Maine Navigability Report

Summary

In Maine, the public has the right to boat, hunt, and fish in navigable waters.[1] Maine courts have generally construed these rights liberally to include those activities that are "reasonably incidental or related" to "fishing, fowling, and navigation."[2] Navigable waters are subject to public use as a highway for the purposes of commerce and travel.[3]

State Test of Navigability

Maine has historically employed various tests to determine whether a particular waterway is "navigable." As one court observed, navigable waters "have been variously defined as those bodies of water which are tidal, or lakes or ponds whose surface area is greater than ten acres, or whose waters are suitable for, or capable of, having property transported upon them."[4]

As a general rule, however, "navigable, or public waters" refer to those waterways that are "susceptible of use as a common passage for the public . . . to carry boats, rafts or other property."[5] Whether or not a waterway is "navigable" in the legal sense is primarily a factual determination, *i.e.*, whether the waterway is "in fact navigable."[6] Moreover, Maine courts have observed that "the terms 'navigable' and 'floatable' [are] practically synonymous."[7] Accordingly, as a general rule, all streams in Maine that are, in their natural condition, "sufficient to float boats, rafts or logs, are deemed public highways and as such are subject to the use of the public."[8] Though Maine courts have affirmed that right to travel over navigable waters in a frozen state,[9] it is not clear whether the ability to travel over water when frozen alone would make the water navigable.

Maine has long recognized that the public's right to navigate the state's waterways for pleasure is as important as any commercial purpose.[10] Accordingly, recreational use is sufficient to demonstrate navigability without the additional requirement of commercial use.

As stated above, the test for navigability is a factual one, and is applied on a case-by-case basis.[11] Maine courts do not appear to have imposed actual use requirements; on the contrary, the

---

[1] Bell v. Town of Wells, 557 A.2d 168, 173 (1989) (citing Barrows v. McDermott, 73 Me. 441, 449 (1882))
[2] *Id.*; *see also* State v. Leavitt, 72 A. 875 (1909) (interpreting "fishing" to include the right to dig for shellfish); French v. Camp, 18 Me. 433 (1841) (finding that "navigation" also includes the right to travel over frozen navigable waters).
[3] Smart v. Aroostook Lumber Co., 68 A. 527, 531 (1907).
[4] Stanton v. Trustees of St. Joseph's College, 233 A.2d 718, 720 (1967).
[5] *Id.* at 721.
[6] Smart, 68 A. at 531.
[7] *Id.* (citing Knox v. Chaloner, 42 Me. 150 (1856)).
[8] Veazie v. Dwinel, 50 Me. 479, 484 (1862).
[9] Ross v. Acadian Seaplants, Ltd., 206 A.3d 283, 290 (Me. 2019) (citing French v. Camp, 18 Me. 433 (1841)); McGarvey v. Whittredge, 28 A.3d 620, 626 (Me., 2011) (citing *French*, 18 Me. 433).
[10] *Smart*, 68 A. at 532 (observing that "navigability for pleasure is as sacred in the eyes of the law as navigability for any other purpose").
[11] *Id.* at 531.

language of courts' articulation of the navigability test, that is, whether the waters are "susceptible of,"[12] "suitable for, or capable of"[13] having property floated upon it, suggests that capability of use for such purposes is sufficient.

While various factors, including the size, natural condition, and historical usage of the waterway, are relevant considerations for the court in determining whether a stream is navigable, ultimately, "all streams in [Maine] of sufficient capacity in their natural condition to float boats, rafts or logs, are deemed public highways and, as such, are subject to the use of the public."[14]

Maine's test for navigability derives from a multitude of sources, including Massachusetts common law, the Colonial Ordinance of 1641-1647 of the Massachusetts Bay Colony (which included the then "District of Maine"), and current Maine case law.[15]

In Maine, there are three separate shoreland areas subject to distinct public and private rights.[16] "First, the land below the mean low-water mark is owned by the State. Second, the dry sand, above the mean high-water mark, belongs exclusively to the upland property owner. Finally, there is the [] the intertidal zone—the land between the mean high-water mark and the mean low-water mark up to 100 rods[, which] belongs to the owner of the adjacent upland property . . . 'subject to certain public rights.'"[17]

Maine has long recognized the public's use rights in submerged intertidal lands, so long as such activities are reasonably related to fishing, fowling and navigation.[18] As a court observed, "while a riparian land owner has certain rights which inhere in his ownership of the land adjacent to a body of water, these rights are subject to reasonable regulation by the State in the exercise of its public trust rights."[19] As established by case law, Maine holds in trust such intertidal land, or the soil between the low and high water marks, and manages these lands for the benefit of the public.[20] Often quoted as examples of permissible use of intertidal lands under the state's public trust doctrine are:

> Others may sail over them, may moor their craft upon them, may allow their vessels to rest upon the soil when bare, may land and walk upon them, may ride or skate over them when covered with water bearing ice, may fish in the water

[12] Stanton v. Trustees of St. Joseph's College, 233 A.2d 718, 721 (1967).
[13] *Id.* at 720 (citing Brown v. Chadbourne, 31 Me. 9 (1849)); Wadsworth v. Smith, 11 Me. 278 (1834).
[14] *Smart*, 68 A. at 531 (citing *Veazie*, 50 Me. 479, 484 (1862)).
[15] Bell, v. Town of Wells, 557 A.2d 168, 171 (year).
[16] Ross v. Acadian Seaplants, Ltd., 206 A.3d 283, 288 (Me. 2019).
[17] *Id.*
[18] Bell, 557 A.2d at 174 (citing Marshall v. Walker, 45 A. 497 (1900)); *see also* McGarvey v. Whittredge, 28 A.3d 620, 626 (Me., 2011) (tracing certain public trusts rights in intertidal lands to early English law and possibly Roman law); accord *Ross*, 206 A.3d at 289.
[19] Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91, 95 (1996) (citing Whitmore v. Brown, 65 A. 516 (1906)).
[20] F. Austin Harding v. Comm'r of Marine Res., 510 A.2d 533 (1986) (citing Moor v. Veazie, 32 Me. 343 (1850)); Moulton v. Libbey, 37 Me. 472, 485-87 (1854).

> over them, may dig shell fish in them, may take sea manure from them, but may not take shells or mussels or deposit scrapings of snow upon the ice over them.[21]

Equally well settled, however, is Maine's recognition that owners of land adjacent to such waters "have certain rights or privileges different from those generally belonging to the public."[22] These rights include: "(1) the right to have the water remain in place and retain as nearly as possible, its natural character, (2) the right of access to the water, (3) subject to reasonable restrictions, the right to wharf out to the navigable portion of the body of water, and (4) the right of free use of the water immediately adjoining the property for the transaction of business associated with wharves."[23]

Accordingly, a property owner's riparian rights in adjacent streambeds are not absolute, but subject to the reasonable regulation by the state in its exercise of the public trust doctrine for the benefit of the public's use. With respect to navigable rivers, since at least 1849, Maine has recognized a common law rule that "riparian proprietors own to the thread of fresh water rivers," but such ownership rights do not include the right to block public passage.[24]

Certain bodies of water have been deemed as navigable or non-navigable. "The Presque Isle Stream above the bridge at Presque Isle for a distance of thirty miles" was found to be "clearly . . . navigable in fact."[25] The Wescott Brook that empties into the Presumpscot River was held to be "non-navigable."[26]

Extent of Public Rights in Navigable and Non-Navigable Rivers

The public has a right to use navigable waters to fish, fowl, navigate, and conduct other activities that are reasonably related to these enumerated uses as described above. Maine case law has interpreted "fish, fowl, and navigate" to include "skating, digging worms, clamming, floating logs, landing boats, mooring, and sleigh travel, among other activities."[27]

In contrast, non-navigable waters, *e.g.*, "such little streams or rivers that are not floatable, that is, cannot, in their natural state be used for the carriage of boats, rafts, or other property, are wholly and absolutely private . . . because they are not susceptible of use, as a common passage for the public.[28]

---

[21] Bell, 557 A.2d at 174 (citing *Marshall*, 45 A. at 498); *but see McGarvey*, 28 A.3d at 636 ("Although Maine has a rich history of private ownership of intertidal lands, that ownership has always been subject to the public's right to cross the wet sand to reach the ocean.").
[22] *Great Cove Boat Club*, 672 A.2d at 95.
[23] *Id.*
[24] Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 215 & n.39 (D. Me. 2015), *aff'd in part & vacated in part*, 861 F.3d 324 (1st Cir. 2017), *reh'g en banc granted, op. withdrawn sub nom*., Penobscot Nation v. Frey, 954 F.3d 453 (1st Cir. 2020).
[25] Smart, v. Aroostook Lumber Co., 68 A. 527 (1907).
[26] Stanton, v. Trustees of St. Joseph's College, 233 A.2d 718, 721 (1967).
[27] *See, e.g.*, Penobscot Nation v. Mills, 151 F. Supp. 3d 181, 215, fn. 40 (D. Me. 2015) ("These public servitudes, which evolved from commercial use, do not involve any depletion or damage to soil or chattels and do not include the right of the public to wash, swim, picnic, or sunbathe.").
[28] *Stanton*, 233 A.2d at 721 (citing Wadsworth v. Smith, 11 Me. 278, 281 (1834)).

Case law makes no specific mention of the right to portage on land adjacent to navigable waters. It would seem reasonable, however, from the cases addressing activities "reasonably related" to fishing, fowling, and navigation that portage would fall into this category of activities.[29]

Despite the existence of a public easement on land adjacent to navigable waters for fishing, fowling, and navigation as described above, a landowner's rights to private, non-navigable waters is virtually absolute. Accordingly, the owner of such property may avail himself to the "traditional forms of action against persons who attempted to interfere with his rights of [such ownership]. 'He may maintain trespass for unlawful entry thereon, or trespass on the case for obstructing his rights of fishery . . . .'"[30]

Miscellaneous

An owner of land adjacent to a public waterway has no right to obstruct the river.[31] A landowner has the right to erect and wharf out to the navigable portion of the body of water, subject to the general prohibition against unreasonably obstructing the flow of such waters or creating a detriment to the public's use and enjoyment of such waters.[32]

For additional information about fishing and boating in Maine, visit the Maine Department of Inland Fisheries and Wildlife fishing and boating page at https://www.maine.gov/ifw/fishing-boating/index.html.

[29] *See, e.g.*, State v. Wilson, 42 Me. 9 (1856) (holding that the public's right to navigate includes the right to moor vessels and discharge and take on cargo on intertidal land).
[30] Bell v. Wells, 557 A.2d 168, 173 (Me. 1989) (citing Marshall v. Walker, 93 Me. 532, 537, 45 A. 497, 498 (1900)).
[31] Brown, v. Chadbourne, 31 Me. 9, 26 (1849).
[32] Great Cove Boat Club v. Bureau of Pub. Lands, 672 A.2d 91, 95 (1996).