

Oregon Navigability Report

Summary

In Oregon, the public has a right to float, wade, and fish in navigable streams up to the ordinary high water mark. The public also has a right to float, fish, and swim in certain smaller non-navigable streams that have public use rights. The law, however, remains unclear as to whether the public can touch the streambed or banks of these smaller non-navigable streams while floating.

State Test of Navigability

In Oregon, state-owned waterways generally are available to the public for any legal¹ use, such as navigation, commerce, fisheries, and recreation.² Waterways are considered state-owned if they are title-navigable.³ A waterway is considered title-navigable if, at the time of statehood, the waterway in its natural and ordinary condition was capable of being used as a highway of commerce for trade and travel by a customary mode of water transportation.⁴ This test for title-navigability is based on federal law.

The Oregon State Land Board is authorized by statute to make determinations of title-navigability under the federal title test and has adopted several regulations concerning navigability determinations.⁵ The Oregon State Land Board also has compiled a list of streams that are navigable based on federal judicial decisions, State Land Board policy or rules, meandering characteristics, or tidal influences.⁶ However, the navigable status of many other streams in Oregon has not yet been decided. No comparable mechanism has been established to determine whether a waterway is subject to the public use doctrine, discussed below, for smaller waterways.

Weise v. Smith, decided shortly after statehood, defined streams subject to public use for a passageway as those streams “capable of being commonly and generally useful for floating boats, rafts, logs, for any useful purpose of agriculture or trade.”⁷ Another case concluded that such trade and commerce should include “the use of boats and vessels for the purposes of

¹ In general, any act that is illegal on land also is illegal on a public waterway. The State of Oregon provides a non-exclusive list of such acts. See Oregon Dep’t of State Lands, Aquatic Res. Mgmt. (Oct. 2016), <https://www.oregon.gov/dsl/WW/Documents/PublicRightUseWaterways.pdf>.

² Op. Or. Att’y Gen. 8281, 2005 WL 1079391 (Apr. 21, 2005), https://www.oregon.gov/dsl/WW/Documents/ag_op-8281_navigability.pdf.

³ Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988); United States v. Holt, 270 U.S. 49, 56 (1926); 45 Op. Or. Att’y Gen. 1, 1985 WL 200065 (Jul. 15, 1985).

⁴ Op. Or. Att’y Gen. 8281, at *10. Even if land has dried due to avulsion, the state still owns the land if the land was submerged or submersible at statehood and understood to be navigable. Hardy v. State Land Board, 274 Or. App. 262 (Oct. 14, 2015).

⁵ Or. Rev. Stat. § 274.404 (2020); Or. Admin. Rules § 141-121-0000 et seq. (2020). In addition, the criteria for the federal navigability test are discussed, in 37 Op. Or. Att’y Gen. 1342, 1976 WL 193950 (May 14, 1976).

⁶ See State-Owned Waterways, <https://www.oregon.gov/dsl/WW/Documents/RiverList.pdf>; State-Owned (Meandered) Lakes in Oregon, <https://www.oregon.gov/dsl/WW/Documents/LakeList.pdf>.

⁷ *Weise v. Smith*, 3 Or. 445, 449 (1869).

pleasure,” or “for the purpose of fishing.”⁸ Consequently, the public use doctrine extends beyond strict commerce for pecuniary benefit to include activities such as fishing and pleasure boating.⁹ In 1959, the Oregon State Attorney General advised that public uses also extend to bathing, hunting, and other things incidental to public use of water.¹⁰ It would seem, therefore, that the capacity to float a kayak would qualify as a public use benefiting from the floatage easement.

Waterways are also state-owned if they are tidally-influenced.¹¹ A waterway is tidally-influenced if it is affected by the ebb and flow of the tide. A tidally-influenced waterway is considered state-owned, even if it is not used or not susceptible of use for commerce.¹² Thus, the public also has a right to float, wade, fish, swim, and so forth, in tidally-influenced streams and rivers.

Extent of Public Rights in Navigable & Non-navigable Rivers

Oregon owns the beds of navigable rivers. The public has the right to boat, fish, swim, etc. in these rivers to the ordinary high water mark.¹³ The ordinary high water mark is determined by “ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of a bed a characteristic mark distinct from that of the banks in respect to vegetation and the nature of the soil itself.”¹⁴ Further, the public has a right to access these waters from public land.¹⁵

Another source of public rights to use waterways in Oregon derives from state common law definition of navigable waters and is referred to by the state as the “floatage easement” or “public use” doctrine. This doctrine gives the public the right to make certain uses of a waterway whose bed is privately owned if the waterway has the capacity, in terms of length, width and depth, to enable boats to make successful progress, even for recreational use, through the waters,¹⁶ and was affirmed in the 2019 Oregon Supreme Court decision *Kramer v. City of Lake Oswego*.¹⁷

In privately-owned river and streambeds, which are subject to the public’s floatage easement, the extent of public rights is still uncertain. In *Kramer*, the court opined recently that even for private land, the public use doctrine means that “the public has the paramount right to the use of

⁸ *Gulliams et al. v. Beaver Lake Club*, 175 P. 437, 441-42 (Or. 1918).

⁹ *Luscher v. Reynolds et al.*, 56 P.2d 1158, 1162 (Or. 1936) (“‘Commerce’ has a broad and comprehensive meaning. It is not limited to navigation for pecuniary profit. A boat used for the transportation of pleasure-seeking passengers is, in a legal sense, as much engaged in commerce as is a vessel transporting a shipment of lumber.”).

¹⁰ 29 Op. Or. Att’y Gen. 296, 296-97, 1959 WL 68829 (Dec. 1, 1959); 29 Op. Or. Att’y Gen. 311, 312, 1959 WL 68839 (Dec. 24, 1959).

¹¹ *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); *United States v. Holt*, 270 U.S. 49, 56 (1926); 45 Op. Or. Att’y Gen. 1.

¹² *Phillips Petroleum Co.*, 484 U.S. at 478-81.

¹³ Memorandum entitled *State Ownership of Navigable Waterways*, issued by the Director of the Oregon Division of State Lands, May 24, 1996; 39 Or. Op. Atty. Gen. 440, 1978 WL 29441 (Dec. 8, 1978) (stating that the boundary line between public ownership and riparian ownership along the beds and banks of navigable rivers in the State of Oregon is the line of ordinary high water).

¹⁴ 39 Or. Op. Atty. Gen. 440.

¹⁵ *Kramer v. City of Lake Oswego*, 446 P.3d 1, 10 (2019).

¹⁶ Op. Or. Att’y Gen. 8281, at *1-*2, *16-17 (collecting cases), *24 (citing *Gulliams*, 175 P. at 441 and *Luscher*, 56 P.2d at 1162); see also *Kramer*, 446 P.3d at 8-10 (citing *Luscher*, 56 P.2d at 1162).

¹⁷ *Kramer*, 446 P.3d at 8.

the waters.”¹⁸ The public clearly has the right to float these streams,¹⁹ but the courts have not confirmed that the floatage easement includes other rights incidental to boating, such as wading, fishing, and portaging over privately-owned stream banks.

Few court decisions, some more than a hundred years old, have addressed limited exceptions to accessing private lands along rivers with a public use easement. The court in *Weise* allowed a “necessity” exception to access the lands by allowing the attachment of a log boom to a privately-owned island because such attachment was necessary to exercise the right of driving logs on the river and the impact was temporal and minimal.²⁰ *Lebanon Lumber Co. v. Leonard* indicate that “necessity” may be limited to a need to enter upon the land of a streambed owner to reclaim stranded property or by reason of avoiding danger.²¹ The discussion in *Kramer* would suggest that touching the streambanks and the streambed is impermissible except possibly in narrow circumstances where “the burden on the landowner was incidental and temporary [and necessary],” but that public’s “paramount” use right would permit other incidents of navigation such as boating.²² *Kramer*, however, left open whether *Weise* remained good law.²³

It is less certain that the narrow exceptions would permit portage, as *Kramer* noted the “established rule” that “the public have . . . no common-law right to use [private] land adjoining a river above the high-water mark.”²⁴ But, under the exceptions in *Weise*, acknowledged by *Kramer*, portage would seem to be permissible as incidental, temporary, and necessary to navigation. In some instances, district attorneys have dismissed trespass cases that occur on rivers that have not been subject to a determination of navigability, although some individuals nonetheless have been arrested.²⁵

In contrast, entering upon an upland when unnecessary likely is a trespass.²⁶ *Kranmer* held that while the public does have an easement to float these streams, there is no associated right to use any abutting upland to reach the water in the first place.²⁷ But though the public may not trespass upon a privately-owned upland, a streambed owner likewise may not construct a fence or other obstruction blocking travel along a waterway.²⁸

¹⁸ *Id.* (quoting *Luscher*, 56 P.2d at 1162).

¹⁹ *Id.* at 10 (quoting *Luscher*, 56 P.2d at 1162).

²⁰ *Weise*, 3 Or. at 451. *But see Kramer*, 446 P.3d at 11 (noting the exceptions in *Weise*, but giving it a narrow scope and “to the extent it remains good law.”).

²¹ *Lebanon Lumber Co. v. Leonard*, 136 P. 891, 892-93 (1913).

²² *Kramer*, 446 P.3d at 10.

²³ *Id.* (“To the extent *Weise* remains good law, it should be understood as a narrow exception to the rule.”).

²⁴ *Id.* at 10-11 (quoting *Lebanon Lumber*, 136 P. 892-93); *see also id.* (“[T]he navigability of the stream does not give to the navigator a right of way on the land,” and “[t]o the extent *Weise* remains good law, it should be understood as a narrow exception to the rule.”).

²⁵ Letters from David T. McDonald to Captain Lindsey Ball, Oregon State Police dated August 16, 1996, and September 26, 1996.

²⁶ *Weise*, 3 Or. at 451. Trespass in Oregon is entering on premises that are not open to the public. Or. Rev. Stat. § 164.245 (2020). Premises “open to the public” means premises that by their physical nature, function, custom, usage, notice or lack thereof, or other circumstances would cause a reasonable person to believe that no permission to enter or remain is necessary. Or. Rev. Stat. § 164.205 (2020).

²⁷ *Kramer*, 446 P.3d at 10.

²⁸ *Gulliams*, 175 P. at 441-42.

Miscellaneous

For further information, Oregon State maintains a detailed website detailing navigability issues.
<https://www.oregon.gov/dsl/WW/Pages/Waterways.aspx>.

Common Waters of Oregon is a membership-based, public benefit, nonprofit organization dedicated to preserving Oregon rivers as common highways and forever free. This organization maintains an informational website covering water use issues.
<https://commonwaters.wordpress.com/>.