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American Whitewater

New Mexico Navigability Report©

Summary

The constitution of New Mexico declares water in a stream to be public. The public has the right to use this water for recreational purposes, subject to the right of appropriators to remove water from the stream (*e.g.* for irrigation). So, in New Mexico, it seems that you can float any stream for which there is legal access.

State Test of Navigability

New Mexico, a state that follows the doctrine of prior appropriation, has taken a different approach to determining public rights in streams where the streambed is privately owned. New Mexico is one of the few states that have used the appropriation doctrine, and not common law navigability tests, to determine which waters are public. In New Mexico, while title to streambeds may be held by a private entity, appropriators hold only a usufructory right in the water, and title to the water remains in the state.¹⁾ All unappropriated waters from every natural stream, perennial or torrential, are public waters in the public domain.²⁾ In fact, navigability is but one criterion in determining whether there exists public rights to use a body of water.

While no case or law has carefully defined the criteria for distinguishing public and private waters, the most liberal of tests distinguishing public and private waters is consistent with *Red River Valley*. *Red River Valley* defined public waters very broadly, and expressly condoned recreational uses of public waters.³⁾ The only clearly important factor in distinguishing public from private streams is whether the public has legal access.⁴⁾

Extent of Public Rights in Navigable and Non-Navigable Rivers

Red River Valley recognized a general expansion in the public water doctrine.⁵⁾ The public has a right to use these waters for a beneficial use,⁶⁾ including recreation and fishing.⁷⁾

No case or statute discusses portaging on private land around obstructions in the stream. While the public doctrine gives the public the right to use the zone between the high and low water marks, the New Mexico attorney general's office expressed doubts about the right to portage above this zone.⁸⁾ The letter cited the trespass statute, which says “knowingly entering or remaining upon posted private property without possessing written permission from the owner or person in control of the land,” or “knowingly entering or remaining upon the unposted land of another knowing that such consent to enter or remain is denied or withdrawn by the owner or occupant thereof. Notice of no consent to enter shall be deemed sufficient notice to the public . . . by posting the property at all vehicular access entry ways.”⁹⁾ The letter did not discuss portaging as being a necessary incident to the right to navigate.

Red River Valley, however, does provide evidence that portaging may be accepted. The court looked to the laws of the Partidas, which were the prior existing Spanish laws in New Mexico that the New Mexico constitution is based upon.¹⁰⁾ The court cited the following law of the Partidas: “And although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them, by mooring his vessels to the trees, by repairing his ships and his sails upon them, and by landing his merchandise there; and fishermen have the right to deposit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like those which appertain to the calling and the trade by which they live.”¹¹⁾ However, this expansive position is tempered by the statement by the court that “[a]ccess to [the public water at issue] can be, and must be, reached without trespass.”¹²⁾ Nevertheless, it could be argued that this latter statement is not dispositive as to the use of the bank incident to navigation because the statement is referring to trespass as it relates to access.

¹⁾ State v. Red River Valley Co., 182 P.2d 421 (N.M. 1946). Notice that the court in Red River Valley Co. distinguished Hartman v. Treatise, 84 P. 685 (Colo. 1905) (a case which applied the riparian rule of deciding on public rights by examining the title to the bottom).

- ²⁾ Red River Valley Co., 182 P.2d at 430.
- ³⁾ Id. at 434.
- ⁴⁾ Id. at 429.
- ⁵⁾ ¹¹⁾ ¹²⁾ Id.
- ⁶⁾ N.M. Const. art. XVI, § 2.
- ⁷⁾ Red River Valley Co., 182 P.2d at 434.
- ⁸⁾ Letter from the Att’y Gen. to Mark Sundin, April 8, 1997.
- ⁹⁾ N.M. Stat. Ann. 2007, § 30–14–1.A & B
- ¹⁰⁾ Red River Valley Co., 182 P.2d at 429.