



North Dakota
State Water Commission



NAVIGABLE & NON-NAVIGABLE WATERS OF THE STATE OF NORTH DAKOTA

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OF THE STATE OF NORTH DAKOTA

This document was prepared by the Office of the State Engineer as a reference guide in regard to those waterbodies the state claims to be navigable, as well as those waterbodies determined to be non-navigable. This document explains navigable waters from the perspective of the state for management of sovereign lands. The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers have a differing perspective of navigable waters for the purpose of the Clean Water Act.

Definitions

Navigable Waters¹:

“‘Navigable waters’ means any waters that were in fact navigable at the time of statehood, that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.”

N.D. Admin. Code § 89-10-01-03.

Ordinary High Water Mark:

“‘Ordinary high watermark’ means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable waters are considered to be below the ordinary high watermark in their entirety.”

N.D. Admin. Code § 89-10-01-03.

Sovereign Lands:

“‘Sovereign lands’ means those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams.”

N.D.C.C. § 61-33-01.

¹ This definition and use of navigable waters is different from that used by the EPA and Corps of Engineers for purposes of the Clean Water Act. See <http://www.swc.state.nd.us/4dlink9/4dcgi/GetContentPDF/PB-2495/October.pdf>

Public Trust Doctrine

Public Trust Doctrine is defined as “the principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public’s right to the use.” *Black’s Law Dictionary* 1246 (7th ed. 1999).

The North Dakota Supreme Court has interpreted that the Public Trust Doctrine imposes on the state the duty to manage sovereign land to foster not only the “public’s right of navigation,” but also “other important aspects of the state’s public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies.” *J.P. Furlong Enterprises, Inc. v. Sun Exploration & Production Co.*, 423 N.W.2d 130, 140 (N.D. 1988). The Doctrine further requires the protection and preservation of other interests, including “natural, scenic, historic and aesthetic values.” *United Plainsmen Ass’n v. State Water Conservation Comm’n*, 247 N.W.2d 457, 462 (N.D. 1976) (citing *Payne v. Kassab*, 312 A.2d 86, 93 (Penn. 1973)).

The State Engineer’s authority to manage sovereign land is derived from N.D.C.C. § 61-33-05, which provides the State Engineer shall “manage, operate, and supervise” sovereign land.

Equal Footing Doctrine

Each of the thirteen original colonies, at the time of independence, gained ownership of the land beneath navigable waters. “[T]he people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and soils under them, for their own common use.” *Martin v. Wadell’s Lessee*, 41 U.S. 367, 410 (1842). In 1845, the United States Supreme Court concluded that states entering the union after 1789 did so on an “equal footing” with the original States and so have similar ownership over these “sovereign lands.”

In 1953, Congress confirmed States’ equal footing rights to submerged lands beneath inland navigable waters when it enacted the Submerged Lands Act of 1953, 67 Stat. 29 (1953), 43 U.S.C. 1301 et seq. The Act “confirmed” and “established” States’ title to and interest in “lands beneath navigable waters within the boundaries of the respective States.”

Navigability

Two interrelated federal standards may be considered for determining whether a given waterbody is navigable. The first is the federal standard for establishing state title to sovereign land under the Equal Footing Doctrine. The second is also a federal standard, where waterbodies are defined as navigable waters of the United States under the Commerce Clause of the United States Constitution.

Federal Standard under the Equal Footing Doctrine:

“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

The presence of rapids, waterfalls and sandbars, which may require portaging around does not preclude navigability because the fact that navigation may be difficult and at places interrupted does not render a stream un-navigable. The character of a river as a public highway is not determined by the frequency of its use, but by its capacity for being used. Nor is it essential that a stream should be capable of being navigated at all seasons of the year. *Economy Light & Power Co. v. U.S.*, 256 U.S. 113 (1921). However, it is important to note that a river need not be navigable in all its reaches, that navigability for title be made on a segment-by-segment basis as established in *U.S. v. Utah*, 238 U.S. 64 (1931) and *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215 (2012).

Federal Standard under the Equal Footing Doctrine:

The Commerce Clause of the United States Constitution states: “The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” U.S. Const. art. 1, § 8. Federal jurisdiction over navigable waterways has been asserted through various statutes, such as Section 10 of the Rivers and Harbors Act of 1899 and the Federal Powers Act of 1920.

“If, however, a river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State” *Sierra Pacific Power Co. v. Federal Energy Regulatory Comm’n*, 681 F.2d 1134, 1138 (9th Cir. 1982); *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870).

A finding of state ownership to the bed of a navigable waterbody under the Equal Footing Doctrine carries no weight under the Commerce Clause. One has nothing to do with the other when making navigability determinations.

It should be noted that the United States Army Corps of Engineers (Corps) has certain authorities and responsibilities in relation to waters of the United States and waters found to be navigable waters of the United States under the Commerce Clause.

There are six waterbodies in North Dakota that have been determined to be navigable waters of the United States under the Commerce Clause of the United States Constitution and administered under Section 10 of the Rivers and Harbors Act of 1899. They are:

1. Red River of the North
2. Bois De Sioux
3. James River from the railroad bridge at Jamestown to the South Dakota border.
4. Missouri River
5. Upper Des Lacs Lake
6. Yellowstone River

“Precise definitions of ‘navigable waters of the United States’ or ‘navigability’ are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies.” 33 C.F.R. § 329.3 (1986). Conclusive determinations of navigability can be made only by courts.

The following waterbodies have been determined by the courts to be navigable because of the federal standard under the Equal Footing Doctrine:

1. Missouri River
2. James River
3. Devils Lake
4. Painted Woods Lake
5. Sweetwater Lake

However, failure to be identified as a navigable waterbody by the courts does not prevent the State Engineer from asserting jurisdiction over additional waters. In fact, the State Engineer has a responsibility under the Public Trust Doctrine to use prudent judgment in identifying all rivers and lakes throughout the state that should be included on the state’s list of navigable waters.

To make those determinations, the State Engineer relies on the federal standards for navigability under the Equal Footing Doctrine – in particular, whether a waterbody was “susceptible” to navigation at the time of statehood, or if historical documentation of navigability warrants a navigability determination.

At this time, the following waterbodies have been determined to be navigable by the State Engineer under the federal standard of the Equal Footing Doctrine, and therefore, sovereign to North Dakota:

1. Red River of the North
2. Sheyenne River
3. Pembina River
4. Mouse River
5. Lake Metigoshe
6. Cannonball River
7. Heart River
8. Knife River
9. Long Lake – Bottineau County
10. Bois De Sioux River
11. Yellowstone River

Other waterbodies can be added to this list should the State Engineer determine a particular river or lake to be navigable under the federal standards of the Equal Footing Doctrine. Conversely, the State Engineer can remove any particular waterbody from this list if sufficient evidence is discovered or if the determination of navigability is challenged and the state does not prevail.

Non-Navigable Waters

Little Missouri River: In 1992, the United States Court of Appeals, Eighth Circuit ruled that the State of North Dakota failed to prove the Little Missouri River to be navigable at the time of statehood. Therefore, the State Engineer does not claim the Little Missouri River as a jurisdictional waterbody as it relates to navigability.

Several waters of the state have been determined by the State Engineer to be non-navigable under the federal standards of the Equal Footing Doctrine and therefore not sovereign. These determinations have been made on a case-by-case basis as the question of navigability of a particular waterbody arises. To make those determinations, the State Engineer relies on the federal standard for navigability under the Equal Footing Doctrine as described above. However, should evidence of historic commercial use of any of these waterbodies come to the attention of the State Engineer, determinations of navigability could be subject to change.

Kidder County:	Hutchinson Lake Lake Isabel	T. 143 N., R. 74 W., Sec. 29, 30, 31, and 32 T. 139 N., R. 72 W., Sec. 26, 27, 34, and 35
Nelson County:	Horseshoe Lake	T. 149 N., R. 57 W., Sec. 4 and 5 T. 150 N., R. 57 W., Sec. 32
McIntosh County:	Unnamed Lake	T. 129 N., R. 71 W. Sec. 14, 15, 16, 21, 22, 23, 25, 26, 35, and 36
Pierce County:	Grass Lake Hurricane Lake	T. 158 N., R. 70 W., Sec. 1, 2, 3, 4, 9, 10, 11, 12, and 14 T. 157 N., R. 68 W. Sec. 18, 19, and 30 T. 157 N., R. 69 W., Sec. 1, 2, 11, 12, 13, 24, and 25
Rolette County:	Island Lake	T. 159 N., R. 70 W., Sec. 15, 16, 20, 21, 22, and 28
Sargent County:	Lake Taayer	T. 131 N., R. 58 W., Sec. 27, 28, 29, 32, and 33

The following waterbodies have also been determined to be non-navigable by the State Engineer using the federal standards under the Equal Footing Doctrine, and therefore, not sovereign to North Dakota. These waterbodies are primarily situated in the area of the Bakken-Three Forks oil play in the northwest quarter of the state. Navigability determinations were made for these waterbodies to clear title to the beds for the purposes

of leasing mineral rights and disbursement of royalty payments. Upon making a determination of non-navigability of a particular waterbody, an Affidavit of Disclaiming Title was jointly signed by the Commissioner of the North Dakota Board of University and School Lands and the State Engineer and filed with the respective county recorders' offices. Again, it should be noted that if evidence of historic commercial use of any of these waterbodies comes to the attention of the State Engineer, determinations of navigability could be subject to change.

Bottineau County:	Brager Lake	T. 163 N., R. 74 W., Sec. 8 and 9
	Cassidy Lake	T. 163 N., R. 74 W., Sec. 28, 33, and 34
	Grass Lake	T. 163 N., R. 74 W., Sec. 26 and 27
	Loon Lake	T. 163 N., R. 74 W., Sec. 18, and 19
		T. 163 N., R. 75 W., Sec. 13 and 24
	Pelican Lake	T. 163 N., R. 74 W., Sec. 16 and 17
	Sandy Lake	T. 163 N., R. 74 W., Sec. 16
	Strawberry Lake	T. 163 N., R. 76 W., Sec. 15
	Sultier Lake	T. 163 N., R. 74 W., Sec. 24
	Thompson Lake	T. 163 N., R. 75 W., Sec. 25 and 36
	Walker Lake	T. 163 N., R. 74 W., Sec. 10 and 11
Burke County:	Beaver Lake	T. 162 N., R. 92 W., Sec. 8, 16, and 17
	Fish Lake	T. 159 N., R. 93 W., Sec. 1
		T. 160 N., R. 93 W., Sec. 36
	Helde Lake	T. 160 N., R. 92 W., Sec. 20
	Martin Lake	T. 160 N., R. 90 W., Sec. 31 and 32
	Rennie Lake	T. 162 N., R. 91 W., Sec. 29 and 30
	Sletten Lake	T. 159 N., R. 94 W., Sec. 25, 26, 35, and 36
	Smishek Lake	T. 159 N., R. 93 W., Sec. 1, 2, and 11
		T. 160 N., R. 93 W., Sec. 36
	Swenson's Slough	T. 160 N., R. 91 W., Sec. 8 and 9
	Unnamed Lake	T. 160 N., R. 91 W., Sec. 9
	Ward Lake	T. 160 N., R. 91 W., Sec. 5, 6, and 8
Burke & Mountrail Counties:		
	Powers Lake	T. 158 N., R. 92 W. Sec. 6, 7, 8, 17, 18, 19, and 20
		T. 158 N., R. 93 W., Sec. 1
		T. 159 N., R. 92 W., Sec. 31
		T. 159 N., R. 93 W., Sec. 35 and 36
Divide County:	Johnson Lake	T. 162 N., R. 102 W., Sec. 22 and 23
	Miller Lake	T. 162 N., R. 102 W., Sec. 19, 20, 21, 29, and 30
	Musta Lake	T. 160 N., R. 100 W., Sec. 3
	North Lake	T. 162 N., R. 102 W., Sec. 5, 7, 8, 17, and 18
	Skjermo Lake	T. 163 N., R. 103 W., Sec. 13, 14, 23, and 26
	Unnamed Lake	T. 160 N., R. 99 W., Sec. 23, 24, 25, and 26
	Unnamed Lake	T. 160 N., R. 100 W., Sec. 22 and 27
	Stink Lake	T. 160 N., R. 103 W., Sec. 28, 29, 32, 33, and 34

Willow Lake T. 160 N., R. 96 W., Sec. 6
T. 160 N., R. 97 W., Sec. 1
T. 161 N., R. 96 W., Sec. 33 and 34

Divide and Williams Counties:

Blue Ridge Wildlife Management Area Lakes
T. 159 N., R. 100 W., Sec. 1
T. 160 N., R. 100 W., Sec. 35 and 36

McHenry County: Round Lake T. 153 N., R. 75 W., Sec. 26, 27, 34, and 35

McHenry and Bottineau Counties:

Lakes 4 & 5, J. Clark Salyer National Wildlife Refuge
T. 159 N., R. 77 W., Sec. 16, 17, 18, 19, 20, 21, 22,
27, 28, 29, and 30
T. 159 N., R. 78 W., Sec. 1, 2, 3, 10, 11, 12, 13, 14,
23, 24, and 25
T. 160 N., R. 78 W., Sec. 34 and 35

Mountrail County: Clearwater Lake T. 157 N., R. 90 W., Sec. 15, 22, and 23
Cottonwood Lake T. 157 N., R. 92 W., Sec. 5, 6, 7, 8, 9, 16, and 17
Lake Timothy J. Uhl T. 155 N., R. 88 W., Sec. 20, 21, and 29
Lake Tolley T. 156 N., R. 88 W., Sec. 1 and 12
Redmond Township NWPA Lakes
T. 157 N., R. 89 W., Sec. 4, 8, 9, 15, 16, 17, 20, 21,
22, 27, 28, 29, 32, and 33
Shell Lake (North) T. 155 N., R. 89 W., Sec. 17, 18, 19, and 20
Shell Lake National Wildlife Refuge (South)
T. 154 N., R. 89 W., Sec. 3, 9, and 10
T. 155 N., R. 89 W., Sec. 34
Tagus Lake T. 156 N., R. 88 W., Sec. 11 and 12
Unnamed Lake T. 156 N., R. 89 W., Sec. 4, 5, 8, and 9
Unnamed Lake T. 155 N., R. 88 W., Sec. 24, 25, and 26

Unnamed Lake T. 156 N., R. 89 W., Sec. 6 and 7
T. 156 N., R. 90 W., Sec. 1 and 12
Unnamed Lake T. 156 N., R. 90 W., Sec. 4, 8, 9, 16, and 17
White Lake T. 156 N., R. 91 W., Sec. 5 and 6
T. 157 N., R. 91 W., Sec. 19, 20, 27, 28, 29, 30, 31,
32, 33, 34, and 35
T. 157 N., R. 92 W., Sec. 25

Mountrail & Ward Counties:

Carpenter Lake T. 155 N., R. 87 W., Sec. 17, 18, 19, and 20
T. 155 N., R. 88 W., Sec. 24

Williams County: Alkali Lake T. 159 N., R. 100 W., Sec. 22

SUMMARY

Navigable Waters of the State of North Dakota

1. Missouri River
2. James River
3. Sheyenne River
4. Pembina River
5. Mouse River
6. Red River of the North
7. Bois De Sioux
8. Knife River
9. Heart River
10. Cannonball River
11. Yellowstone River
12. Devils Lake
13. Lake Metigoshe
14. Painted Woods Lake
15. Sweetwater Lake
16. Upper Des Lacs Lake
17. Long Lake, Bottineau County



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