

South Dakota Navigability Report

Summary

South Dakota has adopted a recreational boating test for navigability. In other words, if a river or stream is capable of being floated, it can be used for any lawful recreational activity, such as boating or fishing. Any public use above the ordinary high-water mark, *i.e.*, outside of the stream bank, without the landowner's permission, would be considered trespassing. South Dakota also follows the public trust doctrine, where all waters of the state are held in trust for beneficial public use. Where stream or lake beds are privately owned, the public may use the waters for recreational purposes if expressly authorized by the state or if the owner has not marked the property as closed., but may not touch the bed unless with recreational equipment incidental to recreational use.

State Test of Navigability

South Dakota statutorily defines navigability by stating that “a stream, or portion of a stream, is navigable if it can support a vessel capable of carrying one or more persons throughout the period between the first of May to the thirtieth of September, inclusive, in two out of every ten years.”¹ This definition does not apply to a stream or portion of a stream which is navigable pursuant to federal law.² South Dakota law further provides that riparian owners, developers, or 25 electors of the state may petition the Water Management Board for a determination of any hir or low wter mark.³

South Dakota case law also articulates a recreational boating test to determine if a river or stream is navigable. A body of water is navigable if it is of such character and extent that its waters constitute “public waters,” which are defined as those waters that are naturally available “for public purposes taking into consideration the natural character and surroundings of a lake or stream.”⁴ This test also has been stated in different terms to include waters capable of being used for public purposes, such as boating, fishing, bathing, skating, and purposes not yet anticipated.⁵

Extent of Public Rights in Navigable and Non-Navigable Rivers

South Dakota has statutorily declared “that the people of the state have a paramount interest in the use of all the water of the state, and that the state shall determine what waters of the state, surface and underground, can be converted to public use or controlled for public protection.”⁶ The South Carolina Supreme Court decision in *Parks v. Cooper* in 2004 and then in *Duerre v. Hepler* in 2017 applied public ownership and the public trust doctrine to all waters of the state, even to non-meandered waters, but considered public use and access for recreational purposes as a separate issue to be decided by the legislature.⁷ “[T]he public trust doctrine imposes an

¹ S.D. Codified Laws § 43-17-34 (2021).

² *Id.*

³ *Id.* § 43-17-28.

⁴ *Flisrand v. Madison*, 152 N.W. 796, 798 (S.D. 1915).

⁵ *Id.* at 799; *Hillebrand v. Knapp*, 274 N.W. 821 (S.D. 1937); *Op. S.D. Att’y Gen.* (August 16, 1995).

⁶ S.D. Codified Laws § 46-1-1.

⁷ *Duerre v. Hepler*, 892 N.W.2d 209 (S.D. 2017); *Parks v. Cooper*, 676 N.W.2d 823 (S.D. 2004).

obligation on the state of South Dakota to preserve water for public use [and] provides that the people of South Dakota own the waters themselves, and that the state, not as proprietor, but as trustee, controls the water for the benefit of the public.”⁸

The public has a right of access along navigable streams for hunting, fishing, boating, and other recreational purposes up to the ordinary high-water mark.⁹ The ordinary high water mark is determined during periods of ordinary flow, not extreme floods or low water.¹⁰

Use of the streambed in navigable waters, where the bed is privately owned, probably is permissible, as the cases indicate that activities such as bathing are permissible in navigable waters. The right to portage is questionable, and arguments can be made for either position, although those against a right to portage might be on slightly firmer ground. The fact that the case law has adopted such an expansive definition of public waters and contemplates all kinds of uses of the water militates in favor of a right to portage. At the same time, cases have recognized that the upland owner’s title is absolute above the ordinary high water mark and subject to the public trust below the ordinary high water mark.¹¹ In addition, navigable waterways are considered public highways fifty feet landward of the water’s edge, provided that the outer boundary of such public highway may not expand beyond the ordinary high water mark.¹²

Regarding public recreational use of waters over privately owned stream beds “[i]t is ultimately up to the South Dakota Legislature to decide how [those] waters are to be beneficially used in the public interest.¹³ South Dakota enacted the Open Waters Compromise¹⁴ in response to *Parks and Duerre*, which provides public access for recreational purposes to all non-meandered lakes either where the landowner has not expressly marked the waters as closed, the public has made open an continuous use for a significant period, or public funds have been used to construct a boat ramp.¹⁵ But, the law prohibits “walk[ing], wade[ing], stand[ing], or operat[ing] a motor vehicle on the bed of a nonmeandered lake, or trap[ing] or hunt[ing] on the frozen surface above private land, without permission” of the land’s possessor.¹⁶ But, “any contact between recreational equipment and private property underlying any nonmeandered lake incidental to a lawful recreational use is not a criminal trespass.”¹⁷ The express terms of the statute, however, appear to only reach to lakes, and not rivers or streams.¹⁸ State law also permits a “person owning land through which any nonnavigable stream passes [to] construct and maintain a dam across the nonnavigable stream” so long as the water’s course is not changed and it does not interfere with if the vested or property rights of another.¹⁹

⁸ *Duerre*, 892 N.W.2d at 222 (citing *Parks*, 676 N.W.2d at 838).

⁹ *Hillebrand*, 274 N.W. at 822.

¹⁰ *Flisrand*, 152 N.W. at 801.

¹¹ *Id.*

¹² S.D. Codified Laws § 43-17-2.

¹³ *Duerre*, 892 N.W.2d at 221 (citing *Parks*, 676 N.W.2d at 841).

¹⁴ S.D. Codified Laws Ch. 41-23

¹⁵ See *id.* §§ 41-23-5 to 7; see also S.D. Game, Fish & Parks Comm’n, Nonmeandered Waters, <https://gfp.sd.gov/nonmeandered-waters/> (last accessed Feb. 23, 2021). Recreation use includes “outdoor sporting and leisure activities, including, but not limited to, hunting, fishing, swimming, floating, boating, and trapping.” S.D. Codified Laws § 41-23-2.

¹⁶ S.D. Codified Laws § 41-23-15.

¹⁷ *Id.* § 41-23-18.

¹⁸ *Id.* § 41-2.

¹⁹ *Id.* § 46-4-1.1.

Miscellaneous

Entry onto the posted or enclosed lands of another is a class 2 misdemeanor, which becomes a class 1 misdemeanor if an individual defies an owner who personally communicates an order to leave.²⁰

Legislation enacted in 1990 allows fencing of certain navigable streams, provided that a gate is installed in the fence crossing the stream. Rivers and creeks in the state where gates are required to be installed in fences include portions of the Bad, Big Sioux, Cheyenne, East Vermillion, Elm, Grand, Little White, Moreau, Red Water, Vermillion, and White Rivers, as well as Flandreau, Firesteel, Moccasin, Split Rock, and Turtle Creeks. A map showing the location of the stream segments where gates are required can be viewed at www.state.sd.us/denr/des/waterrights/fence.htm. Fences constructed across navigable streams are required to have a gate with a minimum opening size of 6-feet high by 6-feet wide, and the opening must be outlined with reflective tape or other highly visible material. In addition, reflectors or highly visible material also must be attached to the fence connecting the gate with the stream bank, and the reflectors must be no more than 25 feet apart and visible from both up and downstream. The Missouri River, James River, Boise des Sioux River, and the lower five miles of the Big Sioux River are designated as navigable rivers pursuant to federal law and may not be fenced with or without a gate.

For additional information on boating and fishing in South Dakota, visit the South Dakota Game, Fish and Parks Commission at <https://gfp.sd.gov/agency/>. Additional information on public use of non-meandered waters overlaying private property can be found on the Commission's website at <https://gfp.sd.gov/nonmeandered-waters/>.

²⁰ *Id.* § 22-35-6.