

## **Mississippi Navigability Report**

### **Summary**

Mississippi uses a very straightforward test to determine navigability of streams. Natural streams with a mean annual flow of at least 100 cubic feet per second are public waterways on which the public has the right to navigate, fish, and engage in recreational activities.<sup>1</sup> The public can also acquire rights in a body of water through prescription if there is a long history of public use.<sup>2</sup> The public must be able to legally gain access to the water.<sup>3</sup> The right of the public to use the waterway includes activities associated with the normal use of the waterway, such as tying a boat to a tree and wading where the streambed is privately owned.<sup>4</sup>

### **State Test of Navigability**

Mississippi Code Section 51-1-4 declares “all natural flowing streams” to be public if their mean annual flow is at least 100 cubic feet per second, as determined and designated on maps by the Mississippi Department of Environmental Quality.<sup>5</sup> The Supreme Court of Mississippi upheld this statute, as amended in 1988 in *Ryals v. Pigott*, finding no conflict with the state constitution or federal law.<sup>6</sup> Section 51-1-4 further declares any lake to be public if connected to a natural flowing stream and listed as a public waterway on July 1, 2000, but then removed before July 1, 2001, by the Commission on Environmental Quality for not meeting the annual average flow requirement.<sup>7</sup>

Despite the statutory test, the Supreme Court of Mississippi in *Ryals* also discuss the public status of waters in the context of navigability-in-fact. The court noted that “the capacities of the waters to serve the public have played a major role in defining the waters which are public,” and that historically, questions about navigability “have been answered by the shorthand reference to whether the waters [are] ‘navigable in fact.’”<sup>8</sup> The court held that “navigable in fact” extends beyond “traditional commercial navigation” and encompasses a capacity for fishing, transportation, logging, tourism, and recreation.<sup>9</sup> And finally, in *Ryals*, the court held that the river at issue, Bogue Chitto River, was public both “as a matter of law [because] the River at this point is navigable in fact or with reasonable channel maintenance and dredging,” and “because,

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<sup>1</sup> Miss. Code Ann. § 51-1-4(1) (West 2021).

<sup>2</sup> *Dycus v. Sillers*, 557 So.2d 486, 500 (1990).

<sup>3</sup> Miss. Code Ann. § 51-1-4.

<sup>4</sup> Letter from Mike Moore, Att’y Gen. to Dr. Sam Polles, Exec. Dir., Dep’t of Wildlife, Fisheries & Parks, Op. Att’y Gen. 93-0836, 1993 WL 547413 (Dec. 6, 1993); *see also* Secretary of State v. Wiesenberg, 633 So.2d 983, 988-89 (Miss. 1994) (quoting *Cinque Bambini P’ship v. State*, 491 So.2d 508, 512 (Miss. 1986)).

<sup>5</sup> Miss. Code § 51-1-4.

<sup>6</sup> *Ryals v. Pigott*, 580 So.2d 1140, 1156-57 (Miss. 1990).

<sup>7</sup> Miss. Code Ann. § 51-1-4(8).

<sup>8</sup> *Ryals*, 580 So.2d at 1150.

<sup>9</sup> *Id.* 1150-52 (discussing evolving public uses resulting in the evolution of navigability).

at this point, the River has a mean annual flow of 188 cubic feet per second [and thus meets Section 51-1-4].”<sup>10</sup>

It is not clear whether the test under Section 51-1-4 displaces the navigable-in-fact test or supplements it, for example, whether a stream would be public that has an annual average flow of 99 cubic feet per second but is otherwise navigable in fact. Presumably, the navigable-in-fact test would remain because Section 51-1-4 applies to lakes and streams, and not to tidal waters not part of a “flowing stream.”<sup>11</sup>

### **Extent of Public Rights in Navigable and Non-Navigable Rivers**

Missouri adheres to the public trust doctrine for natural navigable waters and natural tidelands.<sup>12</sup> Navigable or public waters are in effect public property and non-navigable waters belong to the riparian (abutting a stream) or littoral (abutting a lake or ocean) owners.<sup>13</sup> The state has title to all lands under tidal waters up to the ordinary high-water mark, regardless of whether navigable, and thus the public trust extends to the high-water mark on tidal waters,<sup>14</sup> though may also convey to private parties subject to the public trust.<sup>15</sup> “[T]he beds of navigable freshwater rivers, lakes and streams [are] susceptible of private ownership,”<sup>16</sup> with private owners owning to the center of the stream,<sup>17</sup> although, the “owners of the beds and bottoms of navigable freshwaters have no right to exclude others from the waters’ surface.”<sup>18</sup> On navigable non-tidal waters, the high water mark also delineates the extent of state ownership, or where privately owned, the public trust.<sup>19</sup>

The public may also be able to use private waterways that have customarily been used by the public if the public has enjoyed access for at least 10 consecutive years under the doctrine of adverse possession.<sup>20</sup> That is, the public must have been using the waters in an open and notorious manner without permission of the actual owner continuously for 10 years.<sup>21</sup>

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<sup>10</sup> *Id.* at 1156-57. The court also found the river navigable using the federal commerce test, which states waters are “public navigable waters” when “navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and/or travel are or may be conducted in the customary modes of trade and travel on water.” *Id.* at 1152 (quoting *Utah v. United States*, 403 U.S. 9, 10 (1971)).

<sup>11</sup> *See also* Miss. Code § 51-1-4(7) (“[Section 51-1-4] shall apply only to natural flowing streams.”).

<sup>12</sup> *E.g.*, *Stewart v. Hoover*, 815 So.2d 1157, 1159-60 (Miss. 2002); *Secretary of State v. Wiesenberg*, 633 So.2d 983, 987-88 (Miss. 1994); *Ryals*, 580 So.2d at 1147-50.

<sup>13</sup> *Ryals*, 580 So.2d at 1146.

<sup>14</sup> *State v. Murphy*, 202 So.3d 1243, 1252 (Miss. 2016); *Harris v. State*, 256 So.3d 574, 580 (Miss. 2018); *Stewart*, 815 So.2d at 1159-60; *Wiesenberg*, 633 So.2d at 988-89; *Cinque Bambini P’ship*, 491 So.2d at 510-12.

<sup>15</sup> *Bayview Land, Ltd. v. State ex rel. Clark*, 950 So.2d 966, 989 (Miss. 2006) (quoting Miss. Code Ann. § 29-1-107(2)(a)) (upholding a lease of tidelands to a private entity); *Treuting v. Bridge & Park Comm’n of Biloxi*, 199 So.2d 627, 632-33 (Miss. 1967).

<sup>16</sup> *Dycus*, 557 So. at 498; *Cinque Bambini P’ship*, 491 So.2d at 517.

<sup>17</sup> *Cox v. F-S Prestress, Inc.*, 797 So.2d at 843 (Miss. 2001).

<sup>18</sup> *Dycus*, 557 So. at 498.

<sup>19</sup> *Cinque Bambini P’ship*, 491 So.2d at 515.

<sup>20</sup> *Dycus*, 557 So. at 501 (“Where the public has enjoyed access to waters for in excess of ten consecutive years, those waters belong to the state by adverse possession, to be held in trust for the people.”).

<sup>21</sup> *Id.*

Mississippi recognized a broad scope of rights under the public trust doctrine, to include navigation, transportation, fishing, bathing, swimming, and other recreational activities.<sup>22</sup> The right of the public to use a public or navigable waterway includes activities associated with the normal use of the waterway, such as tying a boat to a tree and wading where the streambed is privately owned.<sup>23</sup> On public waters, you may also fish “to your heart’s content, subject only to a like use by others.”<sup>24</sup> Though state cases do not discuss the right to portage, because the public trust extends to the high-water mark and activities such as wading are permitted, portage is almost certainly permitted at least to the high-water mark.

The public must reach public waters without crossing private property.<sup>25</sup> Mississippi Code Section 51-1-4 states that “nothing herein contained shall authorize anyone using said public waterways ... to trespass upon adjacent lands.” Trespass occurs only after a person has been warned not to trespass in person or by a suitable notice in a conspicuous place on the land.<sup>26</sup>

A non-navigable stream belongs to the riparian owner.<sup>27</sup> The public trust does not extend to non-navigable waters that are privately owned, though all non-navigable tidal waters were owned by the state and thus any private conveyance would likely remain subject to the public trust.<sup>28</sup> Further, “[w]here a lake is wholly man-made or artificial, the record titleholders own the waters and all life within them as their interests may appear, . . . whether the lake or pond has been built for commercial, drainage, recreational or aesthetic reasons,” and the owner may exclude the public.<sup>29</sup> Artificially created tidelands also do not become property of the state by virtue of being subject to the tides.<sup>30</sup>

## Miscellaneous

It is a crime punishable by a fine of up to \$1,000 or a prison term of up to six months to obstruct any navigable channel in any manner.<sup>31</sup> The state constitution forbids the legislature from authorizing the permanent obstruction of any navigable water, but includes many exceptions.<sup>32</sup> “Any person may enter and remove any and all obstructions to the navigation thereof which may be in or across or over any navigable stream.”<sup>33</sup>

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<sup>22</sup> *Wiesenberg*, 633 So.2d at 988-89 (quoting *Cinque Bambini P’ship*, 491 So.2d at 512).

<sup>23</sup> Op. Att’y Gen. 93-0836, *supra* note 4.

<sup>24</sup> *Dycus*, 557 So. at 500-01.

<sup>25</sup> *Id.*

<sup>26</sup> Miss. Code Ann. § 49-7-79.

<sup>27</sup> *Ryals*, 580 So.2d at 1146.

<sup>28</sup> *Cinque Bambini P’ship*, 491 So.2d at 517.

<sup>29</sup> *Crenshaw v. Graybeal*, 597 So.2d 650, 652 (Miss. 1992) (citing *Dycus*, 557 So. at 502).

<sup>30</sup> *Dycus*, 557 So. at 502; *Cinque Bambini P’ship*, 491 So.2d at 520.

<sup>31</sup> Miss. Code Ann. § 97-15-43 (West 2021); *see also id.* § 97-15-45 (providing that it is a misdemeanor punishable by a fine of not more than fifty dollars or by imprisonment of up to thirty days to permanently obstruct any navigable waters).

<sup>32</sup> Miss. Const. art. 4, § 81.

<sup>33</sup> Miss. Code Ann. § 51-1-5.

For additional information on boating and fishing in Mississippi, visit the state's Department of Marine Resources website at <https://dmr.ms.gov/boating-in-mississippi/> (boating) and <https://dmr.ms.gov/recreational-fishing-2/> (recreational fishing).