the designation must be consented to by majority vote of the Ohio Soil and Water Conservation Commission. The only watershed designated as "distressed" to date is Grand Lake St. Marys in 2011.

In July 2018, spurred by an executive order by Governor Kasich, the ODA Director proposed designating much of the Maumee River watershed as "distressed," supported by a report explaining why all seven regulatory factors were met. The Maumee River contributes more phosphorus to Lake Erie than any other tributary. But the Ohio Soil and Water Conservation Commission did not consent to the designation, instead referring the matter to an ad hoc task force for indefinite study. Stay tuned.

Subsurface Scope of the Clean Water Act

When does a point source discharge of pollutants to groundwater violate the federal Clean Water Act?

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Relevant Background

- Five federal appellate court decisions in CWA citizen suits in 2018
- Divergent views on the scope of the CWA's NPDES permit program
- Petitions for U.S. Supreme Court review filed
- District court cases pending
- EPA solicited comment on its past interpretations
- Far-reaching implications for NPDES permit program

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The Clean Water Act's NPDES Permit Program

- Clean Water Act (CWA) prohibits the discharge of a pollutant without a permit
- National Pollutant Discharge Elimination System (NPDES) permit program governs "discharge of a pollutant"
- "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source"
 - Pollutant defined broadly to include "industrial, municipal, and agricultural waste"
 - Navigable waters defined as "waters of the United States" (WOTUS)
 - Point source defined as "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged"

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Recent Federal Appellate Decisions

1. *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) ("Maui")
2. *Upstate Forever v. Kinder Morgan Energy Partners, LP*, 887 F.3d 637 (4th Cir. 2018) ("Upstate Forever")
3. *Tennessee Clean Water Network v. Tennessee Valley Authority*, No. 17-6155, 2018 WL 4559103 (6th Cir. Sept. 24, 2018) ("TVA")
4. *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, No. 18-5115, 2018 WL 4559315 (6th Cir. Sept. 24, 2018) ("KWA")
5. *Sierra Club v. Virginia Electric & Power Co.*, 903 F.3d 403 (4th Cir. 2018) ("VEPCO")

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Fact Patterns and Holdings

- **Fact Patterns:**
 - Permitted UIC well
 - Ruptured and later repaired pipeline
 - Closed coal ash settling ponds
 - Sewage disposal systems
 - Landfills
 - But . . . *VEPCO*
- **Holdings:**
 - "Fairly traceable" from point source to WOTUS
 - "Direct hydrological connection" between groundwater and WOTUS
 - Beyond scope of the CWA
 - Not a "point source"

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Potential Supreme Court Review and Implications

- Clear circuit split increases likelihood of Supreme Court review
- Potential permutations of Supreme Court review
- Examples of previously unregulated sources
- Challenges or opportunities for regulators accustomed to regulating "classic" point sources
- Recourse for regulated parties

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