

Kansas Navigability Report

Summary

Many Kansas streams are non-navigable. Navigable streams must be able to be used to transport the local products (usually agricultural and not silvicultural products such as logs). This requirement has caused the navigability test in Kansas to be even stricter than the “log float” test. The public may use a navigable stream up to the ordinary high-water mark; no law discusses whether land above this mark can be used for portage.

State Test of Navigability

Kansas has followed Colorado’s lead in limiting the waters that are open to the public.¹ The test of navigability in Kansas is the “navigable in fact test”; therefore, it is basically the same as the federal commerce test: “[W]hether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”²

To determine navigability, the first question is whether title to the riverbed passed to the state upon admittance into the Union.³ Under this test, the Arkansas, the Kansas, and the Missouri Rivers have been declared navigable.⁴ Although these rivers are open to the public, public access points remain limited.⁵ The Neosho, the Delaware, and the Smoky Hill Rivers have been declared non-navigable.⁶

In a case involving the Neosho River,⁷ the Supreme Court of Kansas determined that the Neosho is non-navigable despite the operation of ferryboats, floating of logs, and use by motor boats for pleasure, because the river contains shallow riffles which boats need to be dragged across.⁸

¹ *Kansas ex rel. Meek v. Hays*, 785 P.2d 1356, 1362 (Kan. 1990) (citing Colorado’s boater-unfriendly case *People v. Emmert*, 597 P.2d 1025 (Colo. 1979)).

² *Id.* at 1359 (quoting *Oklahoma v. Texas*, 258 U.S. 574, 586 (1922)).

³ *United States v. Holt Bank*, 270 U.S. 49 (1926), established the specific criteria to be used in determining whether particular bodies of water are deemed navigable for purposes of vesting the state with title to the beds. Under this test, a body of water is navigable and title to the beds under the water are vested in the state if: (1) the body of water was used, or was susceptible of being used, as a matter of fact, as highways for commerce; (2) such use for commerce was possible under the natural conditions of the body of water; (3) commerce was or could have been conducted in the customary modes of trade or travel on water; and (4) all of these conditions were satisfied at the time of statehood.

⁴ *See State ex rel. v. Akers*, 140 P. 637 (1914); *Dana v. Hurst*, 964, 122 Pac. 1041 (1912); *Wood v. Fowler*, 26 Kan. 682 (1882).

⁵ The number of public access points on the three navigable rivers has increased in recent years through initiatives by the Kansas Department of Wildlife, Parks and Tourism (KDWPT), local governments, and interest groups.

⁶ James B. Wadley, *Recreational Use of Non-navigable Waterways*, 56-DEC J. Kan. B.A. 27, at 28 (Dec. 1987). *See also Webb v. Board of Comm’rs of Neosho Cty*, 257 P. 966 (1927); *Piazzek v. Drainage Dist.*, 237 P. 1059 (1925); *Kregar v. Fogarty*, 96 P. 845 (1908).

⁷ *Webb*, 257 P. at 966.

⁸ *Id.*

Additionally, the river had never been used to transport agricultural products.⁹ Similarly, the court declared it to be non-navigable despite use by a canoe rental company that ran float trips on the creek and use by another company for plant collections.¹⁰ In issuing this ruling, the court based its determination on the fact that the creek's shallow riffles required even a canoe to be dragged across portions and that the creek had not been used for valuable floatage in transportation to market of the products of the country through which it runs.¹¹

Extent of Public Rights in Navigable & Non-Navigable Rivers

The public has the right to use navigable streams for recreational purposes, including boating, up to the ordinary high water mark.¹² Thus, the bed and banks, up to the line to which water rises in time of ordinary high water, are public property that can be used by the public for lawful or non-destructive recreational purposes.¹³ Although the public has the right to access and use navigable waterways, this right does not include the right to cross private property to get to such waterways. Where no public access exists, however, one may need to obtain permission from the adjoining landowner in order to travel on private land to get to the public land. In this regard, Kansas's courts have not applied the statute that dedicates "[a]ll water within the state of Kansas . . . to the use of the people of the state . . .," in support of a right to use water for recreational purposes.¹⁴ This is contrary to some other jurisdictions with similar statutes.¹⁵ In fact, the statutory definition of criminal trespass includes entering on non-navigable water.¹⁶

The title to the bed of a navigable river is vested in the state.¹⁷ The riparian owner's land extends to the bank of the stream, which is the ordinary high water mark.¹⁸ But if "the stream is nonnavigable, the [adjoining property owner] own[s] the bed of the stream by the same title that they own the adjoining land."¹⁹ Owners of the bed have the exclusive right of control of everything above the streambed, which also lends support to the idea that where the streambed is privately owned, the public cannot use the surface.²⁰ What constitutes a state and private ownership interest in the bed and banks of a navigable river changes as the river gradually moves over time, and thus, the ownership interests are not fixed.²¹

Kansas's law has not dealt with the issue of portage and other incidents of navigation on navigable streams.

⁹ *Id.*

¹⁰ *Meek*, 785 P.2d at 1363.

¹¹ *Id.*

¹² Kansas Attorney General Opinion No. 2000-51 (Oct. 4, 2000).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Wadley, *supra* note 6, at 31.

¹⁶ Kan. Stat. Ann. § 21-5808 (2020).

¹⁷ *Id.* § 70a-106. *See also* Kansas Att'y Gen. Op. Nos. 82-240, 88-35, & 89-5.

¹⁸ *Siler v. Dreyer*, 327 P.2d 1031, 1033 (Kan. 1958).

¹⁹ *Meek*, 785 P.2d at 1358.

²⁰ *Id.* at 1358 ("If the stream is nonnavigable, [those] who own the land adjoining both sides of the stream[] may put a fence across the stream to prevent trespassers upon their property."); *see also id.* at 1364.

²¹ Kansas Att'y Gen. Op. No. 97-45 (May 6, 1997).

Miscellaneous

In *Meek v. Hays*, the court pointed out that where the legislature refuses to create a public trust for recreational purposes in non-navigable streams, courts should not alter the legislature's statement of public policy by judicial legislation. If the non-navigable waters of Kansas are to be appropriated for recreational use, then the legislative process is the proper method to achieve this goal. Despite the strong desire for this to happen by the citizens of Kansas, no such legislation has been promulgated to date.

Criminal trespass on private land or non-navigable water that is fenced or posted against trespass or where the owner has communicated to the trespasser is a class B non-person misdemeanor.²²

Additional information on boating and fishing in Kansas can be found at the Kansas Department of Wildlife, Parks and Tourism's website, <https://ksoutdoors.com/>.

²² Kan. Stat. Ann. § 21-5808 (2020).