

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.

Some public comment at study committee meetings asserted a need to differentiate navigability and passage, while emphasizing a common law right of passage on all waterways as laid out in Justice Lumpkin's second category of rivers. This side of the debate argued the 1863 Code was intended to codify then-existing law rather than derogate from it, and that per the Young decision, the public right is one of 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."

Other public comment and questions from the study committee departed from this train of thought and pointed to language in the case *Givens v. Ichuaway, Inc.*, 268 Ga. 710 (1997):

Nineteenth century statements of what constituted navigability under federal law do not show that the codifiers of 1863 misstated the law of Georgia when they defined navigable streams and delineated the rights of persons in those streams. Young was decided prior to 1863, and the only reasonable conclusion is that the Code of 1863 included the second kind of stream recognized in Young... when the Code of 1863 set forth the definition of a navigable stream. Thus, the servitude Young recognized on a stream "susceptible... of use for a common passage" is identical to the servitude imposed on a navigable stream as defined in O.C.G.A. § 44-8-5(a). There is nothing in Young that imposes a servitude of common passage on a stream that is not navigable as defined in O.C.G.A. § 44-8-5(a).

This side of the debate contended there is a need to link passage with navigability per Georgia case law, that the case law points to a public right of passage solely on navigable waterways, and that the Code Commission in 1863 provided a fact-specific means to determine which rivers were wholly private property and which were susceptible or not for passage.

Collaboration and Partnerships to Increase Access

Durable and sustainable ways of increasing access to Georgia waterways for the public can come in the form of collaborative efforts and private partnerships to secure rights and secure land along Georgia waterways for lasting public use. This can come in the form of partnerships between a combination of private landowners, nonprofit organizations, local governments, and state government. The study committee heard testimony from different preserved areas that used different combinations of stakeholders to collaborate on projects.

Along the Chattahoochee River, Chattahoochee Bend State Park as well as McIntosh Reserve have used different mechanisms to preserve river frontage along one of Georgia's major rivers. Chattahoochee Bend State Park is one of the state's largest state parks, protecting 2,910 acres and five miles of river frontage.⁹ On land previously owned by Georgia Power, the park was

⁹ <https://gastateparks.org/ChattahoocheeBend>