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**Overview**

This is a general overview of the laws allowing use of rivers in New Mexico.

It was last researched in 2005.

NEW MEXICO

**1. Basic Description**

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.

**2. 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 usufructuary right in the water, and title to the water remains in the state. **All unappropriated waters from every natural stream, perennial or torrential, are public waters in the public domain. 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.** The only clearly important factor to distinguishing public from private streams is whether the public has legal access.

**3. Extent of Public Rights in Navigable Rivers**

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

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. 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." The letter did not discuss portaging as being a necessary incident to the right to navigate. (Note: Old Spanish/Territorial Law in the southwest was told to this editor contained references to portage being continuation of the right to navigate due to seasonal or water variability issues in the Southwest)

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. 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 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." This language is tempered by another quote later in the opinion that states, "The small streams of the state are fishing streams to which the public has a right to resort so long as they do not trespass along the banks." This latter statement is not dispositive because it can be argued that use of the bank incident to navigation is not a trespass, and that the court was referring to trespass as it relates to access.

**4. Statutes Governing Landowner Liability**

New Mexico's recreational use statute (N.M. Stat. Ann. §§ 16-3-9, 17-4-7, & 66-3-1013) was passed in 1973. This law does not specify if the landowner has a duty to keep the property safe. It does specify that a landowner does not have a duty to warn or to provide an assurance of safety. In general, this law grants landowners broad immunity from liability for personal injuries or property damage suffered by recreationists on the owner’s land. However, the law does not protect the landowner from liability for willful or wanton misconduct, and does not protect the landowner if a fee is charged for the use of the property unless they

are fees from land leased to a public agency.

New Mexico's tort claims act, which defines the scope of the government’s liability, is detailed in N.M.S.A. 27 § 41-4-1 to 41-4-27 et seq.

**5. Miscellaneous**

    Description of Federal Navigability Law, the Federal Title Test, & the Importance of The Daniel Ball

Federal navigability law is used to designate federal waters as navigable. If a body of water does not meet these requirements it can still be declared navigable under state law through a state test, but Congress may not regulate it under the powers of the Commerce Clause of the Constitution.

**The federal definition of "navigable" waters determines title to the beds underlying streams and lakes.** If water was "navigable" under the federal test at the time of statehood, title to the bed of the stream or lake passed to the state upon admission into the Union.

The Daniel Ball is an important Supreme Court case dealing with navigability. It set precedent in three major areas:

* A river is regarded as a "public navigable river" if it is susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel are or may be conducted in the customary modes of travel and trade on water.
* A river that is navigable in fact is navigable in law.
* The test of navigability, as applied to "navigable waters," is the capability of being used for useful purposes of navigation, -- of trade and travel in the usual & ordinary modes, -- and not the extent and manner of such use.

The federal tests of navigability for determining title and defining Congress's power differ slightly. Both determine whether the body of water was navigable in fact as of the date a state came into the Union, not the time the determination was made. However, the natural & ordinary condition of the body of water at statehood determines navigability for title; whereas, the turning issue for commerce clause and congressional management purposes is determined by whether the body of water could be made navigable by reasonable artificial improvements.

Notes on Landowner Liability and Recreational Use Statutes

Often, private landowners are unwilling to open up their land to public use for the simple reason of liability. While this is a valid concern, virtually every state has legislation that addresses this issue and usually offers private landowners protection from liability. Generally, these laws are called Recreational Use Statutes. While each state has some form of Recreational Use Statute, the protection offered to landowners varies greatly from state to state.

The underlying policy of a Recreational Use Statute (RUS) is that the public's need for recreational land has outpaced the ability of local, state, and federal governments to provide such areas and that private landowners should be encouraged to help meet this need. Generally speaking, a RUS provides that a landowner does not owe, to one using his/her property for recreational purposes and without charge, a duty of care to keep the property safe for entry or use, nor a duty to give any warning of a dangerous condition, use, structure, or activity on the property. In other words, under an RUS, recreational users are treated in the same manner as trespassers and thus the landowner owes them no duty of care.

When the tract of land is owned publicly (e.g. city or state owned park), and in the absence of sovereign immunity, the governing law is some form of a State Tort Claims Act or Governmental Immunity Act that the individual state has passed. This acts as the primary basis for tort liability for municipal, county, school, and state governmental bodies. On the Federal level, the Federal Tort Claims Act serves as a basis for liability. Additionally, some state courts have held that the state RUS was applicable to governmental entities.

For more information on the specific laws that govern this topic in your state please refer to a source of information directed at that subject. Our website has links to these statutes at <www.awa.org/liability\_statutes.htm>. Another source on the internet is <www.law.utexas.edu/dawson/recreate/recreate.htm>. Recreational Use Statutes and landowner liability are other areas where legal counsel would be a wise option.

The reason this issue is pertinent to access rights and navigability law is that there is often a right to portage natural obstructions in a body of water that accompanies the right to float a river. Additionally, this subject may come into context when a boater, fisherman, or bather exits the water for some other reason.