

Florida Navigability Report

Summary

Public waters in Florida include only navigable waters that have not been alienated by grants, sales, or statutes. Florida does not apply ebb and flow principles to determine sovereignty over tidal waters and does not claim those that are not navigable. The test of navigability in Florida is virtually indistinguishable from the federal title test. Public rights to use navigable waters that have not been alienated include commerce, transport of property, fishing, bathing, boating, and other lawful useful purposes. Both public and riparian rights in Florida are subject to extensive regulation by state and local governments.

State Test of Navigability

Article X of the Florida Constitution codifies the public trust doctrine with respect to lands beneath navigable waters and provides that such lands are held by the state, by virtue of its sovereignty, in trust for all the people.¹ This provision applies only to lands under navigable waters and that have not been alienated (*e.g.*, by pre-statehood grants or post state-hood sales or statutes).² Florida does not claim sovereignty over non-navigable tidal lands, which are subject to private ownership.³

Florida uses a navigability test that is almost indistinguishable from the federal title test.⁴ A stream or other body of water is navigable if it is “permanent in character, and in its ordinary and natural state is in fact navigable for useful purposes, and is of sufficient size and so situated and conditioned that it may be used for purposes common to the public in the locality where it is located”⁵ Navigability is measured at the time of statehood (1845) and cannot take into consideration subsequent artificial improvements.⁶ Navigability depends not on actual use, but “on the water body’s potential for commercial use in its ordinary and natural condition.”⁷ Florida has not adopted any set specific use test for determining navigability, with each case decided on its particular facts. Relevant considerations include the size and depth of the water body and other factors that may demonstrate it is useful for public purposes. Actual use is also a

¹ Fl. Const. art. X, § 11.

² *Id.*

³ *Clement v. Watson*, 58 So. 25, 26-27 (Fla. 1912); *Lee v. Williams*, 711 So.2d 57, 59-64 (Fla. Dist. Ct. App. 5th Dist. 1998).

⁴ *Odom v. Deltona Corp.*, 341 So.2d 977, 988 (Fla. 1976) (“Navigability at law is generally a question of navigability in fact” and “must be determined under federal standards of navigability. . . . Florida’s test for navigability is similar, if not identical, to the federal title test.”).

⁵ *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).

⁶ *Odom*, 341 So.2d at 988.

⁷ *Id.* In Florida, rebuttable presumptions of navigability and non-navigability attach based on whether the body of water in question was meandered by early government surveyors. *Id.* at 988-89.

relevant consideration. Uses such as log floatage, pleasure boating, and fishing have all been recognized as evidence of navigability in particular cases.⁸

Extent of Public Rights in Navigable and Non-Navigable Rivers

Assuming legal access, the public has the right to use non-alienated navigable waters for commerce, transport of property, fishing, bathing, boating, and other lawful useful purposes.⁹ These rights coexist with the rights of riparian and littoral owners, which include the right to use water adjacent to the property, the right to access and use adjacent navigable waters (including the right to wharf out to navigability), and the right to an unobstructed view of the water adjacent to the property.¹⁰ The public generally has the right to access public waters only by way of public grounds or a public approach. Access to navigable waters by way of adjacent lands that are privately held is the exclusive right of the riparian/littoral owner.¹¹ Generally speaking, trespass on enclosed lands, lands adjacent to dwellings, cultivated lands, posted lands, or after personal communication against trespassing is given is a first-degree misdemeanor.¹² If the property is posted with no trespassing signs that also identify the property as a construction site or commercial property for horticultural products, unauthorized entrance is a third-degree felony.¹³ The status of portage and scouting rights in Florida is uncertain and has yet to be addressed by the courts.

Florida uses the ordinary high water line to define the boundary of non-tidal sovereignty lands.¹⁴ Use of this standard may result in changes in boundary lines over time, such as through accretion and reliction.¹⁵ The boundary line of tidal sovereignty lands is set by the mean high water line of tidal waters. In 1974, the Florida legislature defined the mean high water line as “the average height of the high waters over a 19-year period.”¹⁶ The Florida Supreme Court also has recognized “soft sand rights,” *i.e.*, the public’s right to make use of privately held soft sand areas

⁸ Board of Trustees of the Internal Improvement Trust Fund v. Florida Pub. Utils. Co., 599 So.2d 1356, 1358 (Fla. Dist. Ct. App. 1st Dist. 1992) (collecting cases).

⁹ *Broward*, 50 So. at 831; *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White River Inspectors’ & Shippers’ Ass’n*, 48 So. 643, 644-45 (Fla. 1909); *Symmes v. Prairie Pebble Phosphate Co.*, 60 So. 223, 224 (Fla. 1912); *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); *White v. Hughes*, 190 So. 446, 450 (Fla. 1939); *Walton Cty v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008).

¹⁰ *Tewksbury v. City of Deerfield Beach*, 763 So.2d 1071, 1071 (Fla. Dist. Ct. App. 4th Dist. 1999); *Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 501, 507 (Fla. 1917).

¹¹ *Ferry Pass Inspectors’ & Shippers’ Ass’n*, 48 So. at 645.

¹² Fla. Stat. § 810.09.

¹³ *Id.* A first degree misdemeanor is punishable by imprisonment for up to one year and/or a fine of up to \$1,000. A third degree felony is punishable by imprisonment for up to five years or a fine of up to \$5,000. Fla. Stat. §§ 775.082, 775.083. The degree of criminality may rise in degree depending upon various circumstances (*e.g.*, carrying of firearms).

¹⁴ *Tilden v. Smith*, 113 So. 708, 712 (Fla. 1927); *Bd. of Trustees of the Internal Improvement Trust Fund v. Walker Ranch Gen. P’ship*, 496 So.2d 153, 154-56 (Fla. Dist. Ct. App. 5th Dist. 1986).

¹⁵ *See, e.g.*, *Bd. of Trustees of the Internal Improvement Trust Fund v. Sand Key Assocs., Ltd.*, 512 So.2d 934, 937-41 (Fla. 1987); *State v. Florida Nat’l Props., Inc.*, 338 So.2d 13, 18-19 (Fla. 1976).

¹⁶ Fla. Stat. § 177.27(14).

adjacent to the mean high tide line when it can be established that public use of the area has been customary, uninterrupted, and ancient.¹⁷

Miscellaneous

Riparian/littoral rights cannot be exercised in a manner that injures the lawful rights of others. Accordingly, riparian owners cannot use adjacent navigable waters in a way that obstructs or unreasonably impedes lawful navigation and commerce. Nor can the riparian owner unlawfully burden or monopolize such activities.¹⁸ When adjacent waters are public, a riparian owner typically has no right to erect permanent structures on shore or bed without first obtaining permission from the appropriate authority.¹⁹

Both the public's rights in sovereignty lands and waters and private riparian/littoral rights are subject to appropriate governmental regulation in the interest of the public.²⁰ Thus, the state has the power to and does regulate the use of navigable waters and sovereignty lands for, among other things, reasons of safety, conservation and wildlife protection, environmental protection, and preservation of the public's right to enjoy sovereign lands and waters. Most regulation and management duties are handled by the Board of Trustees of the Internal Improvement Trust Fund (in which title to sovereignty lands vests), the Florida Department of Environmental Protection ("DEP"), which serves the Board, and individual regional water districts, which serve the DEP.²¹

State and local water management officials have statutory authority and duty to adopt emergency measures for, among other things, when the condition of storm water management systems, dams, impoundments, and reservoirs threaten life or property, or when they are threatened by passing or imminent floods. Approved measures include emptying or lowering water levels of impoundment or reservoir levels. Although the right to close navigable waterways is not specifically enumerated in the statute, authorities do have the right to "take such other steps as may be essential to safeguard life and property." Emergency authority under the statute remains in effect until conditions are "rendered safe or the emergency occasioning the action has ceased."²² The Florida State Emergency Management Act gives state and local officials broad authority to act in emergency and disaster situations (natural, technological, and man-made) that pose a threat to life, health, property, business, and recreation.²³

Additional Resources

- Florida Department of Environmental Protection: <http://www.dep.state.fl.us/>.
- Northwest Florida Water Management District: <https://nwfwater.com/>.

¹⁷ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 78 (Fla. 1974).

¹⁸ *Ferry Pass Inspectors' & Shippers' Ass'n*, 48 So. at 645-46.

¹⁹ Thiesen, 78 So. at 501.

²⁰ *Odom*, 341 So.2d at 977.

²¹ See Fla. Stat. ch. 253; Fla. Admin. Code chs. 18.1-18.24.

²² Fla. Stat. § 373.439.

²³ *Id.* ch. 252.

- Suwannee River Water Management District: <https://www.mysuwanneeriver.com/>.
- St. Johns Water Management District: <https://www.sjrwmd.com/>.
- Southwest Florida Water Management District: <http://www.swfwmd.state.fl.us/>.
- South Florida Water Management District: <https://www.sfwmd.gov/>.
- RiverFacts website: <http://www.riverfacts.com/states/fl.html> (physical descriptions of whitewater runs in Florida).