

Virginia Navigability Report

Summary

Virginia law is unkind to recreational boating. The public has no rights in non-navigable streams. Virginia allows the public to navigate (*i.e.*, boat) on navigable streams that are or were used in commercial trade, but has applied the navigability test rather strictly. The federal navigation servitude,¹ which allows boating, might allow boating on more rivers in Virginia. Virginia is also an exceptional state in that beds of navigable rivers, even those rivers subject to the federal navigation servitude, can be privately owned, and where privately owned, boaters have fewer rights. There is no evidence that boaters have the right to portage, although portaging is arguably an incident to navigation, and therefore allowed in navigable rivers. Virginia has designated some streams for use by the public. Simply put, Virginia defines navigability through commercial use and thus public recreational rights in Virginia generally extend only to streams that have been used for commercial navigation purposes.

State Test of Navigability

Virginia courts have used, rather strictly, the “navigable in fact” test to determine whether a river is navigable. A river is navigable in fact if it is used or susceptible of being used in its natural condition as a highway for commerce on which trade or travel are or may be conducted in the ordinary modes of travel on water.² Virginia’s test is very similar to the federal commerce test of navigability;³ the capability for use, not the actual extent and manner of use, determines the navigability of a watercourse.⁴

The court in *Boerner v. McCallister*, for example, found the Jackson River to be non-navigable despite past attempts to float commercial logs down the river because that use was abandoned after the method proved unsatisfactory.⁵ But a federal court in *Loving v. Alexander* found when applying the federal commerce test of navigability that the Jackson River was navigable-in-fact,⁶ notwithstanding a contrary finding by a Virginia court in *Boerner*. The inconsistent results, however, may be explained by the additional evidence considered by the federal court, namely that the lumber drives “were regular” and “not exceptional one-time occurrences [that would fail to suffice to show navigability]” in addition to “legislative acknowledgment” in 1823 when conditioning a dam authorization on permitting boat passage.⁷ Because navigability in fact is a federal question, interpretation of navigability standards by federal courts should take precedent.⁸

¹ The federal navigational servitude permits the government to exert a dominant servitude in navigable waters. *See, e.g.*, *U.S. v. Twin City Power Co*, 350 U.S. 222, 224-25 (1956) (discussing the federal navigation servitude) (citing *Federal Power Comm’n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954)).

² *Boerner v. McCallister*, 89 S.E.2d 23, 27 (Va. 1955); *Ewell v. Lambert*, 13 S.E. 2d 333 (Va. 1941).

³ *Boerner*, 89 S.E.2d at 27 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), in support of the navigable in fact test).

⁴ *Loving v. Alexander*, 745 F.2d 861, 865-67 (4th Cir. 1983).

⁵ *Boerner*, 89 S.E.2d at 27.

⁶ *Loving*, 745 F.2d at 867.

⁷ *Id.* at 864.

⁸ *E.g.*, *United States v. Holt State Bank*, 270 U.S. 49 (1926) (“[Where a state court] treated the question of navigability as one of local law to be determined by applying the [state rule] . . . they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a

And specific to the Jackson River, the federal court in *Loving* was not bound to the Virginia Supreme Court's decision in *Boerner* because the United States was not a party to the *Boerner* decision.⁹

Although Virginia courts have never specifically ruled that navigation does not include recreation, to date, their decisions have not used navigability in support of public access for recreation.

In sum, federal courts seem more likely than Virginia courts to come down in favor of navigability (though again, the apparent difference may result from the different evidentiary record in *Boerner* and *Loving*).

Extent of Public Rights in Navigable and Non-Navigable Rivers

Virginia permits private ownership of stream beds.¹⁰ The ownership of the beds of navigable streams that are non-tidal is an important issue regarding public recreation rights in Virginia due to the substantial number of such streams in Virginia. Where the beds of the streams are privately owned, the public does not have the right to touch the banks or the bottom, and may not even have the right to fish in such portions of a river.¹¹ Several Virginia court decisions indicate that the beds of non-tidal navigable waters are owned publicly,¹² but the issue has not been definitively resolved.¹³

The legal basis for private ownership traces back to the colonial period, when the British Crown granted the beds of navigable rivers to private individuals on some occasions; these grants have since been upheld.¹⁴ Virginia adopted the English common law upon independence and it continues to apply unless subsequently modified by law.¹⁵ Under English common law, the Crown held title to the beds of all tidal waters while the beds of all non-tidal waters were owned by adjoining landowners.¹⁶

question of federal law to be determined according to the general rule recognized and applied in the federal courts. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended.”) (citation omitted). *See also* PPL Montana, LLC v. Montana, 565 U.S. 576, 591-93 (2012) (discussing the extent of federal regulatory authority over waters).

⁹ *See Loving*, 745 F.2d at 864 n.3.

¹⁰ *Boerner*, 89 S.E.2d at 27; *see also Loving*, 745 F.2d at 868 (recognizing Virginia law permitting private ownership of river beds).

¹¹ *Boerner*, 89 S.E.2d at 27; *see also Loving*, 745 F.2d at 867-68.

¹² *See, e.g., Old Dominion Iron & Nail Co. v. C&O Ry. Co.*, 81 S.E. 108 (Va. 1914) (finding that the state had superior rights over riparian owners in the James River because “[f]or more than 130 years the James river has been controlled by the state of Virginia under and in accordance with her laws” and thus it was “too late” for the riparian owner to claim rights under English law).

¹³ *See James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 122 S.E. 344, 345-47 (recognizing the debate but suggesting that though “there are certain public uses of navigable waters which the state does hold in trust for all the public, and of which the state cannot deprive them, such as the right of navigation, . . . there is no reason why the beds of navigable streams may not be granted, unless restrained by the [state] Constitution”). The court in *Boerner* recognized private ownership, but also found the subject river to be non-navigable. *Boerner*, 89 S.E.2d at 27.

¹⁴ *Kraft v. Burr*, 476 S.E.2d 715, 719 (1996).

¹⁵ Va. Code Ann. § 1-200.

¹⁶ *See Crenshaw v. Slate River Co.*, 6 Rand. (27 Va.) 245 (1828), p. 261.

The public has no rights in non-navigable streams under Virginia law,¹⁷ including no right to use the surface.¹⁸

In streams subject to the federal navigational servitude, however, a federal court has recognized that the public may use the surface.¹⁹ But “the use of [a navigable river’s] bed and its banks are matters of state law, subject only, so far as the United States is concerned here, to the navigational servitude and whatever regulation Congress may lawfully impose.”²⁰ And Virginia’s recognition of private ownership would preclude public access to the beds and banks where owned privately.²¹

Fishing would seem to be permissible as incidental to the federal navigational servitude, even if the bottoms were privately owned. Federal law would likely defeat state law. Landowners have, however, brought successful trespass suits in state court against anglers.²² The other rights incident to the federal navigation servitude would also apply. Therefore, the fact that Virginia limits rights in navigable streams where the bottoms are owned privately creates confusion, because Virginia’s test of navigability seems more stringent, or at least no less stringent than the federal test, and the federal navigation servitude will probably exist in all navigable rivers in Virginia. While the scope of the federal navigation servitude is unclear at present, federal law is likely friendlier to boaters’ rights in Virginia.²³

While these cases make no mention of portaging, portaging is incidental to navigation. A stronger case for portaging probably exists where the federal navigational servitude exists.

Miscellaneous

The Virginia Scenic Rivers Act was enacted to “preserve and protect [the] natural beauty” of some of Virginia’s waterways and to assure their use and enjoyment for scenic and recreational purposes.²⁴ A list of rivers recognized under this act and the portions so designated is available from the Virginia Commission of Game and Inland Fisheries or in the Virginia Code at Chapter 4 of Title 10.1.

For additional information on fishing and boating in Virginia, visit the Virginia Department of Wildlife Resources at <https://dwr.virginia.gov/>. The Department lists rivers and streams for boating and fishing, and identifies the availability of public access at, <https://dwr.virginia.gov/boating/where-to-boat-in-virginia/>.

¹⁷ *Boerner*, 89 S.E.2d at 27.

¹⁸ *Loving*, 745 F.2d at 867 (allowing public use of the river surface after determining the segment in question was navigable, *i.e.*, “useful as a means of commercial transportation”).

¹⁹ *Id.* at 868.

²⁰ *Id.*

²¹ *Boerner*, 89 S.E.2d at 27-28; *see also Loving*, 745 F.2d at 867-68.

²² *Kraft*, 476 S.E.2d at 718; *see also Va. Code Ann. § 18.2-134* (prohibiting entry onto, among other areas, the “waters [and] ponds . . . of another . . . to . . . fish . . . [without the owner’s permission]”).

²³ Fishing is often thought to be incidental to the federal navigation servitude, although federal courts have not definitively answered this question.

²⁴ Va. Code Ann. Title 10.1 ch. 4.