

Oklahoma Navigability Report

Summary

Oklahoma is OK for boaters. Boaters may use any stream capable of floating them. Whether this right includes any use of the bottom, including wading and pushing-off with a paddle, or right of portage, however, is unclear.

State Test of Navigability

In Oklahoma, “navigability in fact is the test of navigability in law.”¹ Many major rivers, however, have been found to be non-navigable, such as the Red River, the Arkansas River above its convergence with the Grand River, and the Neosho and Grand Rivers.² The Kiamichi River has been found Navigable.

In determining that the Kiamichi River was a public highway, the Oklahoma Supreme Court in *Curry v. Hill* made note that the river was used by the public for fishing, recreation and pleasure, as it is known as one of the best fishing streams in the state.³ The Court also noted that the river was used by small boats, was about 150-200 feet wide at the point in question, and had been used in the past in commerce for floating logs.⁴ Upon examination of all of the facts and circumstances, the stream was found to be an “open” stream and navigable in fact, and therefore a public highway.⁵

Extent of Public Rights in Navigable and Non-Navigable Rivers

A servitude likely exists on non-navigable streams, which comprise most of the streams in Oklahoma. In support of this theory, Oklahoma law states that definite non-navigable streams are public waters in Oklahoma, even though the streambed may be privately owned.⁶ In *Curry*, the Oklahoma Supreme Court opined that “the owner of land through which a non-navigable river flows . . . owns the beds thereof subject to the rights of the public to use the river as a

¹ E.g., *Curry v. Hill*, 460 P.2d 933, 935-36 (Okla. 1969); *Aladdin Petroleum Corp. v. State ex rel. Comm’rs of Land Office*, 191 P.2d 224, 229 (Okla. 1948); *Hanes v. State*, 973 P.2d 330, 334 (Okla. Crim. App. 1998).

² See U.S. v. Grand River Dam Auth, 363 U.S. 229, 230 (1960) (Grand River); *Lynch v. Clements*, 263 P.2d 153 (Okla. 1953) (Arkansas River) (citing *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 86 (1922)); *Aladdin Petroleum*, 191 P.2d at 229 (Red River); *Hanes*, 973 P.2d at 334 (Neosho and Grand Rivers).

³ *Curry*, 460 P.2d at 935.

⁴ *Id.*

⁵ *Id.* at 936.

⁶ *Oklahoma Water Res. Bd. v. Central Okla. Master Conservancy Dist.*, 464 P.2d 748, 753 (Okla. 1968). Definite non-navigable streams are public waters, and the state may either reserve to itself or grant to others its right to utilize these streams for beautiful purposes. *Id.* A definite stream need only be “a visible course or channel, and is of sufficient magnitude or volume to show frequent action of running water.” *Id.* See also Okla. Stat. tit. 60 § 60 (2020) (“Water running in a definite stream, formed by nature over or under the surface, may be used by the owner of the land riparian to the stream for domestic uses . . . [but] such water then becomes public water and is subject to appropriation for the benefit and welfare of the people of the state.”).

public highway.”⁷ The court’s discussion in *Curry* indicates that some definite watercourses may be open to the public even if determined not to be navigable in fact. And an opinion of Oklahoma’s Attorney General prohibits fencing across a definite stream.⁸ It is unclear, however, what standards a non-navigable stream must meet in order to be subject to a public servitude.

A boatable stream should be considered open and navigable in fact, and therefore navigable in law. Similarly, a boatable stream would also likely be found to be a public highway even if non-navigable. Thus, regardless of which standard applies, the public should have the right to use the waters.

As a general rule, the ownership of the river bed of a non-navigable river belongs to the owners of the shores on two sides, divided by an imaginary line drawn through the middle of the river.⁹ An owner of land through which a non-navigable river flows is the owner of the river bed. The ownership right, however, is subject to the rights of the public to use the river as a public highway, and the owner does not have exclusive fishing rights in the river.¹⁰ Furthermore, a landowner cannot assert ownership in water forming a definite stream.¹¹ The landowner’s rights in the stream are purely riparian. Riparian owners, however, may act to prevent physical trespass upon their property by fishermen and boaters seeking access to the public waters.¹²

The public has the right to fish from boats in non-navigable streams but does not have the right to fix or fasten trotlines in a privately owned streambed.¹³ This leaves open many questions, including whether incidental contact with the bottom is allowed, whether portage is allowed, etc. One obstacle to favorable findings on these unanswered questions is the “fished on from boats” language in *Curry*.¹⁴ The use of this language may imply that touching the bottom amounts to trespass. Alternatively, it may just be an effort by *Curry* to highlight the difference between fishing with a pole and fishing by anchoring a trotline. Incidental contact from fishing with a pole can be distinguished from anchoring trotlines, due to the ephemeral nature of the former. Additionally, it would seem unreasonable to condone and encourage the use of non-navigable streams without allowing for incidental contact with the bottom. An Oklahoma court will have to decide this at some time in the future. Support for the view that incidents of navigation are permissible in non-navigable streams also can be drawn from *Curry*, where the court cited with approval *Elder v. Delcour*,¹⁵ a Missouri case, which held that permissible uses included uses incident to travel on the river, such as floating, fishing, and wading, for business and pleasure.

⁷ *Id.* at 935. The court in *Curry* held, however, that the river in question was navigable, and thus left open when a non-navigable river would be a public highway.

⁸ Op. Okla. Att’y Gen. 78-170 (July 31, 1971). All waters forming a definite stream, navigable or non-navigable, are not subject to individual ownership. Such waters are public waters, subject to appropriation by the state for the benefit and welfare of the people of the state. *Id.*

⁹ *Curry*, 460 P.2d 934 (citing Okla. Stat. tit. 60, § 338).

¹⁰ *Id.* at 933-94.

¹¹ *Oklahoma Water Res. Bd.*, at 750.

¹² *Curry*, 460 P.2d at 936.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 269 S.W.2d 17, 26 (Mo. 1954).

Miscellaneous

Since definite streams are public waters, an individual is not subject to fine and punishment for fishing upon the same without the consent of the riparian owner. However, those utilizing private property to gain access to public streams without the consent of the landowner are subject to fine and punishment upon the filing of a proper complaint.¹⁶

For additional information on boating in Oklahoma, visit the Oklahoma Department of Public Safety's website at <https://oklahoma.gov/dps/administrative-rules/boating-and-water-safety.html>.

For additional information on fishing in Oklahoma, visit the Oklahoma Department of Wildlife Conservation at https://www.wildlifedepartment.com/law/fishing_regs.

¹⁶ Op. Okla. Att'y Gen. 78-170 (July 31, 1971).