

Tennessee Navigability Report

Summary

Navigable waters are considered public highways under common law. Tennessee recognized waters as legally navigable if they can support navigation by vessels for commerce and as navigable in their ordinary sense if capable of supporting valuable floatage; the former waters are owned by the state in trust for the public to the low water mark while the latter may be privately owned but with an easement for public use. Streams do not have to be floatable at all times of the year, but rather can be seasonal so long as they are regularly floatable and not only during a flood.

State Test of Navigability

Tennessee, through its case law, has adopted a state test of navigability that makes waters navigable if they are navigable in the “legal (or technical) sense” and “ordinary sense.”¹ “The distinguishing difference between the two classes of streams is capacity; that is, depth, width, volume.”²

Under Tennessee law, legally navigable waters are those that are in fact “capable of being navigated.”³ If a river or stream in Tennessee is navigable in the legal sense, the use of the water belongs to the public.⁴ To be legally navigable, water must be capable of navigation “ascending and descending, by sea vessels; that is, such vessels as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels.”⁵

A stream that is not navigable in the legal (or technical) sense may still be navigable in the ordinary sense if the water is of “sufficient capacity [in] depth and width and volume” for valuable floatage.⁶ Valuable floatage can consist of use by “rafts, flat-boats and small vessels of lighter draft than ordinary,” but not merely the “capacity to float a log.”⁷ The water must be capable for navigation in its natural state, though need not be floatable at all seasons nor usable against the current, but need only be navigable with its “ordinary volume of water, either constantly or at regularly recurring seasons.”⁸ Tennessee has not adopted the common law definition of navigability by the ebb and flow of the tide, but instead looks to see if water in its ordinary state is suitable or capable of navigation.⁹

¹ State v. West Tenn. Land Co., 158 S.W. 746, 748-50 (Tenn. 1913).

² *Id.* at 750.

³ *Id.* at 748.

⁴ Stuart v. Clarke’s Lessee, 32 Tenn. 9, 16 (1852); *see also* West Tenn. Land Co., 158 S.W. at 750.

⁵ Clarke’s Lessee, 32 Tenn. at 15-16.

⁶ West Tenn. Land Co., 158 S.W. at 749.

⁷ Irwin v. Brown, 12 S.W. 340, 340 (1889). *But see* Miller v. State, 137 S.W. 760, 762 (1911) (finding a stream was non-navigable in the legal sense, but in effect navigable in the ordinary sense that could float loose logs only when swollen with rains and for 10 to 12 days per year, but then also permitting a dam across the stream that could let loose logs and small rafts pass).

⁸ American Red Cross v. Hinson, 122 S.W.2d 433, 435 (1938) (quoting Sigler v. State, 66 Tenn. 493, 497-98 (1874)).

⁹ Clarke’s Lessee, 32 Tenn. at 14.

The following streams have been held by the courts to be navigable in the technical or legal sense: Cumberland River;¹⁰ the French Broad and Holston or Tennessee River both below and above (at least in part) their junction;¹¹ and Reelfoot Lake.¹² The following streams have been deemed navigable in the ordinary sense for at least part of the watercourse: Big Creek;¹³ Powell's River;¹⁴ and Hiwassee River.¹⁵ A state court has held that Hind's Creek is not navigable in any sense.¹⁶

Extent of Public Rights in Navigable and Non-Navigable Rivers

Tennessee considers all navigable waters to be public highways.¹⁷ Waters navigable in the legal sense cannot be owned privately¹⁸. The state has the right of ownership of lands under the waters, held in trust for the public up to the low water mark.¹⁹ A riparian owner on a stream navigable in the legal or technical sense have title to the ordinary low watermark only, and not to the center of the stream. The public may use legally navigable streams for navigation, commerce, hunting, fishing, "and everything of value incident to a right of soil."²⁰

For a stream only navigable in the ordinary sense, "the bed of the stream is vested in the riparian proprietor, and in that respect it is to be regarded as a private river, [but] the public have a right [*i.e.*, "an easement" or "servitude of public interest"] to the free and uninterrupted use and enjoyment of such stream, for all the purposes of transportation and navigation to which it is naturally adapted."²¹

The public has no rights in non-navigable waters, that is, waters not navigable in the legal ordinary sense. If a stream is so "shallow as to be unfit for transportation and commerce," and is not navigable in even the ordinary sense, the rights to the property and use of the stream are "wholly and absolutely in the owners of the adjoining land."²²

There are no cases that address the question of portage or other incidents of navigation. In legally navigable waters, where the state owns the water and bed to the low water mark, contact with the bottom would be permitted.²³ But the right to portage or otherwise make contact above the low water mark is not clear.²⁴ Further, state courts have also not determined the scope of the

¹⁰ *West Tenn. Land Co.*, 158 S.W. at 748 (citing *Elder v. Burrus*, 25 Tenn. 358 (1845)).

¹¹ *Goodwin v. Thompson*, 83 Tenn. 209, 210-211 (1885).

¹² *West Tenn. Land Co.*, 158 S.W. 747.

¹³ *Sigler*, 66 Tenn. at 497.

¹⁴ *Holbert v. Edens*, 73 Tenn. 204, 208 (1880).

¹⁵ *Southern R. Co. v. Ferguson*, 59 S.W. 343, 344 (1900).

¹⁶ *Irwin*, 12 S.W. at 340.

¹⁷ Tenn. Code Ann. § 69-1-101 (2021).

¹⁸ *West Tenn. Land Co.*, 158 S.W. at 750.

¹⁹ *Id.*; *accord Uhlhorn v. Keltner*, 637 S.W.3d 844, (1982).

²⁰ *West Tenn. Land Co.*, 158 S.W. at 750.

²¹ *Clarke's Lessee*, 32 Tenn. at 16-17; *accord West Tenn. Land Co.*, 158 S.W. at 750.

²² *Clarke's Lessee*, 32 Tenn. at 17.

²³ *See West Tenn. Land Co.*, 158 S.W. at 750 ("everything of value incident to a right of soil").

²⁴ In *City of Townsend v. Damico*, No. E2013-01778-COA-R3-CV, 2014 WL 2194453 (May 27, 2014), the Court of Appeals of Tennessee reversed a trial court that dismissed a trespass citation for an individual who defended the trespass on the grounds of portaging around a dam. The trial court held that a right of portage existed whether the

public easement on waters navigable only in their ordinary sense; the public may float these rights, but it is not clear whether the public may make contact with the bottom, affect portage, or hunt or fish from the waters.

Miscellaneous

All navigable streams are considered public highways under common law, which forbids the obstruction to the detriment of navigation.²⁵ Tennessee Code Annotated § 69-1-117 states that without a permit issued by the Tennessee Department of Environment and Conservation (“TDEC”) no person shall “authorize, undertake, or engage in any activity, practice, or project that has or is likely to have the effect of impairing or obstructing the navigability of any river, lake, stream or watercourse located within the state.”²⁶

Trespass is a class C misdemeanor in Tennessee that is committed when a person receives notice against entering by a posting, fence, or personal communication by the owner.²⁷ Trespass is punishable by a fine up to \$50 and 30 days in jail. Trespass requires the intrusion of the entire body.²⁸

The TDEC and the Tennessee Wildlife Resources Agency manage natural resources and have substantial information on boating, fishing, hunting and parks and recreational activities. Further information can be found on their websites at <https://tdec.tn.gov/> and <https://www.tn.gov/twra.html>.

stream was navigable in law or in the ordinary sense. The appeals court held that the trespasser did not engage in portage because he did not use the most direct route around the dam. Accordingly, because portage did not occur, the appeals court held addressing whether the right existed in Tennessee was moot, and did not provide a definitive statement of portage. The appeals court noted that, as of 2014, “this concept has never been defined in Tennessee case law.” *Id.* at *6.

²⁵ Southern R. Co. v. Ferguson, 59 S.W. 343, 345-46 (1900); *see also* Tenn. Code Ann. § 69-1- 107, 117.

²⁶ Tenn. Code Ann. § 69-1- 107, 117.

²⁷ Tenn. Code Ann. § 39-14-405(a) (2021).

²⁸ *Id.* § 39-14-405(c).