

Arkansas Navigability Report

Summary

The public has the right to use a stream in Arkansas if it is navigable. Both commercial and recreational use is considered in determining navigability. However, landowners on a navigable stream have the right to prohibit the public from crossing their property to reach the stream.

State Test of Navigability

Arkansas courts have recognized the value of recreation and the concomitant need to access streams. The determination of whether a stream is public is a matter of determining its navigability.¹ Navigability under state law was initially tied to the commercial use of the waters, but was expanded in 1980 by the Arkansas Supreme Court to include consideration of recreational use as well.² In order to be navigable under the state test, a stream need not be navigable for the entire year.³ While the minimum length of the period during which the stream is navigable is uncertain, courts have mentioned six months.⁴ Therefore, streams that are capable of being boated may be considered public waterways if they are navigable by small boats for at least six months of the year. Additionally, streams may be navigable even if the streams are navigable for shorter periods during the year, especially if they have a long history of public recreational use.⁵

The Cache River within Arkansas has been declared non-navigable.⁶

Extent of Public Rights in Navigable and Non-Navigable Rivers

One of the incidents of navigation is recreation. Another, although not expressly recognized, factor for determining navigability may be walking on streambeds in connection with the use of a navigable stream.⁷ Portaging in general is often considered an incident to navigation, although the Arkansas courts have not specifically mentioned a right to portage above the ordinary high water mark on public waterways. Nevertheless, landowners on a navigable stream have the right to prohibit the public from crossing their property to reach the stream.⁸

¹ State v. McIlroy, 595 S.W.2d 659, 663 (Ark. 1980).

² *Id.* at 664, 665.

³ *Id.* at 665.

⁴ *Id.* at 661.

⁵ *See Id.* at 662-63, 665 (“The evidence by testimony and exhibits demonstrates conclusively that the [river] had been used by the public for recreational purposes for many years” and “There is no doubt that the segment of [river] that is involved in this lawsuit can be used for a substantial portion of the year for recreational purposes.”).

⁶ 33 U.S.C. § 25 (2020); *see also* Ark. Code Ann. § 15-23-101 (2020).

⁷ Fishing and swimming have been discussed as possible recreational activities in public waterways. *McIlroy*, 595 S.W.2d at 662. Additionally, it could be argued that although the court should have been aware that canoeing during lower flows in the subject river would necessarily involve dragging a canoe across shallow areas, the court did not specifically prohibit canoeing when such dragging would be required.

⁸ *Id.* at 665.

Miscellaneous

It is unlawful for a person to enter posted real property for recreational purposes without written permission of the owner of the real property.⁹ If the posted property becomes flooded above the ordinary high watermark but the signs or paint marks are still visible, then it is unlawful to enter within the boundaries of the posted area without the written consent of the owner.¹⁰ Affirmative defenses to prosecution include: consent was given by a person holding himself or herself out to be the owner of the property; the person was a guest of the property owner or lessee; the person was required to enter upon the premises for business reasons or for health or safety reasons; or the person was authorized by law to enter upon land.¹¹ A violation of this law carries a fine of up to \$500 and imprisonment of up to 90 days.¹²

⁹ Ark. Code Ann. § 18-11-403 (2020).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* § 5-4-201 and 5-4-401.