

Alabama Navigability Report

Summary

There is no simple test of navigability and public access of streams in Alabama. The test of navigability is a subjective decision based on many factors.¹ Public waters include all “natural bodies of water such as rivers, creeks, brooks, lakes, bayous, bays, channels, canals or lagoons or [waters that] are dug, dredged or blasted canals and if these waters traverse, bound, flow upon or through or touch lands title to which is held by more than one person, firm, or corporation.”² Also included in public waters are “[a]ny water impounded by the construction of any lock or dam or any other impounding device placed across the channel of a navigable stream”³ The Federal Court of Appeals for the Eleventh Circuit found that the Code of Alabama from which the above description of public waters comes applies only to navigable waters.⁴ Although the public has no right of access to private waters, the definition of trespassing found in the Code of Alabama gives license and privileges to a person who enters unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, unless notice against trespass is either personally communicated to the person by the owner of such land or authorized person, or unless such notice is given by posting in a conspicuous manner.⁵

State Test of Navigability

The test for navigability is based on case law.⁶ “A stream is navigable in law if it has an aptitude for beneficial public servitude, capable of being traversed for valuable floatage for a considerable part of the year.”⁷ But “occasional use by ‘fishing boats’ and ‘canoes’ during some parts of the year is not sufficient to demonstrate . . . beneficial public use.”⁸ The test of navigability in Alabama involves consideration of the following factors, none of which is dispositive:

- Whether the stream is fitted for valuable floatage;
- Whether the public, or only a few individuals, are interested in transportation;
- Whether any great public interests are involved in the use of the stream for transportation;
- Whether the periods of the stream’s capacity for floatage are sufficiently long to make it susceptible of use beneficial to the public;
- Whether the stream has been previously used by people generally, and how long it has been so used;

¹ Blackman v. Mauldin, 51 So. 23, 25 (Ala. 1909); Rhodes v. Otis, 33 Ala. 578, 1859 WL 615 (Ala. 1859).

² Ala. Code § 9-11-80 (2014).

³ *Id.*

⁴ United States v. Harrell, 926 F.2d 1036, 1044 (11th Cir. 1991).

⁵ Ala. Code § 13A-7-1 (2014).

⁶ Rhodes, 33 Ala. at 596; *see also* Webb v. City of Demopolis, 13 So. 289 (Ala. 1892).

⁷ Wehby v. Turpin, 710 So.2d 1243, 1250 (Ala. 1998).

⁸ *Id.* (citing Rhodes, 33 Ala. at 597-98).

- Whether the stream was meandered by government surveyors, or included in the surveys; and
- Whether, if declared public, the stream will probably in the future be of public use for carriage.⁹

In *Blackman v. Mauldin*, the Supreme Court of Alabama said of these factors in the cases that came before the court, “no one of these considerations, nor any number of them less than the whole, has been given controlling influence.”¹⁰ The burden of proof is upon the party claiming that a stream above tide water is public.¹¹

“The state owns the bed and bottom of navigable streams in Alabama, but not those which are nonnavigable.”¹² The basis of private ownership of streambeds is that the streambeds constitute “a part of the public land ceded by the United States . . . , surveyed and patented by the government as such, by which the title passed to the patentees and their successors in ownership, and is conveyed by the description of the land through which the streams run, and thereby the public have no right of fishery in the waters as they go through such land.”¹³

In *Bullock v. Wilson*,¹⁴ the Supreme Court of Alabama determined that the Coosa River was navigable at the point of a mill that was the subject of the suit. In that era, steamboats plied the Coosa as far upstream as Rome, Georgia, where the river begins. Now, however, a series of seven dams on the Coosa that make the river almost unrecognizable from that of the mid-18th century.

Extent of Public Rights in Navigable and Non-Navigable Rivers

The State has title ownership to all fish in the public fresh waters of Alabama for the purpose of regulating their conservation and disposition.¹⁵ State residents (a bona fide resident for a period of not less than 90 days) under 16 years old are exempted from the requirement of procuring a license.¹⁶ State residents 65 years of age and older are exempted from procuring a fishing license if that resident has on his or her person while fishing a valid Alabama driver license or proof of permanent Alabama residence and age.¹⁷ State residents age 16 or older, but under age 65, have to procure an annual resident freshwater fishing license.¹⁸ A separate annual or trip (7-day) nonresident freshwater fishing license is required for nonresidents over 16 years old.¹⁹

⁹ See *Blackman*, 51 So. at 25; *Rhodes*, 33 Ala. at 596-97.

¹⁰ *Blackman*, 51 So. at 25; see also *Rhodes*, 33 Ala. at 596-97.

¹¹ *Blackman*, 51 So. at 25; see also *Rhodes*, 33 Ala. at 596-97.

¹² *Hood v. Murphy*, 165 So. 219, 220 (Ala. 1936); see also *Harrell*, 926 F.2d at 1044; *City of Birmingham v. Lake*, 10 So.2d 24, 27 (Ala. 1942)

¹³ *Hood v.*, 165 So. at 220.

¹⁴ 2 Port. 436 (Ala. 1835).

¹⁵ Ala. Code § 9-11-81.

¹⁶ *Id.* § 9-11-53(e).

¹⁷ *Id.*

¹⁸ *Id.* § 9-11-53(a).

¹⁹ *Id.* § 9-11-55 & 56.

The public has no right of access to non-navigable waters in Alabama.²⁰ Alabama law provides, however, that a person may enter unimproved and apparently unused land that is not enclosed in a manner to exclude intruders “unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner.”²¹

Owners of private water have an absolute ownership right to any fish contained in the water and it is a misdemeanor to take, catch, or kill (or attempt to do so by any method) fish from private waters without permission.²² Landowners are authorized to make citizens’ arrests of trespassing fishermen if the offense is committed in the presence of the landowner.²³ A landowner may also request help from a game warden in making an arrest.²⁴

Miscellaneous

Alabama has several laws regarding restricting the flow on both private and navigable waters. An owner of private water capable of floating logs who builds an obstruction on the water must provide a chute or sluiceway able to carry any logs that can be floated down to the obstruction from the stream above.²⁵ “Any person who dams up or otherwise obstructs a navigable watercourse must, on conviction, be fined not less than \$100.00 nor more than \$1,000.00.”²⁶ “Any person who by means of traps or other obstructions other than dams prevents the passage of fish up the waters of any river or creek must, on conviction, be fined not more than \$100.00, but it shall not be unlawful to erect or maintain a dam on a nonnavigable stream for the impounding of private waters for the production of fish for food or recreation or for the furtherance of any lawful business without providing or maintaining means for the passage of fish up such stream.”²⁷

Man-made lakes created by impounding navigable waters are public.²⁸ However, man-made lakes created by impounding non-navigable waters are private, and riparian owners’ rights are limited to those waters over their land or to those lands to which they hold easements.²⁹

Helpful Internet Resources

The U.S. Army Corps of Engineers (Mobile District) provides a wealth of information on some of Alabama’s lake and river recreational areas at: <https://www.sam.usace.army.mil/Missions/Civil-Works/Recreation/>.

Alabama Department of Conservation and National Resources: <https://www.outdooralabama.com/>.

²⁰ United States v. Harrell, 926 F.2d 1036, 1044 (11th Cir. 1991).

²¹ Ala. Code § 13A-7-1.

²² City of Birmingham v. Lake, 10 So.2d 24, 27 (Ala. 1942); Ala. Code § 9-11-91.

²³ Ala. Code § 15-10-7(a)(1).

²⁴ *Id.* § 9-11-5.

²⁵ Blackman v. Mauldin, 51 So. 23, 27 (Ala. 1909)

²⁶ Ala. Code § 33-7-3.

²⁷ *Id.* § 9-11-92.

²⁸ *Id.* § 9-11-80.

²⁹ Wehby v. Turpin, 710 So.2d 1243 (Ala. 1998).

Alabama Department of Environmental Management: <http://adem.alabama.gov/>.

U.S. Fish & Wildlife Service – Southeast Region – Alabama: <https://www.fws.gov/alabama/>.