



November 6, 2023

Re: House Study Committee on Fishing Access to Freshwater Resources

Dear Chairman Burchett and Members of the House Study Committee on Fishing Access to Freshwater Resources (HR 519),

The undersigned groups represent the interests of tens of thousands of Georgians as well as visitors to your state that enjoy the simple, healthy, and ancient pastime of paddling down rivers and streams in small boats. The American Canoe Association is a national organization with significant membership in Georgia that serves the broader paddling public by providing educational programs, supporting stewardship initiatives that affect paddlers, and offering competition opportunities to athletes of all abilities. American Whitewater is also a national organization with many Georgia members, focused on protecting and restoring our nation's whitewater rivers and enhancing opportunities to enjoy them safely. The Georgia Canoeing Association is a statewide organization that promotes recreational paddling, river courtesy, skill development and river safety. GCA also has a river protection mission to keep Georgia's rivers clean and flowing and open to paddling. Georgia River Network is a statewide river recreation and advocacy organization whose mission is to help everyone enjoy, connect with and advocate for economically vital and clean flowing rivers.

Our groups have become aware of the House Study Committee on Fishing Access to Freshwater Resources and the committee's potential forthcoming report. This committee's recommendations could pose an existential threat to our members' rights to paddle Georgia streams, or alternatively could offer clear elucidation of our long-held rights. While the emphasis of HR 519 was on public fishing rights, we are concerned about potential ancillary impacts to the distinct right of recreational passage, specifically for paddlers. If the Committee decides to issue a report that recommends an approach to describing which kinds of streams the public has a right to paddle, we strongly recommend that the Committee recommend the well-established pleasure craft test. Our organizations have not heretofore weighed in on this important matter, and we ask that you consider these comments accordingly.

Paddling Plays Important Roles in Georgia's Economy and Way of Life

Based on U.S. Bureau of Economic Analysis statistics, boating and fishing contributed \$762.7 million of added value to Georgia's economy in 2021.¹ A significant portion of this economic value is related to boating on Georgia's rivers and streams in canoes, kayaks, rafts, and other small craft. This beneficial use is supported by vast public and private investment in stream access and use: outfitting services provided by over 70 small businesses, over 700 public river

¹ See: <https://www.bea.gov/sites/default/files/2022-11/orsa1122.pdf>

access areas provided by the state or municipalities, and stewardship provided on over 20 water trails by volunteers being just a few examples. The result is close-to-home healthy outdoor recreation available to all Georgians no matter where they live. These attractive natural assets help retain and recruit skilled workers and provide important tourism dollars in small towns from the mountains to the ocean. On a personal level, many thousands of Georgia citizens deeply value their freedom to paddle streams throughout the state, and the activity is a core part of their wellbeing and quality of life. The decisions before the Committee could further secure or pull the rug out from under these massive investments in outdoor recreation and their many benefits.

Neighboring States Show the Way

Both the adjacent states of North Carolina and South Carolina offer models for how states can support recreational passage and paddlesports while respecting private property. Both states rely upon a modern pleasure craft test to determine the extent of the public's right to paddle a stream. Quite simply if a stream can support recreational paddling, then citizens have the right to paddle the stream regardless of streambed ownership. This right of passage is codified in state law and supported by legal decisions.

A North Carolina Attorney General Opinion clearly finds that "Citizens have the right to travel by 'useful vessels' such as canoes and kayaks, 'in the usual and ordinary mode' on waters which are in their natural condition capable of such use, without the consent of the owners of the shore", and "North Carolina follows the modern 'pleasure craft test' in determining whether waters are navigable-in-fact, and therefore subject to public trust rights."² This system has worked extremely well in North Carolina to support both a robust river recreation economy and culture, as well as private property rights, with a relatively clear delineation between the two.

South Carolina statute, like Georgia's, defines navigability for purposes of public trust uses based on a historical concept about the transportation of goods, which is in turn based on the concept of "valuable floatage."³ Modern case law, including the 2009 Supreme Court case *Brownlee v. S.C. Dep't of Health*, defines "valuable floatage" to include noncommercial pleasure craft use.⁴ Several years ago a landowner filed a lawsuit against the state claiming exclusive rights to a section of the South Fork of the Saluda River that contained a significant cascading rapid called Blythe Shoals. The judge ruled that the river was navigable for the purpose of protecting the right of recreational passage based on evidence of recreational use. The judge wrote:

Given *Brownlee*, navigability for purposes of South Carolina constitutional and statutory law does not require that the waterway be used for commercial purposes. Nor does it require that it be navigable by vessels of a certain size. Nor does it require that a waterway be navigable in both directions. Nor does it require that it

² See: <https://ncdoj.gov/opinions/use-of-navigable-in-fact-streams-without-consent-of-riparian-owner>

³ See: <https://www.scstatehouse.gov/code/t49c001.php>

⁴ Available at: <https://casetext.com/case/brownlee-v-sc-dept-of-health>

be passable at all points or all water levels. Nor does it require actual use. Nor is ease or difficulty of navigation or safety for all users a factor. Nor does it matter that the River may have “occasional natural obstructions to navigation, such as rapids or falls.”

Instead, Brownlee clearly establishes that the standard for navigability rests on the potential for any public use, be it commercial or recreational. Under Brownlee, an established pattern of usage by kayakers, anglers, floaters, and swimmers establishes the required “valuable floatage” for navigability.⁵

Like in North Carolina, the relatively unambiguous pleasure craft test as applied by the State of South Carolina clearly delineates where the public may paddle streams regardless of the ownership of streambeds.

If the Committee decides to issue a report that recommends an approach to describing which kinds of streams the public has a right to paddle, we strongly recommend that the Committee follow the lead of other neighboring states and recommend the pleasure craft test.

The Right of Passage is a Distinct Public Trust Right in Georgia

The Georgia Supreme Court ruled in the 1849 case *Young v. Harrison* that the public has a right of passage on rivers capable of supporting passage that is independent of both land ownership and other public trust uses. The court ruled:

Rivers are of three kinds: 1st. Such as are wholly and absolutely private property. 2d. Such as are private property, subject to the servitude of the public interest, by a passage upon them. The distinguishing test between these two is, whether they are susceptible or not of use for a common passage. 3d. Rivers where the tide ebbs and flows, which are called arms of the sea.

...

Now, it is well settled in England, and the doctrine is pretty uniform in this country, that the proprietor of the land on the margin, owns the bed over which the river passes; and though it be nominally and in terms, bounded on the margin, it extends, by construction of law, to the middle of the stream. In this case, it reaches to the opposite bank, that being the western boundary of the State. The public right is one of passage, and nothing more, as in a common highway; it is called in the books an easement, and the proprietor of the adjoining land has the right to use the land and water of the river, in any way not inconsistent with this easement.⁶

⁵ *Van's Camp, LLC v. State of S.C.*, Available at:

<https://www.americanwhitewater.org/content/Document/view/id/1530/>

⁶ *Young v. Harrison*, 6 Ga. 130 (Ga. 1849). Available at: https://www.courtlistener.com/opinion/5701603/young-v-harrison/?q=&court_nj=on&order_by=dateFiled+desc

We point out that in this ruling, Georgia's Supreme Court confirms a long-held right to paddle rivers "and nothing more." This right exists today on Georgia rivers capable of supporting paddling, and is not wedded to the right to fish or any other public trust right. We request that the Committee, in determining on which kinds of waterways the public has the right to fish, does not accidentally or intentionally limit the freedom of Georgians to paddle our State rivers.

Recreational Navigability Does Not Result in a Takings

Note that the public trust right to paddle a stream – the easement described in *Young v. Harrison* above – is entirely independent of streambed ownership. The US Supreme Court has made clear that those two matters are entirely separate. The Court wrote: "Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."⁷ These two uses of the term navigability have entirely different definitions, applications, tests, legal basis, and oversight.

Some of the discussions that we have seen regarding the Committee's task conflate the term "navigability" as it applies to ownership of streambeds with the term "navigability" as it applies to the public trust use for recreational passage. We request that the Committee clearly differentiate between these two terms in communicating with the public and the legislature. This distinction is especially important in dispelling any unwarranted concerns that finding a stream subject to a right of passage would constitute a takings of private property. In fact, streams can be deemed navigable for the purpose of protecting the right of passage without causing any takings or change in ownership or rights. As the Georgia Supreme Court has recognized, a common law easement has always existed on Georgia's streams that allows for passage since colonial times.

The Right of Passage on Small Streams Matters to Georgians

It is of the utmost importance to our organizations that any recommendations of the Committee that could affect the long-held freedom to paddle Georgia's streams is based on the capacity of those streams to support recreational passage, not any arbitrary size limit, flow level, or other coarse metric. Many world-class paddling streams are quite small, and require rainfall to descend. This is as true in the mountains where almost all whitewater rivers fall into this category, as it is in southern Georgia where small streams comprise a great deal of paddling opportunities. Any recommendation to limit paddling based on stream size would invariably eliminate recreational opportunities on streams where citizens have a right to paddle. We ask that the Committee respect citizen's rights and practice of paddling small streams throughout Georgia.

⁷ See *PPL MONTANA, LLC v. MONTANA*, pg 25. Available at:

Conclusion

Georgia paddlers and visiting paddlers cherish the freedom to float down the state's many beautiful rivers and streams. This freedom is something to be celebrated and respected, as well as protected for future generations and all the Georgians who have built livelihoods, homes, and families based on nearby paddling opportunities. The work of this Committee is important, and appears focused on and richly informed on the public's right to fish on waterways in the state. We ask now that the Committee give special care and thought to how any recommendations or other work products could impact or benefit the distinct public right of recreational passage. Please protect the right to paddle all streams in Georgia capable of supporting recreational passage.

Should you want to learn more, we would welcome a time to discuss our concerns with you in greater detail. You may contact us through Andrea White at andrea@garivers.org to arrange an in-person or virtual meeting with our group.

Sincerely,

Kevin Colburn
National Stewardship Director, American Whitewater
kevin@americanwhitewater.org

Suzanne Welander, Atlanta, GA
AdventureKEEN Author, Canoeing &
Kayaking Georgia
suzanne.welander@gmail.com

Brett Mayer
Public Policy Chief, American Canoe Association
bmayer@americancanoe.org

Erin Evans, Covington, GA
ACA Georgia State Director
GAStateDirector@americancanoe.net

Daniel MacIntyre, Atlanta, GA
Georgia Canoeing Association
dmacintyre4@gmail.com

Andrea White, Atlanta, GA
Member, Board of Directors, American Canoe Association
Chair, ACA Southeast Region
Member, NASBLA Paddlesports Committee
Community Programs Coordinator, Georgia River Network
andrea@garivers.org
RACSoutheast@americancanoe.net

Joe Cook, Rome, GA
Paddle Georgia Coordinator and Guidebook Author, Georgia River Network
joe@garivers.org