Riparian Boundaries and Rights of Navigation: Rivers, Lakes and Seas

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"Many phases of...land and water law are apparently in not a very satisfactory, or settled condition. This condition has, we believe, been brought about by attempts to apply fully evolved modern law of real property to rights and interests which had become fully established long before the legal rules were perceived. It was an attempt to apply a new system of law to an old state of facts 'upon the theory that the law had always existed in the improved form, which was merely fiction, and was impossible of application in the present instance'"

Excerpt from: *Waters of the State – Property in Virginia.* Written by Alvin T. Embrey (Old Dominion Press, 1931)

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Table of Contents:

Introduction

"Are you aware that the U.S. Army Corps of Engineers (U.S.A.C.E.) considers this stream navigable?" This question, put to me during a courtroom cross-examination, highlights the importance of navigable waterways in the United States. However, the attorney posing the question (either purposefully or accidentally) failed to specify the context in which the definitions would be applied. In fact, the applicability of the question above depends on whether the ultimate issue is one of property ownership or of regulatory authority. Although the right to use water has long been a contentious issue in those parts of the United States where major waterways are scarce, litigation related to riparian law or rights of access to smaller waterways is becoming more common nationwide, whether for purposes of access, recreation, or municipal water supply.

My personal mission to explore riparian boundary issues began years ago, initiated by frustration over contradictory or inconsistent answers that seemed to be the norm when dealing with water law. Too often there was a sense of looking at two pieces of a jigsaw puzzle where the edges didn't quite match. This has been by no means an easy topic to research, in part because much of the relevant law is scattered among early state and federal rulings.

Most confusion over riparian rights is based on a problem admirably quantified by the introductory quotation from "Waters of the State." There is a regrettable tendency in many jurisdictions to apply modern regulations, common law, and statutory authority to property rights that were vested long before those definitions and laws were in force. In addition, a large body of misinformation, urban legend, and fragmentary research promotes widespread belief in superficial truisms that are based on flawed and incomplete understanding of the controlling concepts. The goal of this book is to provide an orderly framework to promote better understanding of property rights associated with tracts that adjoin a stream, river, lake or ocean.

It is an unfortunate truth that a comprehensive study of all 50 states would be far beyond the scope of this book. One notable resource, **A Treatise on the Law of Waters 2nd Ed. John M. Gould 1891,** required more than a thousand pages of

text, including 100 pages devoted to the listing of source material. My primary goal with this book is to dispel some commonly held misconceptions and provide the tools to properly analyze problems associated with this unique branch of property law.

Three additional "bookkeeping" notes regarding quotations should be mentioned. To improve readability and as a result of space constraints, internal citations are generally omitted within quotations. Only where they serve to demonstrate the diversity of source material or in some way act as an aid to understanding are they included. Long quotations are highlighted in red to distinguish them from general commentary, while shorter phrases drawn from court opinions are enclosed in quotation marks.

This book does not use the standard footnote format found in most manuscripts of this type – rather, each citation is included at the beginning of the opinion currently under consideration. This is a planned departure from custom, since the citations and quotations are perhaps the most indispensable portions of this book. While I perhaps should apologize for variation, this practice also stems from my frustrating attempts to pick through and find sources in footnotes that often were located on different pages and printed in tiny fonts.

All primary citations are highlighted with a bold red font. Secondary sources and primary source names repeated for clarity are identified by blue text.

Section One:
Determining Property Ownership

Basic Principles and Common Misconceptions

Water boundaries are common in many regions, and a surveyor may be required to show the extent of ownership when the only available description reads "*…to the river, thence with the river…*" Determining the level of navigability of a waterway is an essential step when deciding on a boundary location in such cases, but the limits of property ownership cannot be determined until another question is answered: "What definition is most appropriate?"

Any comprehensive discussion of riparian rights will recognize that at least four separate issues may be of critical importance:

1. Ownership of the bed and substrata under the water
2. Any additional rights of navigation associated with the watercourse
3. Regulatory authority held by state or federal agencies
4. Ownership and allocation of the water

This book focuses primarily on the first three concerns.

To build a true understanding of the rights associated with watercourses, it is essential to dispel three erroneous concepts often associated with riparian boundary problems. The three statements below will be demonstrated convincingly in the pages that follow:

1. There are more than two categories of waterways; some waters may be navigable to a limited degree.
2. No single definition of "navigable" applies in all circumstances.
3. Definitions created by the U.S. Army Corps of Engineers (U.S.A.C.E.) or other regulatory parameters have no applicability when determining property ownership.

The first major hurdle to understanding the many definitions associated with waterways is that the question of navigability may not have a simple "yes or no" answer. This tiered view has been well established throughout the development of the American legal system, but the distinction has been lost in some

jurisdictions in recent years. An early article from the Virginia Law Review emphasizes that the early English system recognized three categories of watercourses, but also notes that more recent decisions have not always recognized this principle: The rules of the common law, however, came to be misapprehended. And the impression became general in certain jurisdictions that in England (where the test of navigability was whether or not a stream was tidal) there were only two classes of streams, in one of which, title to the bed of the stream was in the sovereign, and all of the owner's rights subject to be defeated at the will of the sovereign: and in the other, title to the bed of the stream was in the riparian owner, and his rights superior and exclusive. **The Rights of the Riparian Owner upon a Fresh-Water Stream Navigable in Fact Author(s): Andrew D. Christian Source: Virginia Law Review, Vol. 2, No. 6 (Mar., 1915), pp. 436-446**

This quotation emphasizes the common misconception that English common law as recognized during the early American colonial period admitted the existence of only two types of watercourses. Mr. Christian notes that English law recognized fresh water rivers with both public and private characteristics, but also points out that American courts often have overlooked this distinction.

The second common blunder on the list is the presumption that the term "navigable" has only one definition. The U.S. Supreme Court recognizes that several definitions exist and that no single construction is applicable to all circumstances. In **United States v. Appalachian Elec. Power Co. 311 U.S. 377; 61 S. Ct. 291; 85 L. Ed. 243 (1940),** the court modified its definitions of navigability that previously had been established in The Daniel Ball and The Montello. This court also identified significant differences between definitions affecting title and those concerning regulatory authority: Although navigability *to fix ownership of the river bed* or riparian rights is determined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability, for the purpose of the regulation of commerce, may later arise. An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable.

The legal concept of navigability embraces both public and private interests. It is not to be determined by a formula which fits every type of stream under all circumstances and at all

times. Our past decisions have taken due account of the changes and complexities in the circumstances of a river. We do not purport now to lay down any single definitive test. This ruling makes clear that, in this instance, the conclusions drawn would apply specifically to the contested stretch of the New River and might not be blindly applied to all rivers in all disputes.

United States v. Appalachian clearly demonstrates that any attempt to apply a “one size fits all” approach (or worse, a simple “yes or no” mindset) to watercourses is oversimplifying, and such generalization is not countenanced by the court.

The third common problem frequently arises when a court or a governing body attempts to use a regulatory definition to determine property rights. To further complicate an already muddy situation, many states recognize several regulatory definitions, depending on the specific situation. The Indiana court notes: The interchangeable terms "navigable" and “navigability” do not have a fixed meaning, and it is important to ascertain the purpose for which the terms are being used. … For instance, the term "navigability" has been used to define four separate and distinct concepts: (1) the delineation of the boundaries of navigational servitudes; (2) the scope of Congress' regulatory authority under the Commerce Clause; (3) the extent of the authority of the Army Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899; and (4) the limits of jurisdiction of the federal courts conferred by the United States Constitution. **Soloman v. Blue Chip Casinos: 772 N.E.2d 515 (2002)**

This list of the many regulatory definitions of the word “navigable” admirably highlights the difficulty inherent in selecting the controlling terms for the circumstances of the case. When considering questions of actual ownership of the bed of a watercourse, none of the definitions listed above should be applied. Conversely, these criteria may have great significance when the central issue is the extent of admiralty rights or the jurisdictional extent of the U.S. Army Corps of Engineers (U.S.A.C.E.). Further discussion of regulatory issues is found in Section Three.