

Arizona Navigability Report

Summary

If the watercourse was navigable at the time of statehood, then the stream or riverbed qualifies as State Trust Land. If the watercourse was not navigable at the time of statehood, then the land under the watercourse is owned by the current titleholder.¹ With the exception of the Colorado River, none of Arizona's watercourses are navigable. Ownership of the streambeds of non-navigable watercourses rests with either the federal government or private parties.

State Test of Navigability

In 1992, the Arizona legislature established the Arizona Navigable Stream Adjudication Commission ("ANSAC") to decide ownership. ANSAC determines whether the watercourses were navigable at the time of statehood by conducting evidentiary public hearings across the state regarding each of Arizona's approximately 39,039 watercourses (of which about 2,241 are named) and to determine the public trust values of all watercourses that were navigable at statehood.²

Arizona's test for navigability is based upon the "federal test" for navigability.³ Under this test, a watercourse is navigable if it: (1) was in existence on February 14, 1912 (*i.e.*, at the time of statehood); and (2) at that time, it was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

Prior to 2001, the Arizona law contained a number of presumptions and limitations that made it "almost impossible for an Arizona watercourse to be determined navigable."⁴ For instance, the statute required the navigability of a watercourse to be shown by "clear and convincing" evidence. In *Defenders of Wildlife v. Hull*, the Arizona Court of Appeals declared certain provisions of the statute unconstitutional, finding that the restrictive presumptions and limitations conflicted with the federal test for navigability.⁵ Following the court's *Defenders of Wildlife* ruling, the legislature amended the statute in 2001 to reflect a less restrictive test of navigability, consistent with the federal test, and changed the burden of proof from the "clear and convincing" standard to the "preponderance of the evidence" standard.⁶

Thus, the ANSAC now considers the following six criteria (in the order of greatest weight) as tending to demonstrate navigability

¹ See ANSAC, Program Summary (Aug. 11, 2020), <https://www.azleg.gov/jlbc/psnav.pdf>; ANSAC, Home, <https://www.ansac.az.gov/default.asp> (last accessed Jan. 18, 2021); *see also* Ariz. Rev. Stat. Ann. § 37-1130 (2020).

² ANSAC, Program Summary, *supra* note 2; Ariz. Rev. Stat. Ann. § 37-1121.

³ Ariz. Rev. Stat. Ann. § 37-1101(5)

⁴ *Def. of Wildlife v. Hull*, 18 P.3d 722, 737 (Ariz. Ct. App. 2001) (slip op. at <http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf>).

⁵ *Id.*

⁶ See Ariz. Rev. Stat. Ann. § 37-1128(A) ("preponderance of the evidence").

- Historical record of boating;
- Record of modern boating;
- Perennial stream flow (*i.e.*, they do not flow only in direct response to precipitation);
- Dam located on the stream;
- Fish found in stream; and
- Special status (*e.g.*, other water-related characteristics, including in-stream flow application and/or permit, unique waters, wild and scenic, riparian, and preserve).⁷

The ANSAC also considers the depth, width, and velocity of the water flow and compares these factors to the minimum standards required for different types of vessels, as well as the configuration of the channel and whether it contains rapids, boulders, or other obstacles.⁸

Ownership of a streambed is determined by whether or not the streambed was navigable as of the date of statehood -- February 14, 1912. Under Arizona's application of the "equal footing" doctrine, the state owns the bed of any watercourse that was navigable on the date of statehood. If the stream was not navigable on that date, then the owner of the streambed prior to the date of statehood retains title. Because the ANSAC has determined that all watercourses in Arizona - with the exception of the Colorado River - were non-navigable on the date of statehood,⁹ the state does not own the streambeds of any non-navigable watercourses. Thus, if the streambed was federal land prior to the date of statehood, the federal government would retain ownership. Alternatively, if the streambed had been previously patented by a private party or disposed of by the federal government, then the private party would retain title.

After the ANSAC issues its navigability determination for a particular watercourse, it must then publish a report describing the evidence considered, analytical methods used, and findings supporting its determination. Upon the publication of each report, there is a 180-day appeal period for the Arizona State Land Department and a 270-day appeal period for all other interested parties, during which time the ANSAC's determination may be appealed to the appropriate county superior court. ANSAC has issued its initial navigability determinations for all watercourses in the state as of June 28, 2018.¹⁰ Only ANSAC's determinations for the Salt, Verde, and Gila Rivers are appealable, and only through October 2, 2020.¹¹ ANSAC expected to receive one timely appeal, but as of January 2021, it is not clear whether that appeal has been filed.¹²

⁷ See, *e.g.*, ANSAC Report, Findings and Determination Regarding the Navigability of Small and Minor Watercourses in Yuma County, Arizona (Feb. 20, 2003) at 25-27, <http://www.ansac.az.gov/UserFiles/File/pdf/finalreports/Yuma%20Cy%20Small%20&%20Minor.pdf>.

⁸ *Id.* at 27.

⁹ For a list of ANSAC determinations, see ANSAC, Determination Final Reports https://www.ansac.az.gov/commission_reports.asp (last accessed Jan. 18, 2021). ANSAC has noted in its final reports that the Colorado River was determined to be a navigable river long ago. The ANSAC notes that Arizona's watercourses typically have been used for irrigation, rather than navigation, given the state's arid or desert regions. Arizona includes parts of at least three of the four North American deserts.

¹⁰ *Id.*

¹¹ ANSAC, Home, <https://www.ansac.az.gov/default.asp> (Sep. 2020).

¹² *Id.*

Extent of Public Rights in Navigable and Non-Navigable Rivers

On the Colorado River (and any other watercourses that may be found to be navigable by a court), the public has the right to boat, fish, and recreate.¹³

The extent to which the public has rights in non-navigable watercourses depends upon the ownership of the streambed. For example, if the federal government has retained ownership, the public likely enjoys rights to boat, fish, wade, recreate, and portage. If, on the other hand, the streambed is privately owned, then the public may not boat, fish, or otherwise access the watercourse without the private owner's permission.

Miscellaneous

For additional information on the navigability of Arizona's watercourses, see the ANSAC website at <https://www.ansac.az.gov/default.asp>.

¹³ “The Colorado River ... is one of the great navigable rivers of the west, and a navigable stream is dedicated to the public for its use and enjoyment.” *Brasher v. Gibson*, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), *vacated on other grounds*, 419 P.2d 505 (Ariz. 1966).