

North Dakota Navigability Report

Summary

North Dakota owns the beds and banks of navigable waters, and state ownership or the public trust extends to the high-water mark on navigable waters; accordingly, public use for recreation and commerce on navigable waters extends to the high-water mark. But the definition of navigable waters under state law is uncertain, and may encompass waters navigable to recreational boating or may be limited to only those with a capacity for commerce.

State Test of Navigability

North Dakota state court decisions have considered waters navigable if navigable-in-fact at the time of statehood.¹

The North Dakota Supreme Court has considered capacity for public use as evidence of navigability, whether for commercial or recreational purposes.² Few state court decisions, however, discuss the contours of navigability. In contrast, Section 61-33-01 of the North Dakota Century Code and Section 89-10-01-03 of the state's administrative code, both adopted in 1989, define navigable waters based on the capacity for commerce mirroring the federal test for navigability.³ The North Dakota Water Commission and State Engineer also use the commercial use test.⁴ No authoritative judicial decision has either affirmed or repudiated the recreational boating test in the context of either the statute or the regulation. Accordingly, it is unclear whether a state court asked to adjudicate navigability today would adopt the more restrictive commerce test or the recreational boating test.⁵

¹ See *State v. Brace*, 36 N.W.2d 330, 332-33 (N.D. 1949) (“[T]he state may not now successfully assert title, on the ground of navigability, to lands lying beneath non-navigable waters unless those waters were in fact navigable at the time of statehood in the absence of subsequent conveyances to the state The test is one of navigability in fact.”); *Roberts v. Taylor*, 181 N.W. 622, 626 (N.D. 1921). *But see* N.D. Cent. Code Ann. § 61-33-01 (2021) (“‘Navigable waters’ means waters that were in fact navigable at the time of statehood, and that are used, were used, or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.”); N.D. Admin. Code § 89-10-01-03 (2021) (same).

² *Roberts*, 181 N.W. at 626 (“Purposes of pleasure, public convenience, and enjoyment may be public as well as purposes of trade. Navigation may as surely exist in the former as in the latter.”); *see also* *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488 (N.D. 1949) (discussing the lack of any boating and fishing, and lack of suitability for “purposes of pleasure” when determining a lake to be non-navigable).

³ N.D. Cent. Code Ann. § 61-33-01 (“‘Navigable waters’ means waters that were in fact navigable at the time of statehood, and that are used, were used, or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.”); N.D. Admin. Code § 89-10-01-03 (same).

⁴ North Dakota Water Comm’n & State Eng’r, *Navigable & Non-Navigable Waters of the State of North Dakota* (Jan. 1, 2015), https://www.swc.nd.gov/pdfs/navigability_report.pdf.

⁵ Although adoption of the commercial use test would almost certainly reduce the scope of navigable waterways in North Dakota, it is possible that waters navigable-in-fact under the recreational boating test may remain subject to the public trust. *Cf.* *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 543 & n.7 (N.D. 1994) (noting that a statutory change generally cannot retroactively alter vested rights); *Brace*, 36 N.W.2d at 332 (“The legislature may not adopt a retroactive definition of navigability which would destroy a title already vested under a federal grant, or

In Missouri River has been found navigable in its entirety.⁶ Sweetwater Lake⁷ and Devils Lake have also been found to be navigable.⁸ The North Dakota Water Commission and State Engineer has identified the following waters as navigable as of May 2018: Bois De Sioux, Cannonball River, Devils Lake, Heart River, James River, Knife River, Lake Metigoshe, Long Lake, Missouri River, Mouse River, Painted Woods Lake, Pembina River, Red River, Sheyenne River, Sweetwater Lake, Upper Des Lacs Lake, and Yellowstone River.⁹ The North Dakota Water Commission and State Engineer

Extent of Public Rights in Navigable and Non-Navigable Rivers

Per the North Dakota Constitution, the state owns all waters navigable at statehood, to include the underlying beds, though not waters that became navigable after statehood.¹⁰ The state owns to the high water mark these waters.¹¹ North Dakota holds title to the beds of waters navigable at the time of statehood in 1889 in trust for the public.¹² The state may, however, grant or convey its lands to the low-water mark, subject, however, “the restrictions of the public trust doctrine.”¹³

Neither the courts nor the legislature have definitively addressed the extent of the public trust in navigable waters.¹⁴ The North Dakota Supreme Court has said in dicta, but on several occasions as recently as 2020, that the incidents of public trust include boating, swimming, recreation, and fishing.¹⁵ Because the state owns to the high-water mark on most navigable waters and where the state owns only to the low-water mark, the public trust extends to the high-water mark,¹⁶ touching the banks and bottoms should be permissible up to the high-water mark.

transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner.”).

⁶ *Voge v. Schnaidt*, 635 N.W.2d 161, 162 (N.D. 2001) (quoting *Hogue v. Bourgois*, 71 N.W.2d 47 (N.D. 1955) (“[T]he Missouri River is a navigable stream in this state.”)).

⁷ *Roberts*, 181 N.W. at 626.

⁸ *101 Ranch v. United States*, 905 F.2d 180 (8th Cir. 1990), *aff’g*, 714 F.Supp. 1005 (D.N.D. 1988).

⁹ See North Dakota Water Comm’n & State Eng’r, Guide To Navigating North Dakota Navigable Waters, https://www.swc.nd.gov/pdfs/navigating_sovereign_lands_waters.pdf (last visited June 14, 2021); see also North Dakota Water Comm’n & State Eng’r, Navigable & Non-Navigable Waters of the State of North Dakota, *supra* note 4.

¹⁰ See *Sorum v. State*, 947 N.W.2d 382, 398 (N.D. 2020) (citing N.D. Const. art. XI, § 3; *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488 (N.D. 1949); and *Bigelow v. Draper*, 69 N.W. 570 (1896)); accord *State ex rel. Sprynczynatyk v. Mills*, 592 N.W.2d 591, 592 (N.D. 1999) (citing *J.P. Furlong Enter., Inc. v. Sun Expl. & Prod. Co.*, 423 N.W.2d 130 (N.D. 1988)).

¹¹ *Reep v. State*, 841 N.W.2d 664, 671 (N.D. 2013); *Mills*, 592 N.W.2d at 592. See also N.D. Cent. Code § 61-33-01 (“Sovereign lands’ means those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams.”).

¹² See *Reep*, 841 N.W.2d at 675 (discussing the state’s reservation of rights under the public trust doctrine when conveying lands under navigable waters); *North Dakota State Water Comm’n v. Bd. of Managers*, 332 N.W.2d 254 (N.D. 1983) (citing *United Plainsmen Ass’n v. North Dakota State Water Conservation Comm’n*, 247 N.W.2d 457 (N.D. 1976)) (“The State holds the navigable waters in “trust” for the public.”).

¹³ *Reep*, 841 N.W.2d at 675.

¹⁴ See Charles M. Carvell, *North Dakota Waterways: The Public’s Right of Recreation and Questions of Title*, 64 N.D. L. Rev. 7, 66 (1988).

¹⁵ *Sorum*, 947 N.W.2d at 397 (citing *J. P. Furlong Enter.*, 423 N.W.2d at 140).

¹⁶ E.g., *Reep*, 841 N.W.2d at 675.

For riparian owners along non-navigable streams, “the owner of land through which a non[-]navigable stream flowed [is] possessed of the title to the bed of the stream.”¹⁷ The riparian owner owns to the center of a non-navigable watercourse.¹⁸ The public does not appear to have any rights in non-navigable streams unless owned by the state.¹⁹

Miscellaneous

For additional information on boating and fishing in North Dakota, including an interactive boating access map, visit the state’s Game and Fish Department’s website at <https://gf.nd.gov/boating>.

For additional information about navigability and legal access to waters in North Dakota, visit the Water Commission and State Engineer’s website at <https://www.swc.nd.gov/>. The Commission’s “Guide To Navigating North Dakota Navigable Waters” at https://www.swc.nd.gov/pdfs/navigating_sovereign_lands_waters.pdf provides a short summary to recreational boating rights and a map of navigable waters. These pronouncements may not be binding on a state court, however.

¹⁷ *Sorum*, 947 N.W.2d at 398 (citing *Bigelow*, 69 N.W. at 572).

¹⁸ *Amoco Oil Co. v. State Highway Dep’t*, 262 N.W.2d 726, 728 (N.D. 1978).

¹⁹ See North Dakota Water Comm’n & State Eng’r, Guide To Navigating North Dakota Navigable Waters, *supra* note 9.