

Alaska Navigability Report

Summary

Alaska generally permits portaging to and boating on any body of water that is customarily navigable in its natural state and accessible without trespassing.

State Test of Navigability

Alaska law broadly defines “navigable water” as:

[A]ny water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal, sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction that is navigable in fact in any season, whether in a frozen or liquid state, and for any useful public purpose, including water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes[.]¹

State law also defines “public water” as “navigable water and all other water, whether inland or coastal, fresh or salt, that is reasonably suitable for public use and utility, habitat for fish and wildlife in which there is a public interest, or migration and spawning of fish in which there is a public interest.”²

Alaska’s legal test for determining navigability simply requires a factual showing that a body of water is physically capable of “the most basic form of commercial use: the transportation of people or goods.”³ The state test is an interpretation of the well-settled federal *Daniel Ball* test, which finds water navigable-in-law if navigable-in-fact, *i.e.*, either (1) “used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted or may be conducted in the customary modes of trade and travel on water” or (2) “susceptible of being used” as such.⁴

The Alaska Department of Natural Resources, Division of Mining Land and Water, explains the state test.⁵ First, showing actual use of a body of water to transport people or goods is evidence of navigability:

Interpreting the requirements that navigable waterbodies be used or usable as “highways of commerce,” the courts have ruled that the central theme of title navigability is that the waterbody be capable of use as a highway which people

¹ Alaska Stat. Ann. § 38.05.965 (14) (West 2020).

² *Id.* § 38.05.965 (21) (West 2020).

³ *Alaska v. United States*, 662 F. Supp. 455 (D. Alaska 1987), *aff’d sub nom*, *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989).

⁴ *Ahtna*, 891 F.2d at 1404 (citing *United States v. Holt State Bank*, 270 U.S. 49, 55–56 (1926)).

⁵ See Alaska Dep’t of Nat. Res., Div. of Mining, Land & Water, *State Policy on Navigability*, <http://dnr.alaska.gov/mlw/nav/policy/> (last visited Dec. 21, 2020).

can use for transporting goods or for travel. Neither the types of goods being transported nor the purpose of the travel are important in determining navigability. Transportation on water associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping is, evidence of navigability. The use of waterbodies for transportation in connection with natural resources exploration or development, government land management, management of fish and game resources, or scientific research is also evidence of navigability. Travel by local residents or visitors for the purpose of hunting, fishing, and trapping, or as a means of access to an area can be used to establish navigability. The same holds for recreational transportation, including personal travel and professionally guided trips.⁶

Alternatively, proving the capability of a body of water to transport people or goods, regardless of actual use, is evidence of navigability:

It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible, or physically capable, of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth, and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable.⁷

The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of Alaska's sparse population and lack of development, there are hundreds of remote rivers, lakes, and streams where there is little or no evidence of actual use. Because of their physical characteristics, however, many of these remote waterbodies could be used for transporting people or goods if there was a need. Under these circumstances, they are considered legally navigable.⁸

Regardless, any evidence of navigability must rely on customary water-borne modes of travel:

A finding of navigability does not require use or capability of use by any particular mode of transportation, only that the mode be customary. The courts have held that customary modes of transportation on water include all recognized types and methods of water carriage. Unusual or freak contrivances adapted for use only on a particular stream are excluded. Customary modes of trade and travel on water in Alaska include, but are not limited to, barges, scows, tunnel boats, flat-bottom boats, poling boats, river boats, boats propelled by jet units, inflatable boats, and canoes. In places suitable for harvesting timber, the flotation of logs is considered a customary mode of transportation.⁹

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

The mode of travel must also be primarily waterborne. Boats which may be taken for short, overland portages qualify. The courts have ruled that the use of a lake for takeoffs and landings by floatplanes is insufficient, in and of itself, to establish navigability.¹⁰

Finally, the body of water must be generally navigable in its natural and ordinary condition:

A waterbody which can be used for transportation only because of substantial man-made improvements to the condition of the watercourse is not navigable for title purposes. However, if transportation does or could occur on the waterbody even without the improvements and the improvements would only make transportation easier or faster or possible for larger boats (e.g., dredging), it is still considered navigable for title purposes.¹¹

The presence of physical obstructions to navigation (rapids, falls, log-jams, etc.) does not render a waterway non-navigable if the obstruction can be navigated despite the difficulties or if the obstruction can be avoided by other means, such as portaging, lining, or poling. A waterbody is also navigable even if seasonal fluctuations do not allow it to be navigated at all times of the year. However, a waterbody which is only navigable at infrequent and unpredictable periods of high water is not normally considered navigable. The fact that a waterbody may be frozen for several months of the year does not render it non-navigable if it is navigable in its unfrozen condition.¹²

Extent of Public Rights in Navigable and Non-Navigable Rivers

The people of the State of Alaska “have a constitutional right to free access to and use of the navigable or public water of the state.”¹³ Alaska’s State Constitution specifically provides that the Alaskan legislature “shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”¹⁴ In so providing, the state legislature intended to permit the broadest possible access and use of state waters by the general public.¹⁵ “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.”¹⁶ In short, the people of the State of Alaska have the right to use the water on non-navigable rivers and streams.¹⁷

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Alaska Stat. Ann. § 38.05.126 (West 2020).

¹⁴ Alaska Const. art. III, § 2 (2006).

¹⁵ *Wernberg v. State*, 516 P.2d 1191, 1198–99 (Alaska 1973) (“A careful reading of the constitutional minutes establishes that the provisions in article VIII were intended to permit the broadest possible access to and use of state waters by the general public.”).

¹⁶ Alaska Const. art. III, § 3 (2006).

¹⁷ *Alaska Pub. Easement Def. Fund v. Andrus*, 435 F. Supp. 664, 677 (D. Alaska 1977) (“[T]he people of the State have the right to use the water itself on non-navigable rivers and streams.”).

To this end, Alaska’s Constitution does not explicitly create a public trust; rather, the analogy of a public trust has been used to describe the nature of the State’s duties with respect to wildlife and other natural resources meant for common use.¹⁸ “The public trust doctrine provides that the State holds certain resources (such as wildlife, minerals, and water rights) in trust for public use, ‘and that government owes a fiduciary duty to manage such resources for the common good of the public as beneficiary.’”¹⁹ Alaska’s Constitution provides protections similar to the protections that would be afforded under a public trust doctrine, and that cannot be disregarded by the legislature or overruled by the courts.²⁰ The Alaska Supreme Court has explained that “the common use clause was intended to engraft in [the] constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state.”²¹

Incident to recreational boating on public and navigable waters is the right to portage. The Alaskan Department of Natural Resources provides that—

Free passage or use of any navigable water includes the right to enter adjacent land above the ordinary high water mark as necessary to portage around obstacles or obstructions to travel on the water, provided: (1) entry is made without injury or damage to the land; (2) entry is made in the least obtrusive manner possible; (3) there is no reasonable alternative available to avoid the use of the adjacent land above the ordinary high water mark; and (4) the navigable water is reentered immediately below the obstacle or obstruction at the nearest point where it is safe to do so.²²

Miscellaneous

For more information on Alaska navigability, visit <http://dnr.alaska.gov/mlw/nav/policy/>.

¹⁸ *Brooks v. Wright*, 971 P.2d 1025, 1033 (Alaska 1999) (“Article VIII does not explicitly create a public trust; rather, we have used the analogy of a public trust to describe the nature of the state’s duties with respect to wildlife and other natural resources meant for common use.”); *but see* *Pebble Ltd. P’ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1074 (Alaska 2009) (holding that the state has a “property-like interest” in its waters, that they are “public assets,” and that “the public trust responsibilities [are] imposed on the state by the provisions of article VIII of our constitution . . .”).

¹⁹ *E.g.*, *Baxley v. State*, 958 P.2d 422, 434 (Alaska 1998).

²⁰ Alaska Const. art. VIII, § 3 (2006).

²¹ *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488 (Alaska 1988).

²² *State Policy on Navigability*, *supra* note 5.