

## **Nebraska Navigability Report**

### **Summary**

The public has the right to float the streams and rivers of Nebraska. The public also has the right to portage around obstructions in any river or stream while navigating with a non-powered craft.

### **State Test of Navigability**

Nebraska case law defines navigability as “[w]hen the government, in its survey, runs meander lines along the banks of a stream and parts with its title to the adjoining land, the boundary of which would be high-water mark, then it would seem permissible to classify the stream as navigable, in which case the waters thereof and the bed there under would belong to the state, and be held by it in trust for the people.”<sup>1</sup> The only river that has been declared navigable in Nebraska is the Missouri river.<sup>2</sup>

Nebraska, however, does not use navigability as a test for public access to rivers and streams for recreational purposes, and accordingly has little law on the subject. Instead, public rights to use waters appear in Nebraska’s constitution and statutes.

### **Extent of Public Rights in Navigable and Non-Navigable Waters**

Nebraska’s Constitution dedicates the use of the water of every stream in the state to the public, regardless of whether the stream is navigable.<sup>3</sup> State statute reiterates this right: “The water of every natural stream not heretofore appropriated within the State of Nebraska, including the Missouri River, is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation.”<sup>4</sup> Thus, although the riparian owner may own the river bed, that ownership is subject to public navigation rights, and a boater should not be found to trespass while on the water.<sup>5</sup> Moreover, by state law the public has “access by boat to any cutoff, chute, backwater, or bayou connected with any navigable stream located in the State of Nebraska,” though this right “[does not] allow trespass upon the lands of any person.”<sup>6</sup>

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<sup>1</sup> Crawford Co. v. Hathaway, 93 N.W. 781, 789 (Neb. 1903), overruled on other grounds by Wasserburger v. Coffee, 141 N.W.2d 738 (Neb. 1966).

<sup>2</sup> See Peter J. Longo, Judicial Recognition of the Public Interest in Water Recreation: Nebraska and United States Supreme Court Cases, 15 Pub. Land L. Rev. 199, 212 (1994); Office of the Att’y Gen. of the State of Neb., Op. No. 7, 1971 Neb. AG LEXIS 3, Jan. 11, 1971.

<sup>3</sup> Neb. Const. art. XV § 5 (2020) (“The use of the water of every stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes.”).

<sup>4</sup> Neb. Rev. Stat. § 46-202 (2020). Irrigation rights for agricultural use are the main concern for water in Nebraska. See *id.* § 46-201.

<sup>5</sup> Office of the Att’y Gen. of the State of Neb., Opinion No. 7, 1971 Neb. AG LEXIS 3, Jan. 11, 1971.

<sup>6</sup> Neb. Rev. Stat. § 28-1401 (2020). Though this law refers to “navigable” streams, the law seems to apply to non-navigable waters as well as it cites to Article XV, Section 5 of Nebraska’s Constitution, which speaks to “natural stream[s].”

Hunting and fishing from a rowboat or other boat floating on a lake or river (*i.e.*, watercraft “powered by man”) is permissible.<sup>7</sup> Hunting, fishing, boating, beaching, or tying a craft to the shore on the riparian land next to a river or stream, however, is not legal.<sup>8</sup>

The right of portage is allowed by statute in Nebraska. Statute exempts from criminal trespass liability a boater who enter private land while “in the process of navigating or attempting to navigate with a nonpowered vessel any stream or river in this state and found it necessary to portage or otherwise transport the vessel around any fence or obstructions in such stream or river.”<sup>9</sup>

How a Nebraska court will rule regarding contact with the streambed (such as wading) is unclear. Since portaging is allowed, however, wading in the river would likely be acceptable as well, so long as the use of the river and bed is reasonable and unobtrusive.

### **Miscellaneous**

Criminal trespass on private land that is fenced or posted against trespass or where the owner has communicated to the trespasser is a class III misdemeanor.<sup>10</sup>

Additional information regarding boating and fishing in Nebraska can be found on the Nebraska Game and Parks Commission website, <http://outdoornebraska.gov/thingstodo/>.

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<sup>7</sup> Office of the Att’y Gen. of the State of Neb., Op. No. 321, 1980 Neb. AG LEXIS 285, Sep. 25, 1980.

<sup>8</sup> *Id.* Op. No. 55, 1985 Neb. AG LEXIS 49, Apr. 8, 1985.

<sup>9</sup> Neb. Rev. Stat. § 28-522.

<sup>10</sup> *Id.* § 28-521. If the offender defies an order to leave personally communicated to him or her by the owner of the premises or other authorized person, then the offense is a class II misdemeanor.