

Wisconsin Navigability Report

Summary

In Wisconsin the public may use any river that is “navigable in fact,” even for only a portion of the year. Public use is for both commercial and recreational purposes. Wisconsin adheres to the public trust doctrine for navigable waters.

State Test of Navigability

In Wisconsin, the determination of navigability begins with state statute. Under statute, lakes and streams “navigable in fact for any purpose whatsoever” are declared to be navigable and public waters.¹ The statutes, in turn, are based on the public trust doctrine, which originated in the Northwest Ordinance of 1787 and the Wisconsin Constitution, Article IX, Section 1, which gives the state title to the beds of lakes, ponds, and rivers.² The state definition of navigability is much broader than the federal definition, which relies more heavily on the historic use for commercial navigation.³

Thus, under the state test for navigability, a river or stream is navigable if it can float “any boat, skiff, or canoe, of the shallowest draft used for recreational purposes.”⁴ Moreover, navigability is not determined by the normal condition of the stream.⁵ Thus, a stream may be navigable if it has only periods of navigability that occur from year to year (such as spring freshets), or if it is navigable long enough to make it useful as a highway for recreation or commerce.⁶

A stream is navigable to the “ordinary high water mark,” which is defined as the “point on a bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark, either by erosion, destruction or terrestrial vegetation or other easily recognized characteristics.”⁷ The fact that an obstruction impedes navigation might not defeat a finding of navigability. For example, a court found one stream navigable even though a thirteen-foot canoe with a three to four inch draft required portaging thirteen times around natural obstructions.⁸

¹ Wis. Stat. Ann. § 30.10 (West 2021).

² Wisconsin Const. art. IX, § 1 (“The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well as to the inhabitant of the state as to the citizens of the United States, without any tax, impost or duty therefor.”); *see also* *Movrich v. Lobermeier*, 905 N.W. 2d 807, 814-15 (Wis. 2018) (discussing the origins of the public trust doctrine in Wisconsin).

³ *See, e.g.*, 33 C.F.R. § 329.4 (2019).

⁴ *Village of Menomonee Falls v. Wisconsin Dep’t of Nat. Res.*, 412 N.W. 505, 508 (Wis. Ct. App. 1987) (citing *Muench v. Pub. Serv. Comm’n*, 53 N.W. 514, 519 (Wis. 1952)); *see also* *Movrich*, 905 N.W. 2d at 815.

⁵ *DeGayner & Co. v. Wisconsin Dep’t of Nat. Res.*, 236 N.W.2d 217, 221 (Wis. 1975)

⁶ *Village of Menomonee Falls*, 412 N.W. at 508 (quoting *DeGayner & Co.*, 236 N.W. 2d at 222).

⁷ *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914).

⁸ *Spoerri v. Wisconsin Dep’t of Nat. Res.*, 480 N.W.2d 569 (Wis. Ct. App. 1991) (non-precedential).

Furthermore, an artificial channel connected to a natural and navigable body of water is public because it cannot exist on its own.⁹

Extent of Public Rights in Navigable and Non-Navigable Waters

In Wisconsin, courts interpret expansively the scope of the public trust doctrine to “safeguard the public’s use of navigable waters for purely recreational purposes such as boating, swimming, fishing, hunting, recreation, and to preserve scenic beauty.”¹⁰ Accordingly, boating, swimming, fishing, hunting, and recreation are permitted on navigable waters. In fact, a Wisconsin court specifically found that hunting on navigable waters is lawful when it is confined strictly to such waters while they are in a navigable stage, and between the boundaries of ordinary high-water marks.¹¹

In addition to the access afforded by the public trust doctrine, Wisconsin has stated a policy interest in maintaining public access to navigable waters.¹² To further promote this goal, the Wisconsin Legislature has passed several key statutes that require the creation of public access within shorefront developments¹³ and limit a municipality’s power to remove such public-access sites.¹⁴

The rights of riparian owners are subject to the public’s paramount right and interest in navigable waters.¹⁵ Thus, the owner’s title is qualified by a public easement that gives members of the public the right of navigation, including bathing, hunting, fishing and boating. The riparian owner’s rights, which include the right to reasonable use of water for domestic, agricultural, and recreational purposes, must be reasonably exercised.¹⁶ A riparian owner may not obstruct the free navigation of navigable waters unless otherwise permitted by law.¹⁷

Under the public trust doctrine, Wisconsin “holds the beds underlying navigable waters in trust for all of its citizens,” though a riparian owner “may have a qualified title in the stream bed to its center.”¹⁸ That is, a riparian owner may have title to the stream bed, though ownership rights would be limited by the public trust doctrine. For natural lakes, however, “the adjacent landowner owns only to the shore line [and] the lake bottom is held in trust.”¹⁹

⁹ *Klingeisen v. Wisconsin Dep’t of Nat. Res.*, 472 N.W.2d 603 (Wis. 1991).

¹⁰ *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781, 788 (Wis. 2001); *accord Movrich*, 905 N.W. 2d at 814-15; *Rock–Koshkonong Lake Dist. v. Wisconsin Dep’t of Nat. Res.*, 833 N.W.2d 800, 821 (Wis. 2013); *see also State ex rel. Anderson v. Town of Newbold*, 954 N.W.2d 323, 327 (Wis. 2021) (reaffirming that beds of navigable waters are held in trust for the public).

¹¹ *Diana Shooting Club*, 145 N.W. at 820.

¹² Wis. Admin. Code NR § 1.90 (2008); *see also Selk v. Twp. of Minocqua*, 422 N.W.2d 889, 889 (Wis. Ct. App. 1988).

¹³ Wis. Stat. § 236.16(3) (2021).

¹⁴ *Id.* §§ 66.1006, 236.43 (2021).

¹⁵ *Movrich*, 905 N.W. 2d at 815; *State v. Bleck*, 338 N.W.2d 492 (Wis. 1983).

¹⁶ *Hilton v. Dep’t of Nat. Res.*, 717 N.W.2d 166, 173 (Wis. 2006).

¹⁷ Wis. Stat. § 30.15; *see also Wis. Stat. Ann.* § 30.10.

¹⁸ *Movrich*, 905 N.W. 2d at 814-15 (quoting *Muench*, 53 N.W. 514).

¹⁹ *Id.* at 816-17 (quoting *Mayer v. Grueber*, 138 N.W. 2d 197, 204 (Wis. 1965)); *accord Bleck*, 338 N.W.2d at 497 (Wis. 1983).

It is unclear whether and which activities incident to navigation are allowed on navigable streams where a private party has title to the bed. But because navigable streams are held in public trust, activities incident to navigation would likely be permissible. Specific to portage, Wisconsin law permits the public to use “any exposed shore area of a stream without the permission of the riparian only if it is necessary to exit the body of water to bypass an obstruction,” though the law further defines “exposed shore area” as “the bed of a navigable body of water that is between the ordinary high-water mark and the water’s edge.”²⁰ That is, portage appears protected up to the high-water mark, but there is no right to enter private property above the high-water mark. And statute limits use of the exposed shore area only to portaging around obstacles; there is not a general right of the public to use the exposed shore area.²¹

On non-navigable waters, the riparian owner’s ownership right is absolute.

Miscellaneous

Trespass on posted land or where the trespasser has notice is a class B forfeiture.²²

Wisconsin state law requires that “[n]o person may operate, and no owner may give permission for the operation of, any boat on the waters of this state unless the boat is covered by a certificate of number issued under this chapter or is exempt from the certificate of number requirements of this chapter.”²³

Additional information on boating and fishing in Wisconsin is available from the Wisconsin Department of Natural Resources at <https://dnr.wisconsin.gov/>.

²⁰ Wis. Stat. Ann. § 30.134 (2021); *see also id.* § 943.13 (2021) (trespass statute exempting bypassing an obstruction pursuant to Wis. Stat. Ann. § 30.134).

²¹ *Id.* § 30.134.

²² *Id.* § 943.13 (2021).

²³ *Id.* § 30.51(1).