

## **Idaho Navigability Report**

### **Summary**

Idaho has one of the most boater-friendly regimes in the nation. Streams that can be floated by a kayak in Idaho are open to the public and may be used for any recreational purpose. Boaters may lawfully scout within ordinary high-water marks and portage around obstructions so long as they return to the river at the first safe spot.

### **State Test of Navigability**

Idaho has adopted by statute the federal test of navigability to determine title to the beds of streams.<sup>1</sup> That is, waters are considered navigable if at the time of statehood, the waters “were susceptible to being used, in their ordinary condition, as a highway for commerce.”<sup>2</sup>

For purposes of public rights, however, Idaho has adopted a statutorily defined navigable-in-fact test with broader reach than the federal test. Idaho statute defines “navigable streams” as “[a]ny stream which, in its natural state, during normal high water, will float cut timber having a diameter in excess of six (6) inches or any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft for pleasure or commercial purposes.”<sup>3</sup> State statute also defines a “navigable lake” as “any permanent body of relatively still or slack water, including man-made reservoirs, not privately owned [or under exclusive federal jurisdiction] and not a mere marsh or stream eddy, and capable of accommodating boats or canoes.”<sup>4</sup>

A list of streams considered to be navigable under the federal commerce test (*i.e.*, for title purpose) is available from the Idaho Department of Lands.<sup>5</sup>

### **Extent of Public Rights in Navigable and Non-Navigable Rivers**

Idaho has declared that the title to the beds of navigable waters are state property and that the state may dispose of the beds of navigable waters (whether lakes or streams) as it deems proper “subject only to the paramount right of navigation and commerce.”<sup>6</sup> Idaho claims up to the high-water mark.<sup>7</sup> This ownership declaration applies only to “navigable waters,” defined as

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<sup>1</sup> Idaho Code § 58-1202 (2021).

<sup>2</sup> *Id.* § 58-1202(3).

<sup>3</sup> *Id.* § 36-1601(a) (2021). Idaho Code § 36-1601 was adopted shortly after an Idaho Supreme Court decision in which the court held Silver Creek in Blaine County was navigable for all recreational purposes because it had been used for floating timber. *See* Southern Idaho Fish & Game Ass’n v. Picabo Livestock, Inc., 528 P.2d 1295 (Idaho 1974). *See also* Ritter v. Standal, 566 P.2d 769, 770 n.1 (Idaho 1977) (discussing enactment of Idaho Code § 36-1601).

<sup>4</sup> Idaho Code § 58-1302(a).

<sup>5</sup> Idaho Dep’t of Lands, Lakes & Rivers, <https://www.idl.idaho.gov/lakes-rivers/> (last updated May 12, 2021).

<sup>6</sup> Idaho Code § 58-1201(1); *Newton v. MJK/BJM, LLC*, 469 P.3d 23, 29 (Idaho 2020) (citing *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733, 737 (1987)); *In re Sanders Beach*, 147 P.3d 75, 78, 85 (Idaho 2006) (same).

<sup>7</sup> Idaho Code § 58-1202(1); *State v. Hudson*, 407 P.3d 202, 206 (Idaho 2017); *Lake CDA Inv., LLC v. Idaho Dep’t of Lands*, 233 P.3d 721, 725 (Idaho 2010).

“those waters that were susceptible to being used, in their ordinary condition, as highways for commerce on the date of statehood [July 3, 1890], under the federal test of navigability.”<sup>8</sup> The public trust doctrine applies to these waters, by which “the state, acting on behalf of the people, has the right to regulate, control and utilize navigable waters for the protection of certain public uses, particularly navigation, commerce and fisheries.”<sup>9</sup> The public trust doctrine includes “those of fish and wildlife habitat, recreation, aesthetic beauty and water quality.”<sup>10</sup>

Public use rights are not determined solely by whether the state has title, but whether waters are navigable as defined by state statute.<sup>11</sup> State statute permits recreational use of “navigable streams” as defined by state law and all streams flowing through public lands.<sup>12</sup> Though the public trust doctrine may not apply if the waters are not navigable under the federal test and are thus privately held,<sup>13</sup> “navigable streams” are still “open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation - boating, swimming, fishing, hunting, and all recreational purposes”<sup>14</sup> even if not considered navigable under the federal test. In effect, waters that are not navigable under the federal title test are still open to public use if considered a “navigable stream” under state law, notwithstanding that the waters may be held privately and not subject to the public trust.

The public may not enter onto or cross over private land to access navigable waters and may not cross onto private property above the high-water mark of a “navigable stream” except to portage around obstructions.<sup>15</sup> When entering private property to portage around obstructions, the boater must reenter the stream immediately below the obstruction at the nearest point where it is safe to do so.<sup>16</sup>

State statute also implies that the public may use of “navigable lakes” as defined by state law.<sup>17</sup> State law requires state approval for any encroachment (i.e., structures such as docks or boat ramps) onto a statutorily-defined navigable lake.<sup>18</sup> Encroachment approval must balance “protection of property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic

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<sup>8</sup> Idaho Code § 58-1202(3).

<sup>9</sup> *Newton*, 469 P.3d at 29 (quoting *Kootenai Env'tl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983)).

<sup>10</sup> *In re Sanders Beach*, 147 P.3d at 78, 85 (quoting *Idaho Forest Indus.*, 733 P.2d at 737) (subsequent citations omitted).

<sup>11</sup> Idaho Code § 36-1601(b). *See also Selkirk-Priest Basin Association, Inc. v. State*, 899 P.2d 949, 952-53 (Idaho 1995) (discussing the public trust doctrine for navigability purposes in Idaho, though before legislative amendments in 1996 to the doctrine that appear in Idaho Code § 58-1203); *Fishing From the Bank: Public Recreational Rights Along Idaho's Rivers and Lakes*, 21 Idaho L. Rev. 275 (1985) (same).

<sup>12</sup> Idaho Code § 36-1601(b) (2021).

<sup>13</sup> *Mesenbrink v. Hosterman*, 210 P.3d 516, 522 (Idaho 2009).

<sup>14</sup> Idaho Code § 36-1601(b).

<sup>15</sup> *Id.* § 36-1601(c).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* § 58-1301. Lakes navigable under the federal test would be subject to the public trust doctrine. *E.g., In re Sanders Beach*, 147 P.3d at 85-86.

<sup>18</sup> Idaho Code § 58-1301 (2021).

beauty and water quality [] against the navigational or economic necessity or justification for, or benefit to be derived from the proposed encroachment.”<sup>19</sup>

The owner of non-navigable waters (as determined by the federal test) takes to the center,<sup>20</sup> subject to the public’s rights to use waters defined as navigable streams or lakes by the state. Waters on private property that do not meet Idaho’s tests for navigable streams or lakes are not open to public use.

Trespassing on property that is posted against trespassers with signs or painted fence posts, or where oral or written personal communication to leave the property is given by the owner or lessee, is a misdemeanor.<sup>21</sup>

## Miscellaneous

Legislative amendments passed in 1996 in response to agricultural, timber, and mining interests limit the applicability of the public trust doctrine in Idaho. Specifically, statute provides that the public trust does not apply to: “management or disposition of lands held for the benefit of the endowed [state educational] institutions;” “appropriation or use of water;” “granting, transfer, administration, or adjudication of water or water rights” pursuant to the state constitution; or the “protection or exercise of private property rights.”<sup>22</sup> The state may also “authorize public or private use, encumbrance or alienation of the title to the beds of navigable waters held in public trust . . . for such purposes as navigation, commerce, recreation, agriculture, mining, forestry, or other uses, if . . . made in accordance with [state law].”<sup>23</sup> Although the statute does not directly affect the public’s recreational use of streams, decisions that give the state great discretion over public trust lands could over time negatively impede the public’s ability to enjoy streams for recreational purposes.<sup>24</sup>

For additional information on boating, fishing, and other recreational activities in Idaho, visit the state’s Department of Parks and Recreation website at <https://parksandrecreation.idaho.gov/find-an-activity/>.

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<sup>19</sup> *Id.*

<sup>20</sup> Mesenbrink, 210 P.3d at 520.

<sup>21</sup> Idaho Code § 18-7008 (2006).

<sup>22</sup> *Id.* § 58-1203.

<sup>23</sup> *Id.*

<sup>24</sup> See *Closing the Floodgates? Idaho’s Statutory Limitation on the Public Trust Doctrine*, 34 Idaho L. Rev. 91 (1997) for further background and analysis. *But see* Kootenai Env’tl. All., 671 P.2d at 1089 (discussing when the state may dispose of lands subject to the public trust). The Idaho Supreme Court has held that “a two part test emerges to determine the validity of the grant of public trust property. One, is the grant in aid of navigation, commerce, or other trust purposes, and two, does it substantially impair the public interest in the lands and waters remaining?” *Id.* Further, the court held that “[f]inal determination whether the alienation or impairment of a public trust resource violates the public trust doctrine will be made by the judiciary.” *Id.*