

NAVIGABLE WATER DETERMINATIONS

2022 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Timothy D. Hawkes

Senate Sponsor: _____

LONG TITLE

General Description:

This bill modifies the Public Waters Access Act to address an administrative process to determine navigability of waters for purposes of public recreational access.

Highlighted Provisions:

This bill:

- ▶ addresses definitions;
- ▶ provides for an administrative proceeding to determine navigability of waters;
- ▶ exempts the administrative proceeding from the Administrative Procedures Act;
- ▶ grants rulemaking authority;
- ▶ provides for judicial review;
- ▶ addresses the scope and impact of a determination;
- ▶ requires the Division of Forestry, Fire, and State Lands to publish a list of navigable

waters in the state; and

- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:



28 73-29-102, as enacted by Laws of Utah 2010, Chapter 410

29 ENACTS:

30 73-29-301, Utah Code Annotated 1953

31 73-29-302, Utah Code Annotated 1953

32 73-29-303, Utah Code Annotated 1953

33 73-29-304, Utah Code Annotated 1953

34 73-29-305, Utah Code Annotated 1953



36 *Be it enacted by the Legislature of the state of Utah:*

37 Section 1. Section 73-29-102 is amended to read:

38 **73-29-102. Definitions.**

39 As used in this chapter:

40 (1) "Division" means the Division of Wildlife Resources.

41 (2) "Floating access" means the right to access public water flowing over private
42 property for floating and fishing while floating upon the water.

43 (3) "Impounded wetlands" means a wetland or wetland pond that is formed or the level
44 of which is controlled by a dike, berm, or headgate that retains or manages the flow or depth of
45 water, including connecting channels.

46 (4) "Navigable water" means a water course that ~~[in its natural state without the aid of~~
47 ~~artificial means is useful for commerce and has a useful capacity as a public highway of~~
48 ~~transportation]~~, at the time of Utah’s statehood, was used, or susceptible of being used, in its
49 ordinary condition, as a highway for commerce, over which trade and travel were or may have
50 been conducted in the customary modes of trade and travel on water.

51 (5) "Private property to which access is restricted" means privately owned real
52 property:

53 (a) that is cultivated land, as defined in Section 23-20-14;

54 (b) that is:

55 (i) properly posted, as defined in Section 23-20-14;

56 (ii) posted as described in Subsection 76-6-206(2)(b)(iii); or

57 (iii) posted as described in Subsection 76-6-206.3(2)(c);

58 (c) that is fenced or enclosed as described in:

- 59 (i) Subsection 76-6-206(2)(b)(ii); or
60 (ii) Subsection 76-6-206.3(2)(b); or
61 (d) that the owner or a person authorized to act on the owner's behalf has requested a
62 person to leave as provided by:
63 (i) Section 23-20-14;
64 (ii) Subsection 76-6-206(2)(b)(i); or
65 (iii) Subsection 76-6-206.3(2)(a).
66 (6) "Public access area" means the limited part of privately owned property that:
67 (a) lies beneath or within three feet of a public water or that is the most direct, least
68 invasive, and closest means of portage around an obstruction in a public water; and
69 (b) is open to public recreational access under Section 73-29-203; and
70 (c) can be accessed from an adjoining public [assess] access area or public
71 right-of-way.
72 (7) "Public recreational access" means the right to engage in recreational access
73 established in accordance with Section 73-29-203.
74 (8) (a) "Public water" means water:
75 (i) described in Section 73-1-1; and
76 (ii) flowing or collecting on the surface:
77 (A) within a natural or realigned channel; or
78 (B) in a natural lake, pond, or reservoir on a natural or realigned channel.
79 (b) "Public water" does not include water flowing or collecting:
80 (i) on impounded wetland;
81 (ii) on a migratory bird production area, as defined in Section 23-28-102;
82 (iii) on private property in a manmade:
83 (A) irrigation canal;
84 (B) irrigation ditch; or
85 (C) impoundment or reservoir constructed outside of a natural or realigned channel; or
86 (iv) on a jurisdictional wetland described in 33 C.F.R. 328.3.
87 (9) (a) "Recreational access" means to use a public water and to touch a public access
88 area incidental to the use of the public water for:
89 (i) floating;

- 90 (ii) fishing; or
- 91 (iii) waterfowl hunting conducted:
- 92 (A) in compliance with applicable law or rule, including Sections [23-20-8](#), [73-29-203](#),
- 93 and [76-10-508](#); and
- 94 (B) so that the individual who engages in the waterfowl hunting shoots a firearm only
- 95 while within a public access area and no closer than 600 feet of any dwelling.
- 96 (b) "Recreational access" does not include:
- 97 (i) hunting, except as provided in Subsection (9)(a)(iii);
- 98 (ii) wading without engaging in activity described in Subsection (9)(a); or
- 99 (iii) any other activity.

100 Section 2. Section **73-29-301** is enacted to read:

101 **Part 3. Administrative Determinations of Navigable Waters**

102 **73-29-301. Definitions.**

103 As used in this part:

104 (1) "Affected landowner" means a person listed in the records of a county assessor as
105 an owner of property that is fronting, abutting, or underlying the public water at issue on the
106 day that an administrative proceeding is initiated under Section [73-29-303](#).

107 (2) "Bed," for purposes of navigable water only, means the portions of the land lying
108 below the ordinary high-water mark.

109 (3) "Director" means the director of the Division of Forestry, Fire, and State Lands.

110 (4) Notwithstanding Section [73-29-102](#), "division" means the Division of Forestry,
111 Fire, and State Lands.

112 (5) "GPS" means global positioning system.

113 (6) "Ordinary high-water mark" means the line or mark on the bank or shore to which
114 high water ordinarily rises annually in season.

115 (7) "Publish public notice" means to post reasonable notice when notice is required by
116 this part, including posting notice on the Utah Public Notice Website created in Section
117 [63A-16-601](#).

118 (8) "Requestor" means a person who files a request for a determination of navigability
119 under Subsection [73-29-303](#)(1)(a).

120 Section 3. Section **73-29-302** is enacted to read:

121 **73-29-302. Standard to determine navigability.**

122 A determination of navigability under this part is governed by the definition of
123 "navigable water" in Section [73-29-102](#).

124 Section 4. Section **73-29-303** is enacted to read:

125 **73-29-303. Administrative proceeding to determine navigability -- Judicial review.**

126 (1) The division shall conduct an administrative proceeding under this part to
127 determine whether a public water is a navigable water for purposes of Subsection
128 [73-29-201\(1\)\(a\)\(i\)](#) if:

129 (a) a person files a request with the division seeking a determination of whether a
130 public water is a navigable water open to public use under Subsection [73-29-201\(1\)\(a\)\(i\)](#) that
131 includes:

132 (i) a description of the public water segment at issue, identified through the use of GPS
133 coordinates, river miles, or other geographic place that can be clearly located; and

134 (ii) the evidence known to the requestor showing whether the public water segment at
135 issue is navigable; or

136 (b) the division elects to initiate the administrative proceeding.

137 (2) (a) An administrative proceeding under this part is exempt from Title 63G, Chapter
138 4, Administrative Procedures Act.

139 (b) The division may make rules, in accordance with Title 63G, Chapter 3, Utah
140 Administrative Rulemaking Act, and consistent with this part, establishing procedures for
141 initiating and conducting an administrative proceeding under this part.

142 (c) The director may not directly participate in an administrative proceeding under this
143 part until such time as the division submits the division's report to the director under
144 Subsection (3)(c).

145 (3) (a) If an administrative proceeding is initiated under Subsection (1), the division
146 shall:

147 (i) publish public notice within 30 days of the day on which the division receives a
148 request for or elects to initiate an administrative proceeding of:

149 (A) the initiation of the administrative proceeding;

150 (B) the initiation of the related investigation; and

151 (C) the right, within 60 days of the date the public notice is published on the Utah

152 Public Notice Website, of an affected landowner or member of the general public to submit
153 comments or evidence regarding navigability of the public water segment at issue in the
154 administrative proceeding; and

155 (ii) conduct an investigation of navigability and assemble evidence of navigability,
156 whether the evidence is:

157 (A) discovered by the division; or

158 (B) provided by a requestor, an affected landowner, or a member of the general public.

159 (b) (i) The division may not complete the division's investigation until after the
160 conclusion of the comment period described in Subsection (3)(a)(i)(C). The division shall
161 complete the investigation by no more than 30 days after the conclusion of the comment period
162 described in Subsection (3)(a)(i)(C).

163 (c) At the conclusion of the division's investigation, the division shall submit to the
164 director a report containing:

165 (i) a summary of the investigation, including a detailed description of the assembled
166 evidence; and

167 (ii) a recommendation as to whether the evidence warrants a determination of
168 navigability.

169 (d) The division shall promptly publish public notice that:

170 (i) the report has been submitted by the division under this Subsection (3);

171 (ii) a copy of the report may be obtained at an electronic link to the report included in
172 the public notice; and

173 (iii) an affected landowner or member of the general public has the right, within 30
174 days of the date the public notice is published on the Utah Public Notice Website, to submit
175 comments on the report.

176 (e) The division shall provide a person a copy of the report upon request.

177 (4) (a) The director may not make a determination under this Subsection (4) until after
178 the conclusion of the comment period described in Subsection (3)(d)(iii). The director shall
179 make a determination under this Subsection (4) by no more than 30 days after the day the
180 conclusion of the comment period described in Subsection (3)(d)(iii).

181 (b) The director's determination regarding navigability shall:

182 (i) be in writing;

- 183 (ii) clearly describe the public water segment covered by the determination using GPS
184 coordinates, common descriptions, or maps designed to identify the public water segment in a
185 manner intelligible to a member of the general public; and
- 186 (iii) state whether the public water segment is navigable.
- 187 (c) The division shall promptly publish public notice of:
- 188 (i) the determination of the director;
189 (ii) an electronic link to obtain a copy of the determination of the director; and
190 (iii) the right of a person described in Subsection (5) to appeal the determination of the
191 director.
- 192 (d) The division shall provide a copy of the director's determination upon request.
- 193 (5) (a) A person listed in Subsection (5)(b) may seek judicial review of the director's
194 determination issued under Subsection (4) if the person:
- 195 (i) is aggrieved by the determination; and
196 (ii) files a petition for review in the district court within 60 days of the day on which
197 the public notice described in Subsection (4)(c) is published on the Utah Public Notice
198 Website.
- 199 (b) A person who is entitled to file an appeal includes:
- 200 (i) a requestor;
201 (ii) an affected landowner; or
202 (iii) a member of the public who submits evidence or comments in the administrative
203 proceeding under this section.
- 204 (c) The petition for review shall be a complaint governed by the Utah Rules of Civil
205 Procedure.
- 206 (d) The district court shall review a determination de novo and without a jury.
- 207 (e) The district court may:
- 208 (i) receive evidence relevant to navigability, including evidence not included in the
209 division report submitted under Subsection (3), in accordance with the Utah Rules of Evidence;
210 (ii) affirm, reverse, or remand the determination; and
211 (iii) enter findings of fact, conclusions of law, and a final judgment regarding the
212 navigability of the public water segment at issue.
- 213 (f) A decision on a petition for judicial review is reviewable by a higher court.

214 Section 5. Section **73-29-304** is enacted to read:

215 **73-29-304. Scope and impact of administrative proceeding.**

216 (1) (a) Unless superseded by judicial action or a subsequent administrative proceeding,
217 the director's determination under Section [73-29-303](#) regarding navigability governs whether
218 the public may use a public water and the public water's bed for recreational activity under
219 Subsection [73-29-201](#)(1)(a)(i).

220 (b) A determination by the director under this part is without prejudice to a person
221 seeking a future administrative determination of the navigability of the same public water
222 based on evidence that is different than the evidence on which the determination is made.

223 (c) A determination of navigability under this part does not affect title to the bed of
224 navigable water, or the rights or abilities of the division, landowners, or other interested
225 persons to seek an adjudication of title to the bed of a navigable water.

226 (d) Nothing in this part is intended to affect the ability of a court of competent
227 jurisdiction to determine a state or private claim to or interest in real property.

228 (2) The administrative remedy provided for in this part is not exclusive, and exhaustion
229 of the administrative remedy is not required before filing an action in a court of competent
230 jurisdiction seeking a judicial determination of navigability of a public water, whether for
231 purposes of allowing public recreational use of the public water or adjudicating title to the bed
232 of the public water.

233 Section 6. Section **73-29-305** is enacted to read:

234 **73-29-305. Division to maintain list of navigable waters.**

235 (1) By no later than October 1, 2022, the division shall publish a complete list of public
236 waters in the state that have been determined to be navigable, whether determined under this
237 part or adjudicated by a court for purposes of allowing public recreational use or determining
238 title to the bed of the public water.

239 (2) The division shall maintain the list required by this section and update the list
240 semi-annually.