

## 2.1 Ownership & Public Use

Ownership of streambeds and usage rights involving streamside properties in Arkansas is an extremely complicated issue. It is beyond the scope of this handbook to detail the legal definitions and court rulings in this matter. Please seek a lawyer's opinion for specific answers to ownership issues.

### The Arkansas Navigable Rivers List

In Arkansas, landowners can own the bed of a stream unless it has been determined that the stream is **navigable**. The river bed up to the **high water mark** of a navigable stream actually belongs to the State of Arkansas to hold in trust for the public. When most people think of navigability, they think of giant barges moving up the river. In 1980, the Arkansas Supreme Court expanded the definition of navigability to include recreational use with its decision that the Mulberry River is indeed navigable (State v. McIlroy 268 Ark. 277). Under this decision, rivers that are used for recreational use, for even part of the year during normal flow, could be considered navigable by the State.

The river bed of a **non-navigable** stream is presumed to belong to the adjacent property owner (called a *riparian* owner). This boundary line could change with the movement of the stream – adding or taking away from the total property of a streamside landowner. If a non-navigable stream is determined to be navigable, ownership of the



stream bed is transferred to the State of Arkansas. A large portion of the Kings River is used by boaters throughout the year. Does this mean that it is considered navigable and that the State of Arkansas owns the streambed? The legal determination does not happen automatically just because boaters use the river; it can only be made by the circuit courts or the AR State Legislature. The last time that the Arkansas State Legislature used a legislative act to designate navigability was in 1885. Arkansas Legislative Acts 1854-5 deems the Kings River in Madison County from the mouth of the Dry Fork to the county line of Carroll County as navigable.

Navigability and public use of the Kings River falls into a grey area because the private versus public rights have not been challenged in court. This is not a bad thing...it just means that we are all getting along.



### High Water Mark

In general, this is where most of the vegetation stops. The high water mark is the place where water movement is so usual in ordinary years that it makes a distinctive line between the streambed and the stream banks. This line can be very difficult to determine if extensive streambank erosion exists. The high water mark is NOT the highest point that a river reaches during flood stage.

## Public Use of Arkansas Waterways

The public have a clear legal right to use **navigable** waterways in Arkansas up to the high water mark. However, the public cannot cross private land to gain access to the navigable waterway.

Public access on **non-navigable** waterways has also been supported through Arkansas property law. If a thoroughfare has been used continuously for seven years – with the knowledge but not permission of the owner, the public’s legal right to access could be protected through a prescriptive easement. **Prescriptive easements** traditionally extend only to the thoroughfare itself, and not to surrounding lands. Generally the judge granting the prescriptive easement defines the terms of use, i.e. how and where specifically the public could use the stream corridor. Crooked Creek in Marion County is a local example of a stream with a prescriptive easement placed on it as a result of a court case.

The Kings River is currently used regularly for many recreational activities although neither a prescriptive easement nor navigability standard have legally been placed on it. The Arkansas Game and Fish Commission owns five access points to the Kings River: Marble, Rockhouse, Hwy. 62 Bridge site, Stoney Point, and Romp Hole.

## Federal Navigable Rivers List

As if all of this is not confusing enough, the federal government maintains a separate list of waterways that they consider to be navigable. Their list dates all the way back to the original granting of land to each State, at which time the federal government reserved the right to regulate navigable waterways. The federal definition of navigability was strictly based on the ability of the waterway to support commercial use or interstate commerce, so it is a little different than Arkansas’ definition.

The Army Corps of Engineers was put in charge of enforcing and permitting water quality standards and discharge limits for these navigable waterways under the Clean Water Act. Their jurisdiction has been expanded to include all waters of the State that could potentially impact a navigable waterway. This expansion gives the Corps jurisdiction to regulate even very small or intermittent streams on private property.

The Kings River is not currently on the federal Navigable Waterways List but it and its tributaries can impact the White River so it still falls under the Corps’ jurisdiction.

Contact the U.S. Army Corps of Engineers or the AR Attorney General’s office for more info.

