

## American Whitewater

### West Virginia Navigability Report

#### Summary

If a stream is floatable by commercial logs, the public has right of passage in the stream. The public can use the stream up to the ordinary high water mark. The streams that the public can use include 34,000 miles of streams which have beds claimed by the state.

#### State Test of Navigability

Navigable rivers in West Virginia include three types of streams: (1) streams navigable-in-fact under the federal title test; (2) floatable streams; and (3) streams that are influenced by the tide.<sup>1)</sup> The navigable-in-fact test is the federal title test, and the state owns the beds of streams in this category. Of more interest to boaters is whether a stream is floatable, and subject to a public easement. The state courts of West Virginia have found that streams are floatable if they are capable of valuable use in their natural state for bearing logs or the products of mines, forests, and tillage of the country they traverse to mills or markets.<sup>2)</sup> The ability to float a canoe might make a stream navigable, because fur trappers used canoes to bring pelts to market.<sup>3)</sup> But because the test of whether a river is floatable is similar to the federal navigation test, some confusion remains as to which streambeds the state owns.<sup>4)</sup>

## Extent of Public Rights in Navigable and Non-Navigable Rivers

The public has right of passage in navigable and floatable streams. The state does not necessarily own the bed of floatable streams, but the right to float is derived from a public easement of navigation in these streams. How the rights of the public differ between navigable streams and floatable streams is unclear. The use of floatable streams by the public must be reasonable with respect to the riparian owners, but courts have not examined the reasonableness of recreational use.<sup>5)</sup> The public most likely has some right to portage obstruction in streams that are navigable-in-fact. West Virginia has asserted a right to exercise control over the banks of navigable streams, granting an easement for navigation and access to the public, although this control only extends to the ordinary high water mark.<sup>6)</sup>

## Miscellaneous

The Public Land Corporation owns the publicly owned streambeds of navigable streams. Approximately 34,000 miles of streams are navigable or floatable, and have publicly owned beds.<sup>7)</sup> More information regarding which rivers are navigable may be available from the Division of Natural Resources.

Criminal trespass on private land that is cultivated, fenced or posted against trespass - or where the owner has communicated to the trespasser - is a misdemeanor carrying a fine up to \$100.<sup>8)</sup> If the person defies an order to leave, the fine is \$100-\$500 along with up to six months imprisonment.<sup>9)</sup> A

landowner is actually authorized to arrest a trespassing fisherman in West Virginia.<sup>10)</sup>

1) Campbell Brown & Co., Inc. v. Elkins, 93 S.E.2d 248, 262 (W. Va. 1956).

2) 9) Id.

3) Letter from Office of Real Estate Management, Division of Natural Resources (June 11, 1997) (on file with AWA). The letter does not cite any authority for the proposition that flotation by a canoe makes a river floatable.

4) The Letter from Office of Real Estate Management also states that the beds of floatable streams are owned by the state, again without citing any authority. The latter position taken in the letter is contrary to the rule expressed in *Gaston v. Mace*, 10 S.E. 60, 62 (W. Va. 1889), but it is arguably consistent with the position taken by the U.S. Supreme Court in *The Montello*, 87 U.S. 430 (1874) (cited in *Elkins*, 93 S.E.2d at 262).

5) *Gaston v. Mace*, 10 S.E. 60, 62 (W. Va. 1889).

6) *Ravenswood v. Fleming*, 22 W.Va. 52 (1864); See *Barre v. Fleming*, 1 S.E. 731, 737 (W. Va. 1887); *Union Land & Gravel Co. v. Northcott*, 135 S.E. 589, 591 (W. Va. 1926).

7) Letter from Office of Real Estate Management, Division of Natural Resources (June 11, 1997) (on file with AWA).

8) W. Va. Code § 61-3B-3 (1997).

10) W. Va. Code § 20-2-7.