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Opinion No. 11-75

Determination of Navigability and Ownership of Land Beneath a River

QUESTIONS

1. When is a river legally deemed navigable, and how does such a determination affect ownership of the land beneath the river?

2. Assuming a river is deemed navigable by the U.S. Army Corps of Engineers, then is the river navigable in a legal sense?

OPINIONS

1. Whether a particular waterway is navigable in the legal sense is a question of fact to be determined by a jury. The legal navigability of a waterway determines whether the land beneath those waters may be privately owned. If navigable, the title to the bed of waterway, to the low-water mark, is publicly owned by the State. Conversely, if non-navigable, then the land beneath the waterway can be privately owned. If a waterway has not been deemed legally navigable by a jury, then as regards ownership rights to the land beneath the waterway that waterway is not presumed to be either navigable or non-navigable. Nonetheless, even if a waterway is deemed non-navigable, the public maintains a right to free and uninterrupted use of the waterway for all the purposes of transportation and navigation to which it is naturally adopted.

2. A determination by the U.S. Army Corps of Engineers that a river is navigable may be considered by a jury and even given substantial weight in determining ownership rights to the land beneath the river. However this determination is not binding on the question of whether the waterway is navigable in the legal sense, under Tennessee law, so as to affect ownership rights. A private landowner would be entitled to introduce contrary proof and to question the Corps' determination and the procedures used to reach it. Thus, the question whether a river is legally navigable is for a jury to determine based on a factual record developed in a lawsuit.

ANALYSIS

1. "Under Tennessee law title to the bed of a navigable stream, to the low-water mark, is publicly held and belongs to the State." *Uhlhorn v. Keltner*, 637 S.W.2d 844, 846 (Tenn. 1982) (citing *State v. Muncie Pulp Co.*, 119 Tenn. 47, 99, 104 S.W. 437, 450 (1907)). Thus, the general rule is that land beneath a waterway that is navigable in the "technical legal sense of that

term" is not "capable of private ownership." *State ex rel. Cates v. West Tenessee. Land Co.*, 127 Tenn. 575, 580, 158 S.W. 746, 747 (1913).[1] In contrast, if the waterway is found to be non-navigable, then the land beneath the waterway can be privately owned.

However, even if the waterway is deemed non-navigable and the land beneath the waterway may be privately owned, Tennessee law generally recognizes that the public maintains "a right 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." *The Pointe Ass'n, LLC v. Lake Management Inc.*, 50 S.W.3d 471, 476 (Tenn. Ct. App. 2000) (quoting *State ex rel. Cates v. West Tennessee Land Co*., 127 Tenn. 575, 158 S.W. 746, 749 (1913)). *See also Bauman v. Woodlake Partners, LLC*, 199 N.C. App. 441, 448-449, 681 S.E.2d 819, 824-825 (2009). *But see Austa La Vista, LLC v. Mariner's Pointe Interval Owners Ass'n, Inc.* 173 S.W.3d 786, 791 (Tenn. Ct. App. 2005) (master deed and other documents appropriately restricted timeshare owners use of lake next to condominium timeshare by requiring payment of applicable fees to use the lake and other amenities).

"To be 'navigable' such that it invokes the prohibition on private ownership, a waterway must, in its ordinary state, be capable of and suited to navigation by vessels employed in the ordinary purposes of commerce." *City of Murfreesboro v. Pierce Hardy Real Estate, Inc.*, No. M2000-00562-COA-R9-CV, 2001 WL 1216992 at *6 (Tenn. Ct. App. 2001), *appeal denied*, (Tenn. Feb. 19, 2002) (citing *Cates*, 127 Tenn. at 584-85, 158 S.W. at 747). "The determination of whether a waterway meets the definition, and is, therefore, navigable is one of fact to be determined by the jury." *Id*. at * 6 (citing *Southern Ry. Co. v. Ferguson*, 105 Tenn. 552, 562-63, 59 S.W. 343, 346 (1900)). *See also Miller v. State*, 124 Tenn. 293, 300, 137 S.W. 760 (1911) ("Whether a freshwater stream is navigable is always a question of fact."). If the legal navigability of a particular waterway has not yet been determined by a jury, there is nothing in Tennessee jurisprudence suggesting that the waterway should be presumed to be either navigable or non-navigable for purposes of determining rights of ownership of the land beneath those waters.

2. "Federal law gives the Corps of Engineers the power to declare waterways navigable for the purpose of furthering its mission." *Pierce Hardy*, 2001 WL 1216992 at *7. *See* 33 U.S.C. Part 329 (2011). Although these determinations are "considered binding in regard to the activities of the Corps of Engineers," the Corps' regulations acknowledge that "precise definitions of 'navigable waters of the United States' or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies." 33 C.F.R. § 329.3 (2011). Thus, the Corps' navigability determinations are not binding on a federal court. *See, e.g., Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 449, 451 (6th Cir.

[1] *Cates* involved Reelfoot Lake and an exception to the general rule. Although the lake was deemed legally navigable in that lawsuit, the Tennessee Supreme Court held that land underneath the lake that had been granted by the State of North Carolina prior to the creation of the State of Tennessee could be privately owned. *State ex. Rel Cates v. West Tennessee Land Co.*, 127 Tenn. at 598, 158 S.W. at 752 ("As these lands were grantable by North Carolina, and were subject to private ownership before the formation of the lake, we are of opinion that the mere fact that they have since become submerged by a body of navigable water does not deprive the owners of their title to the land as long as they can be reasonably identified.").

1982), *cert. denied*, 462 U.S. 1123 (1983) (Although "the Corps determined that the River was navigable . . . [t]he District Court did not err in its factual or legal conclusions that the upper portion of the River and the tributaries were not navigable.").

In considering this question in *Pierce Hardy*, the Tennessee Court of Appeals held that if a navigability determination by the Corps is not binding on federal courts, "such agency determination cannot be binding on Tennessee courts on the question of whether a waterway is navigable in the legal sense, under state law, so as to affect ownership rights." 2001 WL 1216992 at *8. The appellate court did note that the Corps' regulations provide that its navigability determinations should be "accorded substantial weight by the courts." *Id*. (quoting 33 C.F.R. § 329.14(a) (2011)).[2] The Court of Appeals concluded in *Pierce Hardy* that even if a navigability "determination by the Corps may be accorded substantial weight, Landowner is entitled to introduce contrary proof and to question the Corps' determination and the procedures used to reach it." *Id*. at *8.

Thus, the question of whether a river is navigable is "an issue for the trier of fact based upon evidence relevant to that determination." *Id*. at *9. While a determination by the Corps that a river is navigable may be considered by a jury, and may even be given substantial weight, it is not binding on the question of whether the waterway is legally navigable, under Tennessee law, so as to affect ownership rights in land beneath the river.

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[2] To be entitled to substantial weight, the Corps' determination must follow the requirements in 33 C.F.R. § 329.14 (2011). *See U.S. v. Harrell*, 926 F.2d 1036, 1043-44 (11th Cir. 1991) ("[A]s the district court noted, [the Corps'] letter 'falls far short of a determination of navigability required by 33 C.F.R. § 329.14.' We agree and, on this basis, reject any suggestion that this letter is entitled to substantial weight.") (footnote omitted).

Requested by:

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