Title 33 - Navigation and Navigable Waters
Chapter II - Corps of Engineers, Department of the Army, Department of Defense

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PART 329 - DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES

Authority: 33 U.S.C. 401 *et seq.*

Source: 51 FR 41251, Nov. 13, 1986, unless otherwise noted.

§ 329.1 Purpose.

This regulation defines the term "navigable waters of the United States" as it is used to define authorities of the Corps of Engineers. It also prescribes the policy, practice and procedure to be used in determining the extent of the jurisdiction of the Corps of Engineers and in answering inquiries concerning "navigable waters of the United States." This definition does not apply to authorities under the Clean Water Act which definitions are described under 33 CFR parts 323 and 328.

§ 329.2 Applicability.

This regulation is applicable to all Corps of Engineers districts and divisions having civil works responsibilities.

§ 329.3 General policies.

Precise definitions of "navigable waters of the United States" or "navigability" are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies. However, the policies and criteria contained in this regulation are in close conformance with the tests used by Federal courts and determinations made under this regulation are considered binding in regard to the activities of the Corps of Engineers.

§ 329.4 General definition.

Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity.

§ 329.5 General scope of determination.

The several factors which must be examined when making a determination whether a waterbody is a navigable water of the United States are discussed in detail below. Generally, the following conditions must be satisfied:

(a) Past, present, or potential presence of interstate or foreign commerce;

(b) Physical capabilities for use by commerce as in paragraph (a) of this section; and

(c) Defined geographic limits of the waterbody.

§ 329.6 Interstate or foreign commerce.

(a) ***Nature of commerce: type, means, and extent of use.*** The types of commercial use of a waterway are extremely varied and will depend on the character of the region, its products, and the difficulties or dangers of navigation. It is the waterbody's capability of use by the public for purposes of transportation of commerce which is the determinative factor, and not the time, extent or manner of that use. As discussed in § 329.9 of this part, it is sufficient to establish the potential for commercial use at any past, present, or future time. Thus, sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time.

(b) ***Nature of commerce: interstate and intrastate.*** Interstate commerce may of course be existent on an intrastate voyage which occurs only between places within the same state. It is only necessary that goods may be brought from, or eventually be destined to go to, another state. (For purposes of this regulation, the term "interstate commerce" hereinafter includes "foreign commerce" as well.)

§ 329.7 Intrastate or interstate nature of waterway.

A waterbody may be entirely within a state, yet still be capable of carrying interstate commerce. This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state. Nor is it necessary that there be a physically navigable connection across a state boundary. Where a waterbody extends through one or more states, but substantial portions, which are capable of bearing interstate commerce, are located in only one of the states, the entirety of the waterway up to the head (upper limit) of navigation is subject to Federal jurisdiction.

§ 329.8 Improved or natural conditions of the waterbody.

Determinations are not limited to the natural or original condition of the waterbody. Navigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation.

(a) ***Existing improvements: artificial waterbodies.***

(1) An artificial channel may often constitute a navigable water of the United States, even though it has been privately developed and maintained, or passes through private property. The test is generally as developed above, that is, whether the waterbody is capable of use to transport interstate commerce. Canals which connect two navigable waters of the United States and which are used for commerce clearly fall within the test, and themselves become navigable. A canal open to navigable waters of the United States on only one end is itself navigable where it in fact supports interstate commerce. A canal or other artificial waterbody that is subject to ebb and flow of the tide is also a navigable water of the United States.

(2) The artificial waterbody may be a major portion of a river or harbor area or merely a minor backwash, slip, or turning area (see § 329.12(b) of this part).

(3) Private ownership of the lands underlying the waterbody, or of the lands through which it runs, does not preclude a finding of navigability. Ownership does become a controlling factor if a privately constructed and operated canal is not used to transport interstate commerce nor used by the public; it is then not considered to be a navigable water of the United States. However, a

private waterbody, even though not itself navigable, may so affect the navigable capacity of nearby waters as to nevertheless be subject to certain regulatory authorities.

(b) ***Non-existing improvements, past or potential.*** A waterbody may also be considered navigable depending on the feasibility of use to transport interstate commerce after the construction of whatever "reasonable" improvements may potentially be made. The improvement need not exist, be planned, nor even authorized; it is enough that potentially they could be made. What is a "reasonable" improvement is always a matter of degree; there must be a balance between cost and need at a time when the improvement would be (or would have been) useful. Thus, if an improvement were "reasonable" at a time of past use, the water was therefore navigable in law from that time forward. The changes in engineering practices or the coming of new industries with varying classes of freight may affect the type of the improvement; those which may be entirely reasonable in a thickly populated, highly developed industrial region may have been entirely too costly for the same region in the days of the pioneers. The determination of reasonable improvement is often similar to the cost analyses presently made in Corps of Engineers studies.

§ 329.9 Time at which commerce exists or determination is made.

(a) ***Past use.*** A waterbody which was navigable in its natural or improved state, or which was susceptible of reasonable improvement (as discussed in § 329.8(b) of this part) retains its character as "navigable in law" even though it is not presently used for commerce, or is presently incapable of such use because of changed conditions or the presence of obstructions. Nor does absence of use because of changed economic conditions affect the legal character of the waterbody. Once having attained the character of "navigable in law," the Federal authority remains in existence, and cannot be abandoned by administrative officers or court action. Nor is mere inattention or ambiguous action by Congress an abandonment of Federal control. However, express statutory declarations by Congress that described portions of a waterbody are non-navigable, or have been abandoned, are binding upon the Department of the Army. Each statute must be carefully examined, since Congress often reserves the power to amend the Act, or assigns special duties of supervision and control to the Secretary of the Army or Chief of Engineers.

(b) ***Future or potential use.*** Navigability may also be found in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date. Non-use in the past therefore does not prevent recognition of the potential for future use.

§ 329.10 Existence of obstructions.

A stream may be navigable despite the existence of falls, rapids, sand bars, bridges, portages, shifting currents, or similar obstructions. Thus, a waterway in its original condition might have had substantial obstructions which were overcome by frontier boats and/or portages, and nevertheless be a "channel" of commerce, even though boats had to be removed from the water in some stretches, or logs be brought around an obstruction by means of artificial chutes. However, the question is ultimately a matter of degree, and it must be recognized that there is some point beyond which navigability could not be established.

§ 329.11 Geographic and jurisdictional limits of rivers and lakes.

(a) ***Jurisdiction over entire bed.*** Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.

(1) The "ordinary high water mark" on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.

(2) Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; however, private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.

(b) ***Upper limit of navigability.*** The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

§ 329.12 Geographic and jurisdictional limits of oceanic and tidal waters.

(a) ***Ocean and coastal waters.*** The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).

(1) ***Baseline defined.*** Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.

(2) ***Shoreward limit of jurisdiction.*** Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

(b) ***Bays and estuaries.*** Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

§ 329.13 Geographic limits: Shifting boundaries.

Permanent changes of the shoreline configuration result in similar alterations of the boundaries of the navigable waters of the United States. Thus, gradual changes which are due to natural causes and are perceptible only over some period of time constitute changes in the bed of a waterbody which also change the shoreline boundaries of the navigable waters of the United States. However, an area will remain "navigable in law," even though no longer covered with water, whenever the change has occurred suddenly, or was caused by artificial forces intended to produce that change. For example, shifting sand bars within a river or estuary remain part of the navigable water of the United States, regardless that they may be dry at a particular point in time.

§ 329.14 Determination of navigability.

(a) ***Effect on determinations.*** Although conclusive determinations of navigability can be made only by federal Courts, those made by federal agencies are nevertheless accorded substantial weight by the courts. It is therefore necessary that when jurisdictional questions arise, district personnel carefully investigate those waters which may be subject to Federal regulatory jurisdiction under guidelines set out above, as the resulting determination may have substantial impact upon a judicial body. Official determinations by an agency made in the past can be revised or reversed as necessary to reflect changed rules or interpretations of the law.

(b) ***Procedures of determination.*** A determination whether a waterbody is a navigable water of the United States will be made by the division engineer, and will be based on a report of findings prepared at the district level in accordance with the criteria set out in this regulation. Each report of findings will be prepared by the district engineer, accompanied by an opinion of the district counsel, and forwarded to the division engineer for final determination. Each report of findings will be based substantially on applicable portions of the format in paragraph (c) of this section.

(c) ***Suggested format of report of findings:***

(1) Name of waterbody:

(2) Tributary to:

(3) Physical characteristics:

(i) Type: (river, bay, slough, estuary, etc.)

(ii) Length:

(iii) Approximate discharge volumes: Maximum, Minimum, Mean:

(iv) Fall per mile:

(v) Extent of tidal influence:

(vi) Range between ordinary high and ordinary low water:

(vii) Description of improvements to navigation not listed in paragraph (c)(5) of this section:

4 Nature and location of significant obstructions to navigation in portions of the waterbody used or potentially capable of use in interstate commerce:

5 Authorized projects:

i Nature, condition and location of any improvements made under projects authorized by Congress:

ii Description of projects authorized but not constructed:

iii List of known survey documents or reports describing the waterbody:

6 Past or present interstate commerce:

i General types, extent, and period in time:

ii Documentation if necessary:

7 Potential use for interstate commerce, if applicable:

i If in natural condition:

ii If improved:

8 Nature of jurisdiction known to have been exercised by Federal agencies if any:

9 State or Federal court decisions relating to navigability of the waterbody, if any:

10 Remarks:

11 Finding of navigability (with date) and recommendation for determination:

§ 329.15 Inquiries regarding determinations.

a Findings and determinations should be made whenever a question arises regarding the navigability of a waterbody. Where no determination has been made, a report of findings will be prepared and forwarded to the division engineer, as described above. Inquiries may be answered by an interim reply which indicates that a final agency determination must be made by the division engineer. If a need develops for an emergency determination, district engineers may act in reliance on a finding prepared as in section 329.14 of this part. The report of findings should then be forwarded to the division engineer on an expedited basis.

b Where determinations have been made by the division engineer, inquiries regarding the *navigability* of specific portions of waterbodies covered by these determinations may be answered as follows:

This Department, in the administration of the laws enacted by Congress for the protection and preservation of the navigable waters of the United States, has determined that ___ (River) (Bay) (Lake, etc.) is a navigable water of the United States from ___ to ___. Actions which modify or otherwise affect those waters are subject to the jurisdiction of this Department, whether such actions occur within or outside the navigable areas.

c Specific inquiries regarding the *jurisdiction* of the Corps of Engineers can be answered only after a determination whether

1 the waters are navigable waters of the United States or

2 If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.

§ 329.16 Use and maintenance of lists of determinations.

a Tabulated lists of final determinations of navigability are to be maintained in each district office, and be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.

b It should be noted that the lists represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not navigable.

c Deletions from the list are not authorized. If a change in status of a waterbody from navigable to non-navigable is deemed necessary, an updated finding should be forwarded to the division engineer; changes are not considered final until a determination has been made by the division engineer.

American Whitewater

Nevada Navigability Report

Summary

In Nevada, navigable streams are those capable of being used or that have been used for commerce, such as floating logs to market. These streams can be floated, and probably fished, recreationally. The right to portage obstructions is undecided in Nevada.

State Test of Navigability

Nevada courts have held that streams are navigable if used or susceptible to being used at regularly-occurring times as highways for commerce over which trade and travel are or may be conducted in customary modes of travel on water.[1)] Nevada courts have applied the federal title test and found that streams that were historically used to drive logs to market satisfy the federal title test.[2)] This test vests title to the beds underlying these waters in the state.[3)] Navigability is not destroyed if the waterway is interrupted by occasional natural obstructions or portages, and a stream need not be open all year to be considered navigable.[4)] Neither the courts nor the statutes in Nevada have addressed the issue of whether the public trust exists in streams that are too small to pass the federal title or commerce test.

Extent of Public Rights in Navigable and Non-Navigable Rivers

Although the public trust applies at least to streams navigable under the federal title test and the navigation servitude to streams navigable under the federal commerce test, Nevada law has not defined the extent of the public trust or the navigation servitude. Navigable streams may be boated, and most likely waded and fished, but rights regarding portaging obstruction have not been decided.

Trespass is a misdemeanor that occurs when a person enters or remains upon the land of another after receiving a sufficient warning not to trespass.[5)] A landowner may provide "sufficient warning" by fencing the property or by following certain posting procedures set out in the trespass statute.[6)] While the term "fence" is defined in the statute to include "a wall, hedge, or chain link or wire mesh fence," the statute was amended in June 2007 to make clear that the term "fence" does not include a barbed wire barrier.[7)] It is prima facie evidence of trespass for anyone to be found on property which is posted or fenced in the manner described in the trespass statute "without lawful business with the owner or occupant of the property."[8)]

Miscellaneous

Several rivers in Nevada, including the Colorado River, the Virgin River, and the Carson River, have been declared to be

navigable to some degree by statute or by case law.[9]. Nevada courts have held that the list of navigable waters in the statutes is not exclusive, and that the issue of navigability is a "judicial question."[10]

In the opinion of the Attorney General of Nevada, the State Engineer, irrigation districts, the Division of State Lands, local counties through their district attorneys, and the United States have the authority to seek removal of structures that may encroach upon the natural channel of a navigable river.[11] Further, cities, counties, public districts such as irrigation districts and flood control districts, and the United States have the authority to improve a navigable river to maintain its water capacity or to avoid flood damage to adjoining property.[12]

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1) State v. Bunkowski, 503 P.2d 1231, 1234 (Nev. 1972).
2) Id. at 1233–36.
3) Id. at 1233.
4) Id. at 1235.
5) Nev. Rev. Stat. § 207.200 (2007).
6), 7), 8) Id.
9) The following rivers have been declared navigable under the federal title test in Nevada: (1) Colorado River by Nev. Rev. Stat. § 537.010 (2007); (2) Virgin River, including sources confluent above St. Thomas, by Nev. Rev. Stat. § 537.020 (2007); and (3) Carson River at Carson City by Bunkowski, 503 P.2d at 1236. A fourth body of water, Winnemucca Lake, was declared a navigable body of water by statute in 1921, Nev. Rev. Stat. § 537.030 (2007), but this lake is now entirely dry. The Nevada Supreme Court noted in Bunkowski that the United States Court of Appeals for the Ninth Circuit has held that Lake Tahoe is navigable. 503 P.2d at 1238 (citing Davis v. United States, 185 F.2d 938, 942–43 (9th Cir. 1950
10) Bunkowski, 503 P.2d at 1238.
11) Op. Att'y Gen. 80–11 (Nev. 1980).
12) Id.

American Whitewater

California Navigability Report

Summary

In California, if a stream can be floated for most of the year, then the public has the right to use the stream. The public may use the stream for recreational boating, fishing, swimming, hunting, etc. up to the high water mark.[1)]

State Test of Navigability

California courts have adopted a state test for determining which streams are subject to a public right of navigation. The waters subject to this right or "easement" include those waters that are navigable in fact at the present time by any watercraft, including small recreational or pleasure craft propelled by motor or by oar, such as canoes, rafts or kayaks. A number of cases have applied this test.[2)] California has rejected the common law rule that navigability is determined by whether the tide ebbs and flows.[3)]

To be considered navigable, the stream must be suitable for public use, which is determined on a case-by-case basis.[4)] The stream need not be navigable in fact for the entire year. A stream navigable in fact for most of the year should suffice.[5)]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The state acquired title to the navigable waters in its territory upon its admission to the union and the navigable waters and lands lying beneath them are held in trust for the benefit of the people.[6)] This includes all waters navigable in fact.[7)]

California's constitution allows the public to use all navigable waters in the state, and further directs the legislature to give the provision the most liberal construction.[8)] Regardless of whether the streambed of a river which is navigable in fact is public or privately owned, there is an easement for public navigation and the incidents of navigation; i.e. boating, fishing, swimming, hunting and other recreational uses.[9)] The easement exists up to the high water mark.[10)] This right includes the use of the bottom of navigable waters for anchoring, standing, or other purposes.[11)] The public easement, however, does

contexts, however, courts have suggested that an action which would otherwise constitute a trespass may be justified if prompted by the motive of preserving life or property, and if reasonably related to that purpose.[13)]

Courts are especially sensitive to infringements upon the public's constitutional rights under the guise of police power.[14)] The Attorney General found such an infringement when the state sought to prohibit the right to use navigable waters that

flowed over inundated privately-owned land adjacent to the navigable waterway.[15] In a landmark case, the same constitutional provision defeated a county ordinance that forbade rafting on a river because of the litter, pollution, and noise generated by the rafters. Although reasonable regulation was in order, use prohibition was not.[16] The California Attorney General, however, has opined that government may close navigable waterways to recreational boaters during an emergency, such as flood conditions, when such emergency rules and regulations are required to protect the safety of persons and property.[17]

There is no right to trespass across private property to access navigable waters.[18] Where a public road or bridge easement across private property intersects a waterway, however, lawful access to the waterway may be provided. For example, a kayaker was found innocent of trespass where the kayaker was carrying his boat from a county road across private land within the perimeter of the road easement to gain access to a navigable waterway.[19] In that case, the improved roadway narrowed where a bridge crossed the waterway; nevertheless, the kayaker's use of the entire road easement to access the waterway was reasonable. The County could have imposed or allowed reasonable restrictions on the use of the easement by the public but had not done so.[20]

Miscellaneous

Article I, section 25 of the California Constitution forbids the state from alienating land without reserving fishing rights in the public.

The state's subdivision map act (Government Code sections 66478.4 and 66478.5) requires that any subdivision development fronting on public waterways provide both (1) reasonable public access from a public highway to the bank of the waterway, and (2) dedication of a public easement along a portion of the waterway bordering on or lying within the subdivision. These rights are in addition to the existing public right to use a river below the high water line.[21]

See American Whitewater's letter [https://www.americanwhitewater.org/content/Document/view/documentid/571] regarding the Pit 4 Reservoir Closure for an example of how we have dealt with navigability issues on a project in California.

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1) Also see the article on California's Public Right to Float by Ronald W. Rogers available at http://www.americanwhitewater.org/archive/article/966 [https://www.americanwhitewater.org/archive/article/966].

2) Bohn v. Albertson, 107 Cal. App. 2d 738 (1951); People ex rel. Baker v. Mack, 19 Cal. App. 3d 1040, 1045-1051 (1971); Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal. App. 3d 560 (1976); Younger v. County of El Dorado, 96 Cal. App. 3d 403, 406 (1979); Kern River Public Access Committee v. City of Bakersfield, 170 Cal. App. 3d 1205 (1985). Additional cases, California Attorney General opinions, and related law reviews are listed in a letter from the Cal. Att'y Gen. to AWA, dated June 16, 1997 (on file with AWA).

3) Mack, 19 Cal. App. 3d at 1048.

4) Hitchings, 55 Cal. App. 3d at 570.

5) Id. at 571.

6) Colberg Inc. v. State of California ex rel. Dept. of Public Works, 67 Cal. 2d 408, 416 (1967).

7) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997

8) Cal. Const. Article X, section 4.

9) Mack, 19 Cal. App. 3d at 1045-1051.

10) Id. at 1050.

11) Bohn, 107 Cal. App. 2d at 749.
12) Op. Cal. Att'y Gen. SO 77-42 (February 1, 1978).
13) People v. Roberts, 47 Cal. 2d 374, 377 (1956).
14) Younger, 96 Cal. App. 3d at 406.
15) Op. Cal. Att'y Gen. 85-602 (October 10, 1985).
16) Younger, 96 Cal. App. 3d at 406-407.
17) 80 Ops. Cal. Atty. Gen. 311 (November 12, 1997).
18) Charpentier v. Von Geldern, 191 Cal. App. 3d 101, 110 (1987).
19) People v. Sweetser, 72 Cal. App. 3d 278 (1977).
20) Id.
21) Kern River Public Access Committee, 170 Cal. App. 3d at 1215.

American Whitewater

Arizona Navigability Report

Summary

The Arizona Navigable Stream Adjudication Commission ("ANSAC") has determined that, with the exception of the Colorado River, none of Arizona's watercourses is navigable. Ownership of the streambeds of non-navigable watercourses rests with either the federal government or private parties. Although the public likely enjoys recreational rights on waters above federally-owned streambeds, it has no such right to access waters above privately-owned streambeds.

State Test of Navigability

In 1992, the Arizona legislature established the ANSAC to conduct full evidentiary public hearings across the state to determine the navigability of each of Arizona's approximately 39,039 watercourses (of which about 2,241 are named) and to determine the public trust values of all watercourses that were navigable at statehood.

Arizona's test for navigability is codified at A.R.S. § 37-1101(5)) [http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/37/01101.htm&Title=37&DocType=ARS] and is based upon the "federal test" for navigability. Under this test, a watercourse is navigable if it: (1) was in existence on February 14, 1912; and (2) at that time, it was used or was susceptible to being used, in its ordinary and natural condition, as a highway for commerce, over which trade and travel were or could have been conducted in the customary modes of trade and travel on water.

Prior to 2001, the Arizona statute contained a number of presumptions and limitations that made it "almost impossible for an Arizona watercourse to be determined navigable."[1)] For instance, the statute required the navigability of a watercourse to be shown by "clear and convincing" evidence. In Defenders of Wildlife, the Arizona Court of Appeals declared certain provisions of the statute unconstitutional, finding that the restrictive presumptions and limitations conflicted with the federal test for navigability. Following the court's Defenders of Wildlife ruling, the legislature amended the statute in 2001 to reflect a less restrictive test of navigability, consistent with the federal test, and changed the burden of proof from the "clear and convincing" standard to the "preponderance of the evidence" standard.

Thus, the ANSAC now considers the following six criteria (in the order of greatest weight) as tending to demonstrate navigability

- Historical record of boating;
- Record of modern boating;
- Perennial stream flow (i.e., they do not flow only in direct response to precipitation);
- Dam located on the stream;
- Fish found in stream; and
- Special status (e.g., other water-related characteristics, including in-stream flow application

Special status (e.g., other water related characteristics, including in stream flow application

and/or permit, unique waters, wild and scenic, riparian, and preserve).[2)]

The ANSAC also considers the depth, width, and velocity of the water flow and compares these factors to the minimum standards required for different types of vessels, as well as the configuration of the channel and whether it contains rapids, boulders, or other obstacles.[3)]

Ownership of a streambed is determined by whether or not the streambed was navigable as of the date of statehood - February 14, 1912. Under Arizona's application of the "equal footing" doctrine, the state owns the bed of any watercourse that was navigable on the date of statehood. If the stream was not navigable on that date, then the owner of the streambed prior to the date of statehood retains title. Because the ANSAC has determined that all watercourses in Arizona - with the exception of the Colorado River - were non-navigable on the date of statehood,[4)] the state does not own the streambeds of any non-navigable watercourses. Thus, if the streambed was federal land prior to the date of statehood, the federal government would retain ownership. Alternatively, if the streambed had been previously patented by a private party or disposed of by the federal government, then the private party would retain title.

After the ANSAC issues its navigability determination for a particular watercourse, it must then publish a report describing the evidence considered, analytical methods used, and findings supporting its determination. Upon the publication of each report, there is a 180-day appeal period for the Arizona State Land Department ("SLD") and a 270-day appeal period for all other interested parties, during which time the ANSAC's determination may be appealed to the appropriate county superior court. Although the ANSAC has issued its initial navigability determinations for all watercourses in the state, it has yet to publish a number of supporting reports, including reports for some of the larger rivers, such as the Little Colorado, Puerco, Big Sandy, Bill Williams, Burro Creek, Santa Maria, Virgin, Agua Fria, Hassayampa, Gila, Upper Salt, and Verde Rivers.[5)] Thus, there remains an opportunity to appeal the ANSAC's determinations that these watercourses are non-navigable. The SLD's appeal of the ANSAC's determination that the Lower Salt River is non-navigable is pending before the Maricopa County Superior Court.

Extent of Public Rights in Navigable and Non-Navigable Rivers

On the Colorado River (and any other watercourses that may be found to be navigable by a court), the public has the right to boat, fish, and recreate.[6)]

The extent to which the public has rights in non-navigable watercourses depends upon the ownership of the streambed. For example, if the federal government has retained ownership, the public likely enjoys rights to boat, fish, wade, recreate, and portage. If, on the other hand, the streambed is privately owned, then the public may not boat, fish, or otherwise access the watercourse without the owner's permission.

Miscellaneous

For additional information on the navigability of Arizona's watercourses, see the ANSAC website at: http://www.azstreambeds.com [http://www.azstreambeds.com/].

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1) Defenders of Wildlife v. Hull, 18 P.3d 722, 737 (Ariz. Ct. App. 2001) (slip op. at

http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf [http://www.cofad1.state.az.us/opinionfiles/cv/cv990624.pdf]).

2) See, e.g, ANSAC Report, Findings and Determination Regarding the Navigability of Small and Minor Watercourses in Yuma County, Arizona (Feb. 20, 2003) at 25-27.

3) Id. at 27.

4) For a list of ANSAC determinations, see: http://www.azstreambeds.com/docs/hearings/hearing.htm [http://www.azstreambeds.com/docs/hearings/hearing.htm]. ANSAC has noted in its final reports (see footnote 3 below) that the Colorado River was determined to be a navigable river long ago. The ANSAC notes that Arizona's watercourses typically have been used for irrigation, rather than navigation, given the state's arid or desert regions. Arizona includes parts of at least three of the four North American deserts.

5) See http://www.azstreambeds.com/docs/hearings/hearing.htm [http://www.azstreambeds.com/docs/hearings/hearing.htm] for the status of pending reports. ANSAC's final reports for small and minor watercourses in Yuma, Mohave, La Paz, Santa Cruz, and Cochise Counties can be found at: http://www.azstreambeds.com/docs/reports/reports.htm [http://www.azstreambeds.com/docs/reports/reports.htm].

6) "The Colorado River ... is one of the great navigable rivers of the west, and a navigable stream is dedicated to the public for its use and enjoyment." Brasher v. Gibson, 406 P.2d 441, 447 (Ariz. Ct. App. 1965), vacated on other grounds, 419 P.2d 505 (Ariz. 1966).