

WATER LAW AND RECREATIONAL ACCESS: SOME QUESTIONS, ANSWERS AND CONSIDERATIONS

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INTRODUCTION

Water law in Illinois, especially as it relates to the public's rights to access Illinois' waters for recreation has been an area of interest to recreators and conservationists for years. However, discussion of this topic has been impeded by: (1) lack of general understanding of the law itself and (2) the ideological gap between what Illinois water law says and what many recreators believe it should say about their rights to use Illinois' waters.

This paper attempts to explain some of the basics of Illinois water law as it relates to recreational access by answering common questions. Recreators' concerns are then discussed and analyzed and various proposals to address these concerns evaluated. Finally, a hopeful vision for the future recreational use of Illinois' waters is presented.

COMMON QUESTIONS

1. What does navigability mean?

The Department of Natural Resources is assigned the trustee responsibility for public bodies of water under the Rivers, Lakes and Streams Act. Section 18 of this Act defines public bodies of water in terms of their usefulness for commercial navigation. Section 18 states: "Whenever the terms public waters or public bodies of water are used in this Act, they mean all open public streams and lakes capable of being navigated by water craft, in whole or in part, for commercial uses and purposes, and all lakes, rivers, and streams which in their natural condition were capable of being improved and made navigable, or that are connected with or discharged their

* This document reflects the views of the authors based on research of existing literature. This document does not necessarily reflect official positions or policies of the Illinois Department of Natural Resources.

3. Why are the historic land surveys an important consideration in defining a public body of water?

These surveys provide the legally defensible factual information that can be used in court to define a public body of water. Federal law governing the original surveys of public lands required the identification of navigable waters which were enclosed with meander lines and subdivided from the uplands on the official plat of survey approved by the surveyor-general. These surveys often represent the most reliable and often the only inventory of navigable waters existing near the time of statehood in most public land states. These surveys are therefore relied on by the courts as clear evidence for a presumption of navigability or non-navigability near the time of statehood.

4. Does the Pleasure Boat test of navigability have any application in Illinois waters?

Illinois Supreme Court rejected a pleasure boat test in 1870, *Hubbard v. Bell*, 54 Ill. 110. In this case the court rejected the saw log test and stated "that it was not every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. In order to have this character, it must be navigable to some purpose useful to trade or agriculture."

In the case of *Schulte v. Warren*, 218 Ill. 108 (1905) the Illinois Supreme Court stated "...A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for row boats or small launches answering practically the same purpose, or that hunters and fisherman pass over the water with boats ordinarily used for that purpose, does not render the waters navigable."

In *United States v. Oregon*, 295 U.S. 1 (1935), the U.S. Supreme Court rejected evidence of the pleasure boat use as establishing navigability of Lake Malheur and affirmed its positions in *Economy Light and Power* and *Holt State Bank*.

According to the legal treatise, *Waters and Water Rights* (1991 edition and 1994 supplement), twelve state supreme courts have adopted a pleasure boat test of navigability. These are: Arkansas, California, Idaho, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Ohio, Oklahoma, Wisconsin, and Wyoming. The Michigan supreme court adopted a pleasure boat test in 1974 and upheld the test in 1979 and 1981 decisions. But in 1982 the court reversed and rejected a pleasure boat test as creating a public recreational easement on private waters. The Kansas Supreme Court rejected the pleasure boat test and denied that the public trust doctrine provides a basis for public use of non-navigable waters without the consent of the landowners 246 Kan. 99 (1990). The last state to adopt a pleasure boat test, Mississippi (1991), did so in a 5-4 decision.

waters is an administrative term that has no legal significance, therefore the rights of use are permissive only and subject to limitation and revocation.

8. What does dedication mean?

The issue of dedication was addressed by the Illinois Supreme Court in *DuPont v. Miller* 310 Ill. 140 (1923). The court stated that "A dedication of land or water to public use is defined as the appropriation or gift by the owner of the land or waterway of an easement therein for the use of the public. The act of dedication may be by deed or by opening the land or waterway without stating for what use, or by offering or permitting a public use with intention to so dedicate it. There must be clear and satisfactory proof both of the intention of the owner to dedicate the land or waterway and the acceptance thereof by the public."

9. Can a water body become public through dedication?

Yes. The usual mode of formal dedication of a private channel is by a plat. Where a plat has not been properly filed, informal dedication can be established by other evidence showing intent to dedicate. One evidence is a map or plat used by the subdivider (or donor) to sell adjacent lots or obtain approvals from public agencies. Another evidence is past maintenance by a public agency or direct control by a public agency such as buoys and signs. Private acquiescence to public use is not, by itself, evidence of intent to dedicate. The courts in Illinois have ruled quite clearly on the issue of dedication. The opinion of the courts as stated in *Leonard v. Pearce*, 348 Ill. 518, is as follows:

"No ambiguity exists in this State concerning the law in relation to common law dedications to public use. The decisions of this court over a long period of years have clearly defined the law. The question of dedication to a public use is a question of fact - i.e., one of intention. The intention of the owner to dedicate the land or waterway, and the acceptance thereof by the public, must be by proof that is clear and satisfactory of both, and it must be unequivocal. The intention to dedicate cannot be inferred from the fact that no assertion of ownership was made by the purported donor, coming from an active condition of his mind on the subject, that determines intention. Unless circumstances establish the intention to donate the use to the public a mere non-assertion of his rights by the owner does not establish a dedication. (Citations omitted)

RECREATOR CONCERNS

To the paddler, angler, boater and others who use Illinois' waters to pursue their sport, the answers Illinois law provides to the questions above are likely to be met with dismay. Much of this dismay is basically ideological. Recreators find, instead of the free and unfettered right to

public access rights may be more illusory than real. An administrative change by IDNR would probably be countered by legislation to "correct" the situation, perhaps also by a lawsuit against the Department. Similarly, a favorable judicial decision would also probably be responded to by legislation, just as a legislative change in water law could be challenged on constitutional grounds.

The document "Assessment of Illinois Water Law" published in July, 1996 presented a detailed evaluation of the issue of "Accessing and Using Water Bodies for Public Recreation." This study looked at various legal options for changing Illinois water law. The legal scholars who conducted this study noted that in the states that allowed recreational stream use, change was accomplished through the courts but noted that this course of action was also unsuccessful in other states and "unfortunately, the Illinois courts provided a track record of opposing change. The pros of this approach are that it is the common law definition that is the source of limited access of the public to the waters of Illinois." In discussing the option of changing the interpretation of the scope of public waters to a broader "commercial usability" context that could include recreational use, this report states that "The departure from commercial usability would be radical and therefore more appropriate for the legislature."

RECREATIONAL ACCESS IN PRACTICE

While organized recreators and conservationists have found much to dislike in Illinois' water law, actual incidents of private landowners preventing recreational use of the State's rivers and streams have been rare. For example, canoers have for years routinely used streams that flow through private property without impediment as long as they avoid trespassing on the landowners' streamside land or otherwise disturbing them.

Public agencies provide launch sites for boats that can provide access to non-public waters for those who travel beyond the boundaries of the public land on which the site is located. Some popular non-public waters for boating have at least one bank of major river reaches in public ownership, often by recreation and conservation agencies, making major stretches of some non-public streams available for public use. In at least one case in Illinois, a non-public stream with only some of its bank in public ownership is promoted as a water trail by a public agency with the tacit approval of private, streamside owners.

The current State of Illinois' water law on access for recreation may, in fact, be rankling recreators as much on ideological as on pragmatic grounds. Although the law may be inconsistent with current constituent beliefs, it seems to pose few problems to most recreators who currently use Illinois' rivers and streams. The real constraints to the present use of Illinois' rivers and streams are the lack of facilities and information that make recreation activities like canoeing easier and more attractive for more of the State's citizens.

To address this situation, IDNR is currently aggressively planning water trails throughout

As more and more recreators use Illinois streams, their currently limited legal right to use non-public streams will at some time be challenged. When that challenge comes, regardless of how it comes, increasing the facilities and information that provide actual access to Illinois' public and public use waters will have built a broader constituency to support further expansion of the public's access rights. Building and informing this constituency is essential to affect the change in river access rights that recreators and conservationists desire.

- 25) **Illinois River** (including all backwater lakes such as Peoria Lake in Peoria, Tazewell and Woodford Counties; Matanzas Bay in Mason County; and Meredosia Lake in Cass and Morgan Counties);
- 26) **Des Plaines River** to Hofmann Dam in Cook County, which is located one-half mile downstream from the junction with Salt Creek. This area is shown on the Berwyn, 7.5 minute USGS quadrangle map;
- 27) **Kankakee River**;
- 28) **Iroquois River** to South Line, SW 1/4, Sec. 30, T27N, R12W, 2nd PM in Iroquois County, which is located approximately one mile downstream from the junction with Sugar Creek. This area is shown on the Gilman, 15 minute USGS quadrangle;
- 29) **Fox River** (Illinois River Basin);
- 30) **Griswold Lake** (McHenry County);
- 31) **Fox Chain-O-Lakes** (Lake and McHenry Counties): Bluff Lake, Lake Catherine, Channel Lake, Fox Lake, Grass Lake, Lake Marie, Nippersink Lake, Dunns Lake, Pistakee Lake, Lake Jerilyn, Lac Louette, Redhead Lake;
- 32) **Vermilion River** (Illinois River Basin) to approximately one-half mile above the mouth near Oglesby in LaSalle County;
- 33) **Spring Lake** (Tazewell County);
- 34) **Spoon River** to North Line, Sec. 24, T0N, R1E 4th PM in Fulton County, which is located approximately one-half mile upstream from the Illinois Highway 95 bridge. This area is shown on the Smithfield, 7.5 minute USGS quadrangle map;
- 35) **Sangamon River** to South Line, NE 1/4, Sec. 1, T15N, R4W, 3rd PM in Sangamon County, which is located approximately one mile south of the Mechanicsburg Road bridge. This area is shown on the Mechanicsburg, 7.5 minute USGS quadrangle map;
- 36) **Sangamon River**: South Fork to South Line, Sec. 33, T16N, R4W, 3rd PM in Sangamon County, which is located approximately two miles upstream from the mouth. This area is shown on the Springfield-East, 7.5 minute USGS quadrangle map;
- 37) **Macoupin Creek** to East Line, Sec. 25, T9N, R13W, 3rd PM in Green and Jersey Counties, which is located approximately one mile downstream from the junction with Boyer Creek. This area is shown on the Boyer Creek, 7.5 minute USGS quadrangle map;
- 38) **Otter Creek** to East Line of Sec. 3, T7N, R1 3W, 3rd PM in Jersey County, which is located approximately two miles east of the Illinois Highway 100 bridge. This area is shown on the Nutwood, 7.5 minute USGS quadrangle map;
- 39) **Kaskaskia River** to East Line, SW 1/4, Sec. 31, T0N, R2E, 3rd PM, which is located nine miles south and two miles west of Herrick. This area is shown on the Vera, 7.5 minute USGS quadrangle map;
- 40) **Big Muddy River** to East Line T8S, R2W, 3rd PM in Jackson County, which is located approximately one mile northwest of the Southern Illinois Airport. This area is shown on the Hurphysboro, 7.5 minute USGS quadrangle map;
- 41) **Ohio River**;
- 42) **Wabash River**;
- 43) **Vermilion River** (Wabash River Basin) to West Line, T1 9N, R1 1W, 2nd PM in Vermilion County, which is located approximately one mile upstream from the junction with the North Fork. This area is shown on the Danville, SW, 7.5 minute USGS quadrangle map;
- 44) **Little Wabash River** to the Illinois Highway 1 bridge in Carni in White County;
- 45) **Saline River** to junction of North Fork and South Fork;
- 46) **Saline River**: North Fork to North Line, Sec. 5, T8S, R0E 3rd PM in Gallatin County, which is located approximately three miles south of the junction of Illinois Highway 141 and U.S. Highway 45. This area is shown on the Ridgway, 7.5 minute USGS quadrangle map;
- 47) **Saline River**: South Fork to West Line, T9S, R0E, 3rd PM in Gallatin County, which is located at the Gallatin-Saline County line. This area is shown on the Equality, 7.5 minute USGS quadrangle map;
- 48) **Horseshoe Lake** (Alexander County).