

Texas Navigability Report

Summary

Public waters in Texas include navigable streams, navigable natural lakes, man-made lakes created by damming a navigable stream, and tidal waters affected by tides in the Gulf of Mexico. In Texas, the public may boat, fish, swim, camp, and, in general, carry on any legal activity on navigable streams and other public waters. Texas waters are considered navigable when they are either “navigable in fact” or “navigable by statute.” When public waters in Texas flow over private land, the public may still make use of the waters (e.g., boating or fishing), but may not have legal access to privately held banks or shores. The public has no right to access public waters by way of privately-held lands.

State Test of Navigability

The public’s right to navigate inland and costal waterways is one of the rights enumerated in the Texas Constitution.¹ Texas streams are considered navigable when they are either “navigable in fact” or “navigable by statute.” The courts have not adhered to any one test in determining whether a stream is “navigable in fact,” acknowledging that a variety of uses may establish navigability. Such uses include boating (both commercial and pleasure), log flotation, and capacity for commercial use.² Texas courts have held that waters are “navigable in fact” when they are useful to the public in their natural state for a considerable portion of the year.³

A stream is “navigable by statute” by statute if it “retains an average width of thirty feet from the mouth up.”⁴ The entire width of the stream bed is included in this measurement.⁵ To constitute a “stream” or “water course,” the watercourse must have discernable banks, and not be, for example, wetlands for which no bank exists.⁶

Public lakes in Texas include both navigable natural lakes (of which there are few), and man-made lakes created by damming navigable streams. Tidal waters (*i.e.*, waterways connected to and subject to the ebb and flow of the Gulf of Mexico) also are considered public waters in Texas.⁷

Extent of Public Rights in Navigable and Non-Navigable Rivers

Generally, the beds and waters of streams that are either “navigable in fact” or “navigable by statute” are owned by the state in trust for the public and are subject to use by the public for

¹ Tex. Const. art. XVI, § 59(a) (2019).

² *See* *Welder v. State*, 196 S.W. 868, 873 (Tex. Civ. App. – Austin 1917, writ ref’d).

³ E.g., *Id.*; *Hix v. Robertson*, 211 S.W.3d 423, 428 n.3 (Tex. App. Waco, 2006) (citing *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 129 (Tex. Civ. App. Waco 1935, writ dismissed)).

⁴ Tex. Nat. Res. Code § 21.001 (West 2019).

⁵ *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 648, 658 (Tex. 2020) (citing *Mott v. Boyd*, 286 S.W. 458, 467-68 (Tex. 1926)).

⁶ *Id.* at 658.

⁷ Tex. Water Code § 5.021(a) (West 2019); Op. Tex. Att’y Gen. DM-169 (1992); Op. Tex. Att’y Gen. M-1210 (1972).

navigation, fishing, and other lawful purposes.⁸ At minimum, the public has the right to boat on and fish in public waters.⁹

Typically, the public must obtain access to public waters (and public submerged lands) by lawful means. In other words, to make use of public waters and public submerged lands, members of the general public need to obtain access by way of public lands (e.g., public parks or roadways) or by permission of private riparian owners (e.g., by way of a privately owned campgrounds that permit access to campers). Access over private land without permission of the landowner is considered a trespass under Texas law.¹⁰

Members of the public may engage in a wide variety of lawful activities on, in, and along navigable streams. These activities include recreational purposes, including boating, swimming, wading, camping, picnicking, fishing (with appropriate licenses), and, in some locations, hunting.¹¹ Permitted activities are generally limited to the waters themselves and the streambeds. In Texas, streambeds cover that portion of the soil that falls between the “gradient boundary” on each stream bank. The Texas Supreme Court has defined the “gradient boundary as “a gradient of the flowing water in the stream, [which] is located midway between the lower level of the flowing water in that just reaches the cut bank and the higher level of it that just does not overtop the cut bank.”¹² In the case of tidal waters within the state boundaries, the state owns the water and the beds and the shores of the Gulf of Mexico and the arms of the gulf, including all land that is covered by the gulf and its arms either at low tide or high tide.¹³ The public has no right of passage beyond the gradient boundary or the inland tidal water boundary without the consent of the riparian or littoral owner.¹⁴

⁸ E.g., *Lone Oak Club*, 601 S.W.3d at 642, 646; see also *In re the Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444 (Tex. 1982) (citing *Motl*, 286 S.W. at 468); *Motl*, 286 S.W. at 445; *Taylor Fishing Club*, 88 S.W.2d 127. Under a 1929 state law known as the Small Bill, Tex. Rev. Civ. Stat. Ann. art. 5414a (West 2019), Texas relinquished some rights in the beds of some navigable streams to riparian owners, primarily to give these landowners the right to royalties from oil and gas located under stream beds that abutted the landowners property. The Small Bill, however, does not alter the public status of navigable streams or impair the public’s right to use of them. The Texas Attorney General has concluded that the public retains wading rights and the right to walk on dry streambeds of streams falling under the Small Bill. Op. Tex. Att’y Gen. S-208 (1956).

⁹ *Diversion Lake Club v. Heath*, 86 S.W.2d 441, 446-47 (Tex. 1935); *Taylor Fishing Club*, 88 S.W.2d 127; see also Op. Tex. Att’y Gen. DM-169 (1992).

¹⁰ *Diversion Lake Club*, 86 S.W.2d at 442; see also Texas Penal Code § 30.05 (West 2019). Criminal trespass requires some sort of notice to the accused trespasser that he is entering private property. Notice can take the form of written or oral notice from the landowner, fencing, visible signage, purple paint markings on trees, and/or crop cultivation and harvesting. Criminal trespass in Texas is a usually Class B misdemeanor, punishable by a fine of up to \$2,000 and a jail term of up to 180 days. Trespass on agricultural land within 100 feet to the boundary is a Class C misdemeanor, punishable by a fine of up to \$500. Trespass may be elevated to a Class A misdemeanor under certain conditions, e.g. if the trespasser is carrying a deadly weapon. A Class A misdemeanor is punishable by a fine of up to \$4,000 and a jail term of up to one year. Tex. Penal Code §§ 30.05(d), 12.21-12.23.

¹¹ See generally, e.g., *Hix*, 211 S.W.3d 423.

¹² *Diversion Lake Club*, 86 S.W.2d at 446.

¹³ *Lone Oak Club, LLC*, 601 S.W.3d at 653 (citing multiple cases to show that it “has long been the law in Texas that navigable waters and their beds—both above and below the tide—are reserved to the State for the use of the public generally.”) (internal quotations omitted).

¹⁴ *Id.*; see also Tex. Nat. Res. Code §11.012 (West 2019).

In the case of man-made lakes, wading and shoreline access will depend not only upon whether the lake is public (i.e., navigable), but also upon whether the submerged land under the lake and the shoreline is public or private. With the exception of “Small Bill” streams (*see* note 6), the issue of wading rights in public waters flowing over privately-held lands appears unsettled.¹⁵ In any case, even when public waters flow over privately-owned lands, the public still has the right to boat on and fish from these waters (subject to state licensing requirements). This is true in the case of both tidal waters and man-made navigable lakes.¹⁶

The existence of portage and scouting rights in Texas is still unsettled. The Texas Parks and Wildlife Code, for example, states that “recreational use of a protected freshwater area,” including portage and scouting, cannot create a “prescriptive easement over private property”¹⁷ The same section of the Parks and Wildlife Code, however, also provides that “[n]othing in this section shall limit the right of a person to navigate in, on, or around a protected freshwater area.”¹⁸ Moreover, as already noted, navigation in the state’s inland and coastal waters is a right recognized by the Texas Constitution. It is possible (but far from certain) that portage and scouting activities might fall within a necessity defense.¹⁹

Miscellaneous

The Texas Water Code, the Texas Parks and Wildlife Code, the Texas Natural Resources Code, and the Texas Penal Code all contain regulations regarding the obstruction of navigable streams and the construction of unauthorized private structures in or along streambeds. For example, the Texas Parks and Wildlife Code generally provides that a person may not restrict, obstruct, interfere with, or otherwise limit the public’s recreational use of protected freshwater areas (subject to trespass laws and other legal exceptions).²⁰ The Texas Water Code prohibits the obstruction of navigable streams by cutting or felling trees or by building dikes, bridges, and the like on or across a stream.²¹ The Texas Penal Code makes a Class B misdemeanor obstructing public waterways without legal authority.²² The Texas Natural Resources Code prohibits the construction or maintenance of non-permitted structures on lands owned by the state. Violations can result in monetary fines and liability for removal costs incurred by the state.²³ Under Texas case law, water obstructions also may constitute unlawful encroachment or enclosure if they encroach on public rights or appropriate that which belongs to the public for private use.²⁴ The Texas Attorney General has also opined that riparian owners may not erect fences on their property that prevent the public from accessing a public waterway by means of a highway

¹⁵ Tex. Att’y Gen LA-97-079 (1997). The Texas Attorney General has concluded that the public retains wading rights and the right to walk on dry streambeds of streams falling under the Small Bill. Op. Tex. Att’y Gen. S-208 (1956).

¹⁶ *Diversion Lake Club*, 86 S.W.2d at 446-447; *Taylor Fishing Club*, 88 S.W.2d 127; *see also* Tex. Att’y Gen LA-97-079 (1997); Op. Tex. Att’y Gen. DM-169 (1992).

¹⁷ Tex. Parks & Wild. Code § 90.007(a) (West 2019) (landowner rights).

¹⁸ *Id.* at §90.007(b).

¹⁹ *See* Tex. Penal Code §§ 30.05, 9.22.

²⁰ Tex. Parks & Wild. Code § 90.008.

²¹ Tex. Water Code § 11.096.

²² Tex. Penal Code § 42.03. Obstruction for purposes of the Penal Code means rendering the waterway impassable or unreasonably inconvenient or hazardous. *Id.*

²³ Tex. Nat. Res. Code § 51.302.

²⁴ *Trice v. State*, 712 S.W.2d 842, 849 (Tex. App. – Waco 1986, writ ref’d n.r.e.).

right-of-way. Nor can a riparian owner prevent the public from navigating up and down public waterways in boats and fishing by constructing fences stretching across the waterway.²⁵

The Texas Disaster Act of 1975²⁶ authorizes state and local officials to take temporary actions in the case of disasters and impending disasters. These laws most likely give state and local authorities the right to close waterways for reasons of public safety (e.g., high water, contamination, or other dangerous conditions). Actions taken under the Texas Disaster Act cannot remain in effect indefinitely from their inception, but rather are subject to certain review/renewal requirements.²⁷

Helpful Internet Resources:

The Texas Parks and Wildlife Department (“TPWD”) maintains a website with comprehensive information about Texas public waterways: <http://www.tpwd.state.tx.us/landwater/water/habitats/rivers/>. This website also includes helpful publications on navigation rights and laws in Texas:

- Overview of Laws Regarding the Navigation of Texas Streams (Jan. 2004), http://www.tpwd.state.tx.us/publications/nonpwdpubs/water_issues/rivers/navigation/riddell/index.phtml;
- If a River Runs Through It, What Law Applies?, (June 2007), http://www.tpwd.state.tx.us/publications/nonpwdpubs/water_issues/rivers/navigation/kenedy/.

The TPWD is also in the process of creating a catalog of public areas used to access Texas rivers, reservoirs, and coastal areas. The result will be a comprehensive Internet database of public boater access sites for major river and coastal basins throughout the state that includes maps and detailed information about each access site: <https://tpwd.texas.gov/landwater/water/habitats/rivers/access/>.

The Texas General Land Office maintains a website that provides access and recreation information for areas along the Texas coast: <http://txcoasts.com/>. Physical descriptions of numerous whitewater runs in Texas are also available on the RiverFacts website: <http://www.riverfacts.com/states/tx.html>.

²⁵ Op. Tex. Att’y Gen. S-107 (1953).

²⁶ Codified at Tex. Gov’t Code ch. 418 (West 2019).

²⁷ *Id.* § 418.014.