

Utah Navigability Report

Summary

In Utah, the public owns the water and has the right to use any surface water for which legal access exists. The public has the right to use navigable waters and their beds for navigation and recreation. The public may also use non-navigable but otherwise floatable waters, even if held privately, for boating and for fishing while boating, and may contact the beds if incidental to boating. But there is no right to general recreation on floatable non-navigable waters where privately owned unless the public has obtained an easement through a statutorily-define process.

State Test of Navigability

The Utah Supreme Court has held that Utah, pursuant to statute, has adopted the federal test for navigability,¹ under which “the touchstone of navigability is commercial utility.”² Utah statute defines navigable waters as “a water course that in its natural state without the aid of artificial means is useful for commerce and has a useful capacity as a public highway of transportation.”³ Evidence of navigability includes “regular log drives . . ., transportation of mining timbers, and the delivery of logs to sawmills.”⁴

Extent of Public Rights in Navigable and Non-Navigable Rivers

All waters in Utah, whether above or under the ground, or in navigable or non-navigable bodies or water, are property of the public.⁵ The state owns the lands “lying below the ordinary high water mark of navigable bodies of water at the date of statehood,”⁶ held in trust for the public.⁷ Lands underlying non-navigable waters may be held privately.

Utah enacted the Public Waters Access Act in 2010 in response to Utah Supreme Court decisions regarding public rights in private property and a lack of legislative guidance on the issue.⁸ The

¹ Utah Stream Access Coal. v. Orange Street Dev., 416 P.3d 553, 558 (Utah 2017) (citing Utah Code § 73-29-102(4)).

² *Orange Street Dev.*, 416 P.3d at 559-60 (citing Utah Code § 73-29-102(4)).

³ Utah Code Ann. § 73-29-102(4) (West 2021).

⁴ *Orange Street Dev.*, 416 P.3d at 559.

⁵ Utah Code Ann. § 73-1-1(1) (West 2021).

⁶ *Id.* § 65A-1-1(6) (West 2021); *accord* State *ex rel.* Div. of Forestry, Fire & State Lands v. Tooele Cty., 44 P.3d 680, 687-88 (Utah 2002).

⁷ Utah Div. of State lands v. United States, 482 U.S. 193 (1987); United States v. State of Utah, 283 U.S. 64 (1931); *see also* Utah Code Ann. § 73-1-1.

⁸ Utah Code Ann. § 73-29-103(3); Utah Stream Access Coal. v. VR Acquisitions, LLC, 439 P.3d 593, 598 (Utah 2019). The two state decisions addressed by the Public Waters Access Act are *J.J.N.P. Co. v. State*, 655 P.2d 1133 (Utah 1982) and *Conatser v. Johnson*, 194 P.3d 897 (Utah 2008). Utah Code Ann. § 73-29-103(3); *VR Acquisitions*, 439 P.3d at 598. The Public Waters Access Act, Utah Code §§ 73-29-101 to 73-29-208, has been challenged as an unconstitutional restriction of a pre-existing public easement to touch privately owned beds of state waters, but the Utah Supreme Court has not yet decided the issue. *See VR Acquisitions*, 439 P.3d 59 at 601.

public's right to use public waters for recreation is now governed by the Public Waters Access Act.⁹

The Public Waters Access Act permits the public to “float on public water that has sufficient width, depth, and flow to allow free passage of the chosen vessel at the time of floating.”¹⁰ The public's right to float these waters for recreational purposes exists when the waters are either navigable or on public property.¹¹ The state's ownership of all waters, however, “does not create or recognize an easement for public recreational use on private property.”¹² Notwithstanding the lack of a public right on private waters to recreational activities in general, the public may, however, float upon waters flowing over private property and may fish those waters while floating.¹³

Utah law provides two independent basis for the public to access the beds.¹⁴ First, navigable waters and their beds are open to the public because the state, not private parties, holds title to the beds of navigable waters.¹⁵ Second, “the public has an unquestioned right to use the waters of the state themselves (even non-navigable ones),”¹⁶ and at a minimum, per the Public Waters Access Act, the public may then “incidentally touch private property as required for safe passage and continued movement;” “portage around a dangerous obstruction” when made in the most direct, least invasive manner; and “fish while floating.”¹⁷ The public must access public waters via public property and has no right to cross private property to affect access other than the limited right to portage around obstacles.¹⁸

Utah law, however, carves out one exception to the general rule that the public may not recreate on private property. The Public Waters Access Act recognizes the doctrine of prescription, by which the public may acquire an easement for “a limited right of public recreational access on private property.”¹⁹ “This public access permits public use of the waters for floating, fishing, or waterfowl hunting.”²⁰ Further, the public may touch private property when incidental to use of the waters both (1) to portage around obstacles by the “most direct, least invasive, and closest means” and (2) within three feet of the public waters.²¹ The public must still access the waters without crossing private property absent the landowner's permission.²² The easement (i.e.,

⁹ Utah Code Ann. § 73-1-1(4).

¹⁰ *Id.* § 73-20-202 (West 2021).

¹¹ *See id.* §§ 73-20-102(4), 202.

¹² *Id.* § 73-1-1(2).

¹³ *Id.* § 73-29-102(2) (defining “floating access”), *id.* § 73-29-202(1) (right to float upon floatable public waters).

¹⁴ *VR Acquisitions*, 439 P.3d at 600-601.

¹⁵ *Id.* (citing *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589 (2012) and the Public Waters Access Act, Utah Code Ann. §§ 73-29-101 to 73-29-208).

¹⁶ *Id.* at 601.

¹⁷ Utah Code Ann. § 73-20-202; *accord id.* § 73-29-102(6). *See also VR Acquisitions*, 439 P.3d at 601 (discussing, without deciding, whether the Public Waters Access Act unconstitutionally restricts the public's right to touch streambeds where held privately).

¹⁸ *Id.* § 73-29-202.

¹⁹ *Id.* § 73-29-103(6).

²⁰ *Id.* § 73-29-102(6), (7), (9).

²¹ *Id.*

²² *Id.* § 73-29-102(6).

“public recreational access”) exists when “private property has been used by the public for recreational access . . . for a period of at least 10 consecutive years that begins after September 22, 1982” and if public use has been continuous, open and notorious, adverse, and without interruption.²³

Miscellaneous

Entry upon property that is posted, fenced, or after personal communication that the property is private is a trespass infraction.²⁴

For additional information on boating and fishing in Utah, visit the Department of Natural Resources website at <https://stateparks.utah.gov/activities/> or <https://wildlife.utah.gov/fishing/main-fishing-page.html>.

²³ *Id.* § 73-20-203(1). For additional information on meeting these terms, see state court decisions interpreting prescription or adverse possession. The terms, however, generally have the following meanings. “Continuous” use requires use as would be customary for recreation on the waters and not a literal constant physical presence, and need not be by the same person. For example, if a stream were floatable half the year, public access a few weekends a month during the floatable season would likely suffice, but sporadic use over several years with long periods of non-use would likely not suffice. “Open and notorious” means that public access would place a reasonably prudent landowner on notice that other parties have accessed the property. “Adverse” means without the owner’s permission. “Without interruption” means the true owner has not stopped, or attempted to stop, the public’s access or granted permission before the 10-year statutory period has elapsed; an interruption would reset the statutory period. Prescription cannot be used against state lands, though the public already enjoys a right to use public lands.

²⁴ *Id.* § 76-6-206 (West 2021).