

Montana Navigability Report

Summary

Montana statutes allow public use of streams that are capable of being used for recreational purposes. The public can fish, hunt, swim, float and wade in streams satisfying this test. The public also has a right of portage in these streams.

State Test of Navigability

Montana has adopted the navigable-in-fact test for navigability of waters.¹ The ability to float logs or “extensive[use] for organized recreational river floats” suffices for navigability in fact.²

In Montana, however, navigability does not bear upon public use. Under the Montana constitution, all waters of the state are owned by the state for the use of its people,³ and this provision has been interpreted as establishing a public trust over the waters of the state.⁴ Montana has defined by statute permitted recreational uses for purposes of effecting the public trust doctrine.⁵

The Montana Department of Fish, Wildlife and Parks has published a brochure which includes a preliminary list of some of the waters that have been deemed navigable.⁶

Extent of Public Rights in Navigable and Non-Navigable Rivers

The state owns all land below navigable waters, but private parties may acquire title to the midline of non-navigable waters and to the low-water mark of navigable waters.⁷ Private ownership, however, remains subject to Montana’s limited public trust easement over state waters for fishing and recreational use between the high-water marks.⁸ And under state law, “all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.”⁹ This recreational use right applies to both navigable and non-navigable waters.¹⁰

The right to use waters that satisfy the state recreational test includes recreational uses of the water for fishing, hunting, swimming, floating in small craft or other floatation devices, craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or

¹ Montana Coal. for Stream Access v. Curran, 682 P.2d 163, 166 (Mont. 1984).

² *Id.*; Edwards v. Severin, 785 P.2d 1022, 1024 (Mont. 1990).

³ Mont. Const. art IX § 3(3); *see also* Mont. Code Ann. § 70-1-202 (Montana owns “all land below the water of a navigable lake or stream) (2021).

⁴ *Curran*, 682 P.2d at 168, 170-71.

⁵ Mont. Code Ann. § 23-2- 301, 302(1) (2021).

⁶ Montana Dep’t of Fish, Wildlife, & Parks, Stream Access in Montana, <https://fwp.mt.gov/fish/stream-access> (last visited June 4, 2021).

⁷ Ash v. Merlette, 407 P.3d 304, 308 (Mont. 2017).

⁸ *Id.*; *Curran*, 682 P.2d at 172.

⁹ Mont. Code Ann. § 23-2-302(1).

¹⁰ Galt v. State *ex rel.* Dep’t of Fish, Wildlife, & Parks, 731 P.2d 912, 915 (Mont. 1987).

incidental uses.¹¹ However, recreational use exclude activities such as use of a stock or private pond, overnight camping, big-game hunting, placement or creation of any permanent structures (e.g., duck blind or boat moorage), or use of the bed when water is not flowing (except as necessary for portage).¹² The recreational use right extends up to the high-water mark (though private property rights extend down to the low-water mark), but only as is necessary to use the water itself, to include portage.¹³ But use of the bed and banks must be of “minimal impact.”¹⁴

Further, The right to use the water for recreational use also includes the right to use the underlying and adjoining real estate essential to the enjoyment of the public’s ownership of the water.¹⁵ “A “member of the public making recreational use of surface waters may, *above the ordinary high-water mark*, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of the landowner’s rights.”¹⁶ But, a riparian owner may erect structures for land or water management, and if such a structure does not interfere with the public’s use of the surface waters, the public “may not go above the ordinary high-water mark to portage around the structure.”¹⁷

Public access does not extend to “manmade water conveyance systems,” although alterations to the waterway to maintain or improve waterflow do not defeat public use.¹⁸

A prescriptive easement is not acquired for recreational use of surface waters under the statute.¹⁹

Miscellaneous

A Montana Attorney General's Opinion has clarified that the public does have the right to access rivers in Montana from bridges, bridge abutments, and bridge or road easements.²⁰

For additional information on boating and fishing in Montana, visit the state’s Department of Fish, Wildlife, & Parks website at <https://fwp.mt.gov/> or the state’s Office of Tourism website at <https://www.visitmt.com/things-to-do/outdoor-and-adventure.html>.

¹¹ Mont. Code Ann. § 23-2-301; *see also* Montana Trout Unlimited v. Beaverhead Water Co., 255 P.3d 179, 184-85 (Mont. 2011) (“Under the Montana Constitution and the public trust doctrine, the public owns an instream, non-diversionary right to the recreational use of the State’s navigable surface waters.”).

¹² Mont. Code Ann. § 23-2-302.

¹³ *Galt*, 731 P.2d at 915-16; *Curran*, 682 P.2d at 172; Mont. Code Ann. § 23-2-311(1).

¹⁴ *Galt*, 731 P.2d at 915.

¹⁵ *Id.*

¹⁶ Mont. Code Ann. § 23-2-311(1) (*italics added*).

¹⁷ *Id.* § 23-2-311(2); *see also Galt*, 731 P.2d at 914 (finding unconstitutional a statute that required landowners to create a portage route around artificial barriers).

¹⁸ Bitterroot River Protective Ass’n v. Bitterroot Conservation Dist., 198 P.3d 219, 238, 240-41 (Mont. 2008).

¹⁹ Mont. Code Ann. § 23-2-322.

²⁰ 48 Op. Att’y Gen. 13 (2000). *See also* Pub. Lands Access Ass’n v. Bd. of Comm’r of Madison Cty, 321 P.3d 28 (Mont. 2014) (public access at bridge abutment implied even with prescriptive easement, regardless of no history of public use)