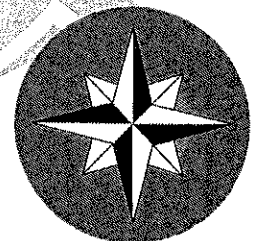


**60th ANNUAL
MEETING**

OF THE
MISSOURI SOCIETY OF PROFESSIONAL SURVEYORS

**MISSOURI
WATER LAW**

Attorney Harry Styron



Answers to questions asked of surveyors about rights to use Missouri streams, ponds and lakes

by Harry Styron, hs@styronlaw.com, 2017

Surveyors occupy the middle ground between the lawyers and judges, on one side, and landowners on the other. Unlike lawyers and judges, surveyors have intimate knowledge of the lay of the land and are known to be practical people, capable of straight talk¹. Owners ask surveyors all kinds of questions about real estate law and expect an authoritative answer.²

Few aspects of Missouri real estate law are more difficult to explain to laypeople (and to surveyors, lawyers and judges) than the rights of landowners and recreational users to streams, ponds and lakes. To assist surveyors with these questions, I have compiled these answers, based on rules of law that have been pronounced by Missouri courts, rather than by the Missouri legislature. Much of real estate law is judge-made law (better known as “common law”), and the Missouri General Assembly has not enacted any significant statutes regarding riparian rights (rights of owners of land on streams and lakes, relating to the water body) or rights of use.

In 2017, Rep. Robert Ross, a professional land surveyor, introduced HB 556 in the Missouri General Assembly, entitled “Navigability of Missouri’s Waters.” HB 556 fairly stated rules that have been developed by courts with respect to riparian rights in Missouri, providing the following:

1. The riparian owner has the right to the natural flow of the natural watercourse including its volume and purity, except as affected by the reasonable use by other riparian owners.

¹ In sharp contrast to their verbal legal descriptions, which are written in an arcane dialect.

² Without an invoice.

2. The riparian owner has title in fee to the low water mark of a navigable watercourse of the state or a public navigable watercourse and to the thread of a nonnavigable watercourse
3. The riparian owner has the right of access to the water from his or her frontage including the right to wharf out, provided that he or she does not interfere with the public's right of navigation and floatage
4. The riparian rights or regulations must not attach to artificial watercourses such as farm ponds or dug drains, but must attach to artificially enlarged watercourses such as reservoirs in streams or rivers;
5. If a watercourse is navigable, the bed of the watercourse below the low water mark belongs to the state.
6. A riparian owner along a navigable watercourse of the state or a public navigable watercourse owns only to the water's edge at its low water mark;
7. If a watercourse is nonnavigable, the bed of the watercourse belongs to the riparian owner of the land if the water course is bounded on both sides by the same owner's land and if a nonnavigable watercourse is the dividing line between landowners, the owner of each side owns to the thread of the watercourse;
8. No adjoining parts of a watercourse are to be considered navigable unless they are deemed navigable by a Missouri court;{
9. Accretions along a watercourse belong to the riparian owner where the accretions were deposited. However, no owner may claim title to any land added by accretion caused by an artificial condition he or she created;
10. Specifies the ways in which ownership to land washed away by a navigable watercourse of the state or a public navigable watercourse may be transferred and reacquired;
11. Specifies that the line between counties divided by a navigable watercourse of the state or a public navigable watercourse must be the thread of the watercourse. A slow, imperceptible and gradual change of the watercourse must change the county line, but a sudden change by avulsion must not.

Finally, HB 556 attempted to draw a line in the sand, by prohibiting the Department of Natural Resources from implementing any portion of the federal rule to revise or provide guidance on the definition of “waters of the United States” or “navigable waters” under the Clean Water Act, specifying that no federal agency may make a determination or designate any watercourse within the state as navigable.

In my opinion, a statute that prohibits the Department of Natural Resources from following federal law violates the United States Constitution and the Clean Water Act. It is also my opinion that the Missouri General Assembly has no jurisdiction over the actions of federal agencies; it would be up to the executive branch of the State of Missouri to challenge the actions of federal agencies and ask a federal court to determine if the federal agency had overstepped its authority.

1. Who owns the water in a stream?

The water in streams belongs to the people of the state. *Hickey v. Hazard*, 3 Mo. App. 480 (1877).

2. May I take water out of a creek for irrigation or watering cattle?

A riparian owner (which means an owner of the shoreline of creek or lake) may pump water out of the creek for reasonable uses, but not to the extent that it deprives other riparian owners of their reasonable uses. Obviously, this kind of a legal rule is based on water being abundant. In times of scarcity, a court might find that the behavior of an owner to be unreasonable who pumped so much water from a creek into his pond that the creek went dry, affecting the ability of downstream cattle to drink.

The rule of reasonable use has been explained in several appellate court decisions.

Riparian uses that have been recognized by Missouri courts include household use, irrigation of crops, livestock watering, and industrial uses. A rancher-versus-sodbuster dispute, *Ripka v. Wansing*, 589 SW2d 333 (Mo.SD 1979) gave the Southern District a chance to refer to the factors mentioned in the RESTATEMENT OF TORTS, SECOND §§ 850-850A) to be considered in determining the reasonableness of riparian uses, as follows:

- (a) the purpose of the use,
- (b) the suitability of the use to the watercourse or lake,
- (c) the economic value of the use,
- (d) the social value of the use,
- (e) the extent and amount of the harm it causes,
- (f) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
- (g) the practicality of adjusting the quantity of water used by each proprietor,
- (h) the protection of existing values of water uses, land, investments and enterprises, and
- (i) the justice of requiring the user causing harm to bear the loss.

3. Who owns the water in a farm pond?

For all practical purposes, the owner of the land under the pond owns it and the water itself. But if the pond is a wetland because of a connection to a stream, or if it is the home of an aquatic or amphibious Endangered Species or Species of Concern, the owner may be unable to drain the pond.

4. If I own the land under my pond or lake and the water in it, do I also own the fish in it?

You own them when you catch them. And you can fish without a license on your own land (or land you lease and live on) if it completely encircles your pond or lake and you are a Missouri resident.

5. Who owns wildlife in streams and lakes?

The wildlife in streams belongs to the people of the state. § 252.030 RSMo.

Nearly one hundred years ago, Justice Holmes drew a distinction between fish, which are mobile, and mussels, which remain in one place, also distinguishing between the rights of possession and title to mussels and the right of Missouri to regulate their taking, but did not find it necessary to rule on whether they were a part of the realty like "a prehistoric boat discovered underground." *McKee v. Gratz*, 260 US 127 (1922).

Under the ancient common law principle called the "rule of capture," a person becomes the owner of a wild thing when it is lawfully captured. If you capture an alligator snapping turtle, but don't have a permit to possess it, then you can't lawfully keep it.

Some kinds of wildlife, such as aquatic invertebrates (other than mollusks or crayfish), may be collected without a permit unless they are a "species of concern" or are collected from state or federal land or waters.

The U. S. Fish and Wildlife Service, which is a part of the Department of Interior, also enforces federal regulations relating to wildlife, including migratory birds and some fish. The Fish and Wildlife Service also operates the Endangered Species and Wetlands Inventory Programs. In Missouri, the Fish and Wildlife Service operates the Neosho National Fish Hatchery and manages several wetlands and other sites.

6. Can a landowner lawfully discharge wastewater into a stream?

If the wastewater contains pollutants defined by the federal Clean Water Act and the regulations issued under it, lawful discharge requires a permit. The federal Clean Water Act established the National Pollutant Discharge Elimination System, which requires permits for discharge of pollutants. In Missouri, the federal standards are to be enforced by the Clean Water Commission, comprising persons appointed by the governor. The Missouri Department of Natural Resources administers the regulations adopted by the Clean Water Commission. See § 644.052 RSMo. Upon approval of an application, the Clean Water Commission will issue an NPDES permit, which defines the quantity of pollutants that may be lawfully discharged into a particular watercourse at a particular point.

7. May I build a dock, pave a ford, on a non-navigable stream on my property?

The U. S. Army Corps of Engineers controls modification of the streambeds and banks of almost all flowing streams. Nobody really believes that the Corps is concerned only with navigable streams. Just like a farmer who doesn't want to own all the land in the country, just all that borders his, the Corps wants to control navigable streams and their tributaries.

Dredging, filling streams or wetlands (with rocks, dirt, concrete, etc.), placement of docks, erection of bridges, and building dams is subject to the regulation of the Corps and EPA, under section 404 of the federal Clean Water Act, which also requires a "section 401" certification from the Missouri Department of Natural Resources.

The authority of the federal government extends to "waters of the United States," which has a definition that changes with opinions of federal courts and the interpretations of agencies. In 2017, the Trump Administration announced that the definition would be narrower than the Obama Administration's definition.

However, the process of withdrawing or amending federal regulations is lengthy. Nothing will change much quickly.

8. May I build a dam?

Erection of dams higher than 35 feet requires construction permits from the Missouri Department of Natural Resources, which has a Dam Safety Council to advise it. See Chapter 236 RSMo. Section 252.150 requires owners of dams to provide for the free passage of fish. Building of dams over non-navigable streams is a right affirmed by statute. Sections 236.010-236-020 RSMo. However, obstruction of streams to prevent the free passage of fish is a misdemeanor. Section 252.200 RSMo. Just because the State of Missouri says a landowner has a right to build a dam, that alone does not eliminate the jurisdiction of the Corps of Engineers.

9. May I install a generator in a stream on my property?

The Federal Energy Regulatory Commission regulates the use of streams for generation of hydroelectric power. An extensive and readable discussion of the policies and regulations affecting hydropower are found at <http://www.hydroreform.org/hydroguide/shorelands/protecting-shorelands-as-part-of-the-hydroelectric-relicensing-process>.

Recreational Use of Streams

Elder v. Delcour, 269 SW2d 17 (Mo. 1954), made possible the growth of the recreational canoeing industry, giving the public the right to wade and boat on floatable streams, "for business or pleasure."

Elder's logic is elusive. The opinion holds that the Meramec River at the point in question is non-navigable, but a public highway. Thus, the public has an easement to travel its waters and submerged streambed and pursue fish. "Since the ownership of the fish in the stream belonged to the state and since respondent was not a trespasser in passing down the stream by boat or by wading, he had the right to fish and to take fish from the stream in a lawful manner."

The *Elder* court was undeterred by a statute that determined that the terminus of the Meramec River as a public highway was downstream from Delcour's land: "The action of the Legislature, as mentioned, had no bearing on the issues here presented where the factual situation controls."

State law behavior restrictions directed as behavior on streams

Section 306.220 RSMo requires children under the age of seven to always wear a personal floatation device. Lighting and PFDs for all vessels are described in § 306.100 RSMo.

Section 306.325 RSMo applies to inner tubes, kayaks, and canoes:

1. As used in this section, the following terms mean:

- (1) "Navigable waterway", any navigable river, lake, or other body of water located wholly or partly within this state and used by any vessel³;
- (2) "Vessel", any canoe, kayak, or other watercraft which is easily susceptible to swamping, tipping, or rolling, but does not include any houseboat, party barge, runabout, ski boat, bass boat, excursion gambling boat as defined in section 313.800, RSMo, or similar watercraft not easily susceptible to swamping, tipping, or rolling.

2. Any person entering, traveling upon, or otherwise using navigable or nonnavigable waterways by vessel or innertube and transporting foodstuffs or beverages shall:

- (1) Use a cooler, icebox, or similar nonglass container, and shall not use, other than containers for substances prescribed by a licensed physician, any glass container for beverages on a vessel within the banks of navigable waterways;
- (2) Use a cooler, icebox, or similar nonglass container sealed in a way which prevents the contents from spilling into the water;
- (3) Carry and affix to the vessel a container or bag suitable for containing refuse, waste, and trash materials and which is capable of being securely closed;

³ The term "navigable waterway" in this statute does not apply outside this statute.

- (4) Transport all refuse, waste, and trash materials to a place in which such materials may be safely and lawfully disposed; and
 - (5) Shall safely secure any glass containers to protect them from breakage or discharge into any stream.
3. Any person who violates the provisions of this section is guilty of a class C misdemeanor.

The General Assembly is always worried about nudity and drunkenness on Missouri's streams. Finally, in 2009, section 306.109 RSMo was enacted:

- 306.109. 1. No person shall possess or use beer bong or other drinking devices used to consume similar amounts of alcohol on the rivers of this state. As used in this section, the term "beer bong" includes any device that is intended and designed for the rapid consumption or intake of an alcoholic beverage, including but not limited to funnels, tubes, hoses, and modified containers with additional vents.
2. No person shall possess or use any large volume alcohol containers that hold more than four gallons of an alcoholic beverage on the rivers of this state.
3. No person shall possess expanded polypropylene coolers on or within fifty feet of any river of this state, except in developed campgrounds, picnic areas, landings, roads and parking lots located within fifty feet of such rivers. This subsection shall not apply to high density bait containers used solely for such purpose.
4. Any person who violates the provisions of this section is guilty of a class A misdemeanor.
5. The provisions of this section shall not apply to persons on the Mississippi River, Missouri River, or Osage River.

Section 306.325 RSMo applies to inner tubes, kayaks, and canoes:

1. As used in this section, the following terms mean:
 - (1) "Navigable waterway", any navigable river, lake, or other body of water located wholly or partly within this state and used by any vessel;

- (2) "Vessel", any canoe, kayak, or other watercraft which is easily susceptible to swamping, tipping, or rolling, but does not include any houseboat, party barge, runabout, ski boat, bass boat, excursion gambling boat as defined in section 313.800, RSMo, or similar watercraft not easily susceptible to swamping, tipping, or rolling.

2. Any person entering, traveling upon, or otherwise using navigable or nonnavigable waterways by vessel or innertube and transporting foodstuffs or beverages shall:

- (1) Use a cooler, icebox, or similar nonglass container, and shall not use, other than containers for substances prescribed by a licensed physician, any glass container for beverages on a vessel within the banks of navigable waterways;
- (2) Use a cooler, icebox, or similar nonglass container sealed in a way which prevents the contents from spilling into the water;
- (3) Carry and affix to the vessel a container or bag suitable for containing refuse, waste, and trash materials and which is capable of being securely closed;
- (4) Transport all refuse, waste, and trash materials to a place in which such materials may be safely and lawfully disposed; and
- (5) Shall safely secure any glass containers to protect them from breakage or discharge into any stream.

3. Any person who violates the provisions of this section is guilty of a class C misdemeanor.

The Missouri Department of Conservation enforces its regulations of vehicles, including bicycles and aircraft, and horse and pets, on all land and waters owned, leased or managed by the Conservation Commission. Section 252.045 RSMo.

Federal regulation for directed at behavior on streams

While the Ozarks National Scenic Riverways (the ONSR includes portions of the Jacks Fork and Current rivers) and the National Wild and Scenic Rivers (NWSR includes a portion of Eleven Point River) are subject to federal controls on river access, licensing of concessionaires, and behavior, the rest of Missouri has enjoyed a less-structured experience. The ONSR is operated by the National Park Service, which is a part of the Department of Interior. The NWSR system is a part of the USDA.

The ONSR regulations are compiled in the “Superintendent’s Compendium” and are claimed to “compliment [sic] and apply in addition to the regulations contained in Parts 1-7 of Title 36 CFR.” See <http://www.nps.gov/ozar/parkmgmt/upload/Supt-Compedium09.pdf>.

Violations may be punished with a fine of up to \$5,000 for individuals and \$10,000 for organizations and up to six months in prison.

From the 2009 OSNR Superintendent’s Compendium—which are subject to being updated—here are the rules of most interest to people who are likely to get in trouble:

Glass beverage containers

The possession or use of glass beverage containers in caves, on trails or waterways, or within 50 feet of any river or stream in the park is prohibited for public safety and sanitation, except in campgrounds or picnic sites, or in vehicles on roads and parking areas.

Foam coolers

The possession of foam (commonly known as Styrofoam), polypropylene, expanded polypropylene and polystyrene coolers are prohibited on or within 50 feet of the Current and Jacks Fork rivers, except in developed campgrounds, picnic areas, landings, roads and parking lots occurring within the zone of 50 feet. This prohibition includes coolers, ice chests, and containers. High density bait containers, used solely for that purpose, are allowed and are exempt from this regulation.

Alcohol restrictions

The possession or use of any large volume alcohol containers that hold more than one gallon of an alcoholic beverage is prohibited. This includes but is not limited to the following: kegs, quarter kegs, pony kegs, party balls, or similar containers.

The possession or use of beer bong or other similar volume drinking alcohol devices is prohibited. This includes any object or device that is intended and designed for the rapid consumption/intake of and alcoholic beverage, including but not limited to funnels, tubes, hoses and modified cans with additional vents. The possession or consumption of any alcoholic substance that is produced in a gelatin form is prohibited.

The above prohibitions apply to portions of the Current River between Baptist Access and the lower landing at Round spring and from Waymeyer to the park boundary of the Van Buren Gap near Raftyard.

On the Jacks Fork River these prohibitions apply to the river between Bluff Hole at Alley and Keaton Campground and from the park boundary east of Eminence to Two Rivers' lower landing. These prohibitions are enforced in the campgrounds within the park boundary and apply to the above stretches of rivers and campgrounds between Memorial Day Weekend and through Labor Day.

Dry Ice

The possession and/or use of dry ice anywhere within the park boundary are prohibited, with the exception of use for long term camping of more than two nights. Dry ice is defined as a solidified form of carbon dioxide.

Jumping and/or diving

The jumping or diving from cliffs, high banks or rocks, and trees into the Current and Jacks Fork Rivers, springs or spring branches is prohibited. The installation or use of rope swings or other similar devices from stationary objects, such as trees, with the purpose of descending one from land to water is also prohibited.

Mardi Gras beads

The distribution of Mardi Gras bead necklaces or similar paraphernalia intended to cause behavior associated with disorderly conduct within the Riverways is prohibited. Such unwanted behavior includes but is not limited to fighting, solicitation of nudity, obscene language and creating a public nuisance.

Mardi Gras necklaces are defined as necklaces that consist of multi-colored beads that are made from plastic, aluminum or similar material, regardless of length or size of the necklace.

Geocaching

Geocaching within the boundaries of Ozark National Scenic Riverways is prohibited.

Paint-balling

The possession and/or use of a paint-ball gun, or similar device, are prohibited.

Technical Climbing/rappelling

The following areas are closed to technical climbing and rappelling:

- Areas within the park that are designated as state natural areas and rock faces above caves, springs, and spring branches and trails

The installation and/or use of any permanent bolt, anchor, or chipped rock hold is prohibited throughout the Riverways.

Segways

Gyroscopic stabilized mobility devices, commonly referred to as Segways, shall be considered as a motorized wheelchair when operated by persons with disabilities and may be operated throughout Ozark National Scenic Riverways on trails and paths open to wheelchair use. All other use of gyroscopic stabilized mobility devices is prohibited.

Seekers of subtler pleasures may be interested in other regulations found in the Superintendent's Compendium. Gathering by hand of small amounts of edible nuts, fruits and berries and mushrooms for onsite consumption is permitted, but not tapping of maple trees or collection of wildflowers. Hunting and trapping are permitted within the former state park boundaries at Alley Spring, Big Spring and Round Spring.

Restrictions on ATVs and Motorized Vessels

Subsection 304.013.2 RSMo prohibits ATVs from being in streams except when operated by the riparian landowner as follows:

No person shall operate an off-road vehicle within any stream or river in this state, except that off-road vehicles may be operated within waterways which flow within the boundaries of land which an off-road vehicle operator owns, or for agricultural purposes within the boundaries of land which an off-road vehicle operator owns or has permission to be upon, or for the purpose of fording such stream or river of this state at such road crossings as are customary or part of the highway system. All law enforcement officials or peace officers of this state and its political subdivisions or department of conservation agents or department of natural resources park rangers shall enforce the provisions of this subsection within the geographic area of their jurisdiction.

A similar statute applies to "utility vehicles." Section 304.032.1 RSMo.

ATVs are prohibited on paved roads within the ONSR, but permitted only for ingress and egress to reach roads where they are permitted. Inboards and personal watercraft are prohibited. Motorized vessels regulations in the ONSR are permitted as follows:

1. Above the Big Spring landing on the Current River and below Alley Spring on the Jacks Fork River with an outboard motor not to exceed 40 horsepower.
2. Above Round Spring on the Current River and above Alley Spring (at the Hwy 106 bridge) on the Jacks Fork River with an outboard motor not to exceed 25 horsepower.
3. Above Akers Ferry on the Current River from May 1 to September 15 with an outboard motor not to exceed 10 horsepower.
4. Above Bay Creek on the Jacks Fork River from March 1 to the Saturday before Memorial Day with an outboard motor not to exceed 10 horsepower.

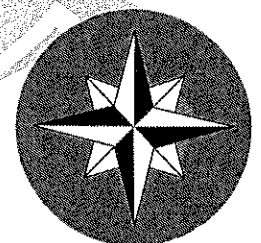
In the NWSR, outboards up to 25 horsepower are permitted.

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MISSOURI RIPARIAN BOUNDARIES

Dr. Richard L. Elgin, PS, PE



“MISSOURI RIPARIAN BOUNDARIES”

**Dr. Richard L. Elgin, PS, PE
Rolla, Missouri**

Abstract

Riparian boundaries bring consternation to the surveyor, confoundment to attorneys and confusion to the courts. The proposition of shifting boundaries and shifting law are not embraced by we surveyors who seek definiteness in the lands we survey (as do our clients). This talk brings firmness (not definiteness) to Missouri riparian boundaries: Definition of terms, boundaries for lands bordering the four possible water body types, construing descriptions of riparian tracts (where's the boundary?), affect of meander lines, “abandoned” river beds, navigability today, and survey practice issues are some of the subject areas covered. This seminar is a preview to Dick's forthcoming book of the same title.