

1975 S.C. Op. Atty. Gen. 207 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4140, 1975 WL 22436

Office of the Attorney General

State of South Carolina

Opinion No. 4140

September 29, 1975

*1 A stream navigable in fact is navigable in law. The General Assembly may not declare a navigable stream to be non-navigable in order to bar public travel thereon.

TO: Honorable Ramon Schwartz, Jr.
Representative
Sumter County

QUESTIONS PRESENTED:

1. What constitutes a navigable stream by law?
2. May the General Assembly declare a particular stream to be non-navigable as to ban public travel thereon?

AUTHORITIES:

Section 70–1, South Carolina Code of Laws(1962).

Article 14, Section 4, Constitution of South Carolina.

[The Daniel Ball](#), 77 U.S. 577 (1870).

[State v. Pacific Guano Co.](#), 22 S.C. 50 (1889)

[Heyward v. Farmers Company](#), 42 S.C. 138, 19 S.E.

[State v. Water Power Co.](#), 82 S.C. 181, 63 S.E. 884 (1909).

[Manigault v. Ward](#) 123 F. 707 (1903).

Navigability—Its Meaning and Application in South Carolina, 23 S.C.L.R. 28 (1971).

DISCUSSION:

These questions arise out of the continuing use of Beach Creek in Sumter County by boaters to gain access to private, posted property.

The accepted doctrine in this state, as well as in most other jurisdictions may be found in [The Daniel Ball](#) 77 U.S. 557, 563 (1870), wherein it was stated that rivers navigable in fact are navigable in law.

Therefore, whether Beach Creek is navigable is a question which may ultimately be decided by a jury in a trespass action or an action to enjoin further trespass. Navigability in fact has had varied definitions.

The Common law definition is set forth in [Heyward v. Farmers Co.](#) 42 S.C. 138, 19 S.E. 963 (1894). That to be navigable, a stream should have sufficient depth and width of water [to float useful commerce, supra](#) at 150. This definition was in accord with [State v. Pacific Guano Co.](#) 22 S. C. 50, 57 (1884), and was later approved in [State v. Columbia Water Power Co.](#) 82 S.C. 181, 63 S.E. 884 (1909).

However, neither the actual use of the waters nor custom and past use of the water have any materiality, but the stream's capacity for such use is the key factor. [State v. Water Power Co.](#), [supra](#) at 187. Thus the common law doctrine of navigability is one of a commercial potential test.

This doctrine in no way restricts the rights of noncommercial users. Navigable streams are highways; and a traveler for business is as fully entitled to protection in using a public way as a traveler for business. [Heyward v. Farmers Co.](#), [supra](#) at 150, [State v. Water Power Co.](#), [supra](#) at 189.

The latest statutory definition of navigability may be found in Section 70–1, South Carolina Code of Laws (1962). Section 70–1 provides:

All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly. If any person shall obstruct any such stream, otherwise than as in this Title provided, such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law. (emphasis added)

*2 It would appear that the commercial potential test has apparently been abandoned in favor of declaring navigability whenever the shallowest draft vessels known—‘rafts of lumber or timber’—can navigate the stream.

There is one other requirement for a stream to be navigable, and that is that the stream must be accessible at one public place or terminus. [Manigault v. Ward](#) 123 F. 707 (1903). Beach Creek apparently meets this requirement as a tributary of one of the state's major rivers—the Wateree River.

For a further discussion of navigability see [Navigability—Its Meaning and Application in South Carolina](#), 23 S.C.L.R. 28 (1971).

The second question raised deals with the power of the General Assembly to declare a particular stream to be non-navigable in order to bar public travel thereon. Section 70–1 South Carolina Code of Laws (1962) is largely a statutory restatement of Article 14, Section 4, [Constitution of South Carolina](#), which provides:

All navigable waters shall forever remain public highway free to the citizens of the State and the United States without tax, impost or toll imposed; and not tax, toll, impost, or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.

Thus the right to free use of navigable streams is a constitutional right not subject to statutory abridgement.

Furthermore, by long established principles, the State holds title to navigable streams in trust for the public, as part of its prerogative rights, and not as private property. Such legislation would in effect be a conveyance of property rights,

over which the State has no power to convey. See Heyward v. Farmers Co., *supra* at 157, quoting Illinois Cen. R.R. Co. v. Illinois 146 U.S. 458.

CONCLUSION:

Therefore, it is the opinion of this Office that:

1. A stream navigable in fact is navigable in law. A stream is navigable in fact if a person can float any vessel of any size or construction, for any lawful purpose whatsoever (pleasure or commerce), for any length of the stream, without regard to the ease or difficulty of the stream, so long as the stream is accessible from some public place or terminus.
2. The legislature may not declare a navigable stream to be non-navigable as to bar public travel thereon.

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