

# **Recreational Rights of the Public on Missouri’s Rivers and Streams: A Timely Refresher**

**by Paul A. Boudreau<sup>1</sup>**

## **Synopsis**

The right of the general public to use the rivers and streams of Missouri for recreation is grounded in legal principles of commercial navigability. Many recreational floaters and riparian landowners do not fully understand the scope of their rights and obligations under the law. Recent tragic events in Crawford County are a reminder of the importance of effectively communicating the respective legal rights and burdens of both recreational sportsmen and property owners.

On the afternoon of July 20, 2013, a group of individuals floating in canoes along the Meramec River west of the Highway 19 bridge four miles from Steelville in Crawford County stopped on a gravel bar upon which a “Keep Out” sign had been posted. They were confronted by James Crocker, a landowner. Mr. Crocker was carrying a handgun and challenged their right to stop there. An altercation ensued which ended when Mr. Crocker fired his weapon at Paul Dart, Jr., at close range, killing him. Mr. Crocker, who in May of 2014 was tried and convicted of second-degree murder, claimed that he had acted in self-defense and in defense of his property.

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<sup>1</sup> Paul A. Boudreau is a shareholder in the Jefferson City law firm of Brydon, Swearingen & England, P.C. He holds a B.S. in Fisheries and Wildlife Management and a J.D., both from the University of Missouri-Columbia. He is a co-author of the chapter on the Missouri Public Service Commission in The Missouri Bar Association’s *Administrative Law* desk book.

The incident was covered by local news outlets and extensively by the *St. Louis Post-Dispatch*. A follow-up article published by that paper on August 11, 2013, noted the murky nature of Missouri law as it concerns the recreational rights of the general public and the property rights of the riparian landowners on Missouri's popular float streams.<sup>2</sup>

The nature of the public's right of passage and recreation on Missouri's navigable rivers and streams has been known since the mid-1950s. Those rights are not well understood because they have evolved out of commercial law considerations and, therefore, the policies embodied in the law, and language used by the courts, are confusing to even careful students of the topic. It follows that Missouri's lawyers should have a basic understanding of those legal principles so they can properly advise their clients and hopefully avoid conflicts that could escalate into violence like the incident on the Meramec River.

The first thing to understand is even otherwise authoritative sources can contain erroneous guidance about the topic and can validate false notions held by well-meaning individuals. For example, in 2000, the Department of Geology and Land Survey published "A Summary of Missouri's Water Laws," Volume VII, Missouri State Water Plan Series.<sup>3</sup> Under the heading "Recreational Use and Public Rights" on page 18 is the following statement:

"All persons have a right to navigate any river or stream that has a sufficient flow to float a recreational boat like a canoe."

For this proposition, the water law summary cites the case of *Elder v. Delcour*.<sup>4</sup>

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<sup>2</sup> "The Party Doesn't End for Floaters After Shooting on Meramec River"

<sup>3</sup> It is available online at <<http://www.dnr.mo.gov/pubs/WR51.pdf>>

<sup>4</sup> 269 S.W.2d 17 (Mo. banc 1954).

This is an incorrect reading of the Supreme Court of Missouri's opinion. Unfortunately, the Missouri Department of Natural Resources' publication is being referred to on a number of blogs, special interest websites and sportsman's publications as an invitation to trespass and thereby setting the stage for prosecutions, confrontations and possible violence along the state's private streams. The law in Missouri as it concerns the recreational use of rivers and streams is a good deal more involved. In light of recent events and renewed interest, it is appropriate that the topic be revisited.

The legal analysis commences with the act of statehood.<sup>5</sup> As stated in a 1988 opinion of then-Attorney General William Webster:

Title to the beds of rivers and lakes which were "navigable" at the time of statehood passed to the state of Missouri. Bed title to rivers, streams and lakes which were "non-navigable" at the date Missouri was admitted to the Union remained in the federal government or in the grantee of a federal land patent. *United States v. Utah*, 283 U.S. 64, 75; 51 S. Ct. 438, 440; 75 L. Ed. 844, 849 (1931).<sup>6</sup>

Navigable rivers are those that in their ordinary condition are susceptible of commercial use by customary modes of transportation.<sup>7</sup> This was a commercial consideration. The federal government wanted to ensure that the principal waterways of the state remained free and open to all commerce as the only practical public highways and transportation system existing on the

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<sup>5</sup> 3 Stat. 545 (1820).

<sup>6</sup> Op. Att'y. Gen. No. 113-88.

<sup>7</sup> See, *Slovensky v. O'Reilly*, 233 S.W. 478, 481-482 (Mo. 1921). The Court referred to this poetically as "the white sails of commerce." *Id.*

expanding and developing frontier.<sup>8</sup> Most notably among the state's navigable waters are the Mississippi River and the Missouri River. A number of court cases addressing navigability of Missouri's riverways "for determination of title to the bed" are tabulated in a 1971 opinion of then-Attorney General, John C. Danforth.<sup>9</sup>

All other Missouri streams are "non-navigable", that is, not capable of being used by ordinary passenger and freight vessels. This distinction is mostly important in determining who owns the streambed. In the case of navigable streams determined by application of the federal standard, it is the state of Missouri. In the case of non-navigable streams, it is the riparian landowner. It was left to the state to determine the navigability of rivers and streams and to address the rights of landowners and the public along the remaining waterways.<sup>10</sup>

Missouri courts addressing the rights of the public to use the state's smaller waterways have followed the same commercial-interests policy established by the federal government. As

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<sup>8</sup> 3 Stat. at 546. "[T]he river Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of the said state as to other citizens of the United States, without any tax, duty, impost, or toll, therefor, imposed by the said state." The same language was also included in the first Missouri Constitution of 1820 in Art. X, §2.

<sup>9</sup> Op. Att'y Gen. No. 264-71.

<sup>10</sup> The case decisions have established that the riparian landowner along a non-navigable stream owns the property from the "meander line" along the shore to the "middle thread" or "center" of the stream. *E.g.*, *T. L. Wright Lumber Co., v. Ripley County*, 192 S.W. 996, 998 (Mo. 1917); *Bratschi v. Loesch*, 51 S.W.2d 69, 71 (Mo. 1932).

such, they have fashioned the concept of streams that are “navigable in fact”.<sup>11</sup> These are streams that are otherwise useful for commercial purposes. The legal standard developed for determining whether a river or stream is navigable in fact or “floatable”<sup>12</sup> is whether the stream in its unaltered state is capable of being used in commerce.<sup>13</sup> This typically arose in the context of the needs of the lumber industry, specifically, the transportation felled timber or rafts of wooden ties to remote railheads or sawmills. The significance of *Elder* was that it established that Missouri streams that are navigable in fact or floatable are essentially public highways upon which the people may transit through a landowner’s private property for purposes of commerce or recreation.

Waterways in Missouri that are not navigable under the federal or state standards may be entered upon or used only with the permission of the riparian landowner. These are private waterways. The best illustration of this circumstance is the case of *Dennig v. Graham*<sup>14</sup> wherein the Court of Appeals sitting in Springfield addressed the question of whether the general public

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<sup>11</sup> E.g., *McKinney v. Northcutt*, 89 S.W. 351, 354 (Mo. App. St.L. 1905); See, *Weller v. Missouri Lumber & Mining Co.*, 161 S.W. 853, 857-858 (Mo. App. Spfd. 1913).

<sup>12</sup> The terms “navigable” and “floatable” are used somewhat interchangeably in *Elder* and in the cases which preceded it. “Floatable” as used by the courts in these old cases does not have the same connotation as is given to the word in its more contemporary usage and thus contributes to the current confusion.

<sup>13</sup> 89 S.W. at 352. The decision in *McKinney* made it clear that this encompasses a stream’s commercial viability even if only available on a seasonal basis, as during a spring high water run-off. *Id.* at 355.

<sup>14</sup> 59 S.W.2d 699 (Mo. App. Spfd. 1933).

could fish for trout on the Greer Spring branch above its confluence with the Eleven Point River. The Court of Appeals found in favor of the property owner in that the stream was not navigable even though the Greer Spring branch can easily float a canoe or kayak downstream of the two spring outlets,<sup>15</sup> and it enjoined a sport fisherman against future trespass on the landowner's "private waters".<sup>16</sup> The Court in *Elder* specifically noted that there was no inconsistency between its holding and that of the Court of Appeals in *Dennig*.<sup>17</sup>

For the attorney and counselor at law, the important point is that *Elder* does not state that all streams that have sufficient flow to float a personal watercraft like a canoe or kayak are open for public use. To the contrary, that case compiled, affirmed and followed the considerable body of legal precedent that stands for the proposition that a stream's feasibility for commercial navigation determines whether the riparian landowner's property rights "are subject to the burdens imposed by the river."<sup>18</sup> *Elder* expanded on this topic only to address the scope of the public easement on navigable streams. The Court fused a right of recreational usage to that of commercial passage. To put it another way, the Court declared that the public has an easement to pursue the recreational activity of sport fishing along a Missouri stream so long as it is found to be navigable in fact. The Court concluded that the public had a right to fish the waters of the Meramec River at the location of the farm in Dent County because they were public waters.

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<sup>15</sup> The National Forest Service prohibits boating on the spring branch because the considerable discharge of the spring flows down a steep, narrow gorge. A boater in the early 1930's drowned attempting to make the 1.25 mile run in a canoe.

<sup>16</sup> 59 S.W.2d at 702-703.

<sup>17</sup> 269 S.W. at 27.

<sup>18</sup> *Id.* at 24.

Navigability is a question of fact and it is a matter for the trial courts to determine in the event of a dispute. Because the inquiry is so fact-dependent, the same river along its course may be, variously, navigable and subject to federal regulation, navigable and subject to an easement as a public highway of the state and private as one follows the route of the river upstream to its headwaters. In addition to combing rulings of record in the case law reporter services, this may require research concerning the presence of natural features which may pose obstacles to navigation, such as the presence of a shut-ins, as well as the history and practices of the logging or freighting industries as necessary to establish the past uses of a particular river or stream.<sup>19</sup>

Despite the effort of the Court in *Elder* to provide a comprehensive assessment of the rights of the public and to clarify that navigable streams are public highways for travel and for undertaking lawful recreational activities, there are important related questions which were not answered with the same degree of certainty. Does the right to travel over a riparian landowner's property include the right to use an adjacent gravel bar? What about the right to engage in other recreational activities such as trapping furbearers? Does the right to travel over a riparian landowner's property include the right to occupy a streamside gravel bar and establish a campsite? There are some observations and language in court opinions which provide varying degrees of guidance.

The judgment of the trial court that was the subject of the appeal in *Elder* included a declaration that the defendant angler had the legal right, among other things, to use "the stream bed, gravel bars and clearly recognizable area over which the stream flows during its normal

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<sup>19</sup> "These facts concerning the size and use of the river are the essential facts upon which the legal rights of the respondent, as a member of the public, must necessarily depend." *Elder v. Delcour*, 269 S.W.2d at 23.

stages”<sup>20</sup> meaning, presumably, areas inundated during periods of high water. Because the judgment of the trial court was affirmed by the Court, it is reasonable to infer that this is the applicable legal standard. The answer to the question of how high is high must wait to be answered on another day.

The Court in *Elder* found the right to fish a navigable stream in the fact that the title to the fish in the stream belonged to the state until such time as a licensed angler took lawful possession.<sup>21</sup> The same principle, it seems, would apply to the activities of a licensed fur trapper.

As to a recreational canoeist or kayaker camping on a streamside gravel bar, the case decisions provide only limited guidance. *Elder* recites that the fisherman established a “campsite” on a gravel bar for a midday meal before moving on. In another case, the Missouri Court of Appeals in Springfield observed that the upper stretches of the Gasconade River provided an abundance of aesthetic pleasures including “shoals and bars which furnish a happy camping ground for the erstwhile fisherman.”<sup>22</sup> These passages suggest that an overnight streamside campsite likely would be viewed as necessarily ancillary to the right to travel and, therefore, not a trespass.

The right of the general public and sportsmen to use the rivers and streams of Missouri for recreation and angling is derivative of old principles of commercial navigability. Many of the state’s most scenic and desirable fishing streams are well-recognized as public highways which are available for leisure activities. Because of this, the public/private tension only is a consideration on creeks and streams having modest discharge levels. Nevertheless, many

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<sup>20</sup> *Id.* at 21.

<sup>21</sup> *See*, §252.030 RSMo 2000.

<sup>22</sup> *Hobart-Lee Tie Co. v. Grabner*, 219 S.W. 975, 976-977 (Mo. App. Spfd. 1920).



recreational floaters and riparian landowners have misconceptions about the scope of their rights under the law. This appears to have been the primary reason for the tragic conflict which arose between Mr. Crocker and the family and friends of Mr. Dart. The best way to avoid confrontation and possible violence is by knowing, and effectively communicating, the nature of the respective legal rights and burdens of recreational sportsmen and landowners alike.