

## **Illinois Navigability Report**

### **Summary**

Navigable streams and rivers in Illinois primarily are those that are shown by “meander lines” (which are lines representing the natural flow of the water) on maps created by government surveys conducted during the late 1800s and early 1900s. The state owns title, in trust for the people, of the streambed and riverbeds of these meandered waterways. Thus, the public can use these bodies of water for fishing, boating and swimming. There is no definitive answer regarding the public’s right to portage around waterways within the public trust.

### **State Test of Navigability**

Illinois state case law primarily determines navigability of the waters. The Illinois courts find that public navigable waters include waters “navigable in fact,”<sup>1</sup> where navigable in fact is defined as a waterway “that affords a channel for useful commerce and of practical utility to the public as such.”<sup>2</sup> This test of navigability follows the federal title test.<sup>3</sup> Thus, even streambeds that are privately owned may be streams that are declared navigable in fact, giving the public the right to navigate the waters.<sup>4</sup>

The Illinois courts’ definition has limits, however: “The fact that there is water enough in places for row boats or small launches answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose does not render the water navigable.”<sup>5</sup> The focus truly is on the ability of commercial use and “whether they are of sufficient depth to afford a channel for use for commerce.”<sup>6</sup>

In addition, the government conducted numerous surveys of Illinois waterways in the late 1800s and early 1900s, and created maps showing many streams, lakes, and rivers by meander lines. These “meandered” waterways are held in trust for the people, whether the water is navigable in fact or not.<sup>7</sup> If questions arise regarding ownership or navigability of waterways, then the Illinois courts generally will first determine if the stream in question was meandered.<sup>8</sup> Where a stream was not meandered or declared navigable in the surveys, the courts are reluctant to make a finding to the contrary.<sup>9</sup>

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<sup>1</sup> State v. New, 117 N.E. 597, 599 (Ill. 1917).

<sup>2</sup> Schulte v. Warren, 75 N.E. 783, 785 (Ill. 1905).

<sup>3</sup> See DuPont v. Miller, 141 N.E. 423, 425 (Ill. 1923) (citing The Daniel Ball, 77 U.S. 557 (1870)); see also United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

<sup>4</sup> Schulte, 75 N.E. at 785.

<sup>5</sup> Id.

<sup>6</sup> DuPont, 141 N.E. at 425; see also Quad Cities Waterkeeper Inc. v. Ballegeer, No. 4:12-cv-4075, 2015 WL 6541181 (C.D. Ill. Oct. 27, 2015) (finding that Illinois’ rule of navigability is set forth in DuPont, 141 N.E. 423, and Schulte, 75 N.E. 783); Office of the Att’y Gen. of the State of Illinois, Op. 87-006, 1987 Ill. AG LEXIS 3, 1991 Ill. Op. Att’y Gen. 241 (Aug. 10, 1987).

<sup>7</sup> Wilton v. Hessen, 94 N.E. 134, 136 (Ill. 1911).

<sup>8</sup> New, 117 N.E. at 599.

<sup>9</sup> See Dupue Rod & Gun Club v. Marliere, 163 N.E. 683, 684-85 (Ill. 1928).

## Extent of Public Rights in Navigable and Non-Navigable Waters

In Illinois, “the public have an easement for purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil.”<sup>10</sup> If the state owns the streambeds, then the public has the further right to hunt and fish, and generally recreate on the water.<sup>11</sup> If the streambed is privately owned, however, and the stream is navigable in fact, then the public only has the right to navigate the water, and has no right to hunt or fish in that water.<sup>12</sup> The public may, however, have the right to moor to the streambed, such as to pilings driven into the streambed, even if privately owned.<sup>13</sup>

Navigable rivers and streams in Illinois include, among others, the Chicago River,<sup>14</sup> the Illinois River,<sup>15</sup> the Des Plaines River,<sup>16</sup> and the Mississippi River.<sup>17</sup>

It is unclear whether activities incident to navigation, such as portaging, are allowed. Portaging on private land is most likely not allowed in Illinois. Criminal trespass on private land is a class B misdemeanor and occurs where notice has been given indicating that entry is forbidden.<sup>18</sup> In meandered streams, which are held in public trust, portaging may be permissible because the federal navigation servitude should apply to these streams and portage is arguably an incident to navigation. Though no Illinois law or court decision has affirmed that right.

## Miscellaneous

For additional information on public waters, see the Illinois Department of Natural Resources website at <https://www2.illinois.gov/dnr/WaterResources/Pages/default.aspx>.

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<sup>10</sup> *Schulte*, 75 N.E. at 785.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Perona v. Illini Harbor Servs., Inc.*, 474 N.E. 2d 1270, 1271 (Ill. App. Ct. 3d Dist. 1985) (holding that “parking or mooring barges awaiting loading or unloading is an activity incident to the right of navigation” and “that the property of a riparian owner in the bed of the river . . . is subservient to the use of the public as a highway.”) (citation omitted).

<sup>14</sup> *Leitch v. Sanitary Dist. of Chicago*, 17 N.E.2d 34 (1938).

<sup>15</sup> *Schulte v Warren*, 75 N.E. 783 (1905), *Bofman v. Material Service Corp.*, 466 N.E.2d 1064 (1st Dist. 1984); 615 Ill. Comp. Stat. 60/1 (2020).

<sup>16</sup> *People ex rel. Deneen v. Econ. Light & Power Co.*, 89 N.E. 760 (1909), *writ of error dismissed sub nom. People ex rel. Dunne v. Econ. Light & Power Co.*, 234 U.S. 497 (1914); 615 Ill. Comp. Stat. 60/1 (2020).

<sup>17</sup> *Senko v. La Crosse Dredging Corp.*, 147 N.E.2d 708 (1957). For a list of navigable rivers and streams in Illinois see Ill. Admin. Code tit. 17, § 3704 Appx. A.

<sup>18</sup> 720 Ill. Comp. Stat. 5/21-3 (2020).