Public Recreational Rights in Illinois Rivers and Streams

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The increase in public recreational use of rivers and streams currently enjoyed in some states has not occurred in Illinois due to a number of archaic laws that restrict public access to state waterways. In this article, Professor Livingston examines these laws, as well as the limited recreational rights currently enjoyed by Illinois residents. The author then explores judicial and statutory changes in Illinois doctrines that should serve to align Illinois with the contemporary view of waterways as public recreational and aesthetic assets.

Urban riverfront projects are gaining in popularity throughout the country as urban planners, government agencies, and public interest groups begin to recognize the unique qualities of urban waterways. These bodies of water can serve as the centerpieces for neighborhood and downtown revitalization. Riverfront areas also can be used for residential, commercial, and recreational development.

In Illinois, demand for water-based recreational sites is expected to grow throughout this century. This demand probably will be particularly acute in urban areas, where most of Illinois' population resides. Frequent trips to state and national parks will be infeasible because of energy shortages. As a result, there will be an increase in the use of local recreational facilities.

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1. Many of the riverfront rejuvenation projects have focused on developing parks, walkways, and bicycle paths adjacent to the river, rather than attempting to foster use of the water itself for boating, swimming, and the like. The classic riverfront development is the San Antonio River Walk, which was completed in the late 1960's. A mix of landscaped shopping and commercial areas and parks, it has become a considerable tourist attraction. See C. Gunn, D. Reed, & R. Couch, Cultural Benefits from Metropolitan River Recreation—San Antonio Prototype 7-14 (1972). For a discussion of other riverfront projects in Flint and Lansing, Michigan; Houston, Texas; Indianapolis, Indiana; San Jose, California; and Wichita, Kansas, see C. Gunn, J. Hanna, J. Parenzin & F. Blumberg, Development of Criteria for Evaluating Urban River Settings for Tourism-Recreation Use 81-90 (1974).

The city of Chicago recently unveiled plans to transform the area along the Chicago River into a linear promenade containing parks, restaurants, and landscaped walkways. Plan to Beautify Riverbank Told by City Businessmen, Chi. Trib., Feb. 10, 1979, § 1, at 4, col. 2. See Cassidy, Action Plan for the Chicago River, CHICAGO, Aug. 1979, at 98.

Local governmental bodies interested in beautifying waterways in metropolitan areas will be confronted with numerous financial and legal constraints. This article explores one aspect of the potential legal problems—the narrow scope of public recreational rights in Illinois rivers and streams. The focus is on the use of the surface of the water and the stream bed. The current state of Illinois law with respect to public recreational water rights is summarized, and the archaic and inconsistent features of it are noted. Further, local governments’ various options in opening an urban waterway to public use under existing law are examined. This article also recommends judicial and statutory changes that would align Illinois with the contemporary view of waterways as public recreational and aesthetic assets.

SCOPE OF PUBLIC RIGHTS IN ILLINOIS WATERWAYS

The determination of public rights in Illinois waterways depends on three characteristics of the river or stream—navigability, riparian ownership, and bed ownership. These concepts were developed by the common law courts and remain the factors that determine the extent of public rights in natural waterbodies. These notions are interrelated, but not necessarily coextensive. In most jurisdictions, for example, navigability is one factor in determining bed ownership. It is, nonetheless, useful to discuss these concepts separately because in Illinois each determines different public rights in waterways.
Navigability

Navigability is the essential basis for ascertaining whether the public has an easement of navigation in a particular waterbody.11 Because the public easement of navigation applies to navigable waterways, but not to nonnavigable waterways, it is important to be able to distinguish between navigable and nonnavigable waterways.

The definition of navigability varies considerably among the states.12 In Illinois, the concept of navigability underwent a radical change in the nineteenth century. Early Illinois cases used the English common law definition of navigability, according to which only arms of the sea and streams in which the tide ebbed and flowed were regarded as navigable.13 Because no waterways in Illinois experience the ebb and flow of the tide, none were navigable under this common law definition.14 Recognizing the impracticality of this definition for use in the inland states, the Illinois courts shifted to a navigability-in-fact test in the late nineteenth century.15 Under this test, in this context is defined by federal criteria and means navigability in fact. See notes 15-22 and accompanying text infra for an explanation of this concept. The “bed” of a waterway refers to the submerged land beneath the water. Most states have retained their ownership of the beds of navigable waters, while in virtually all jurisdictions the beds of nonnavigable waterbodies are privately owned. 1 WATER AND WATER RIGHTS § 37 (R. Clark ed. 1967) [hereinafter cited as 1 WATER AND WATER RIGHTS]; G. WAITE, A FOUR STATE COMPARATIVE ANALYSIS OF PUBLIC RIGHTS IN WATER 16-19 (Water Resources Center, Univ. of Wis., 1967); Note, Fishing and Recreational Rights in Iowa Lakes and Streams, 53 IOWA L. REV. 1322, 1327-32 (1968); Note, Water and Watercourses—Recreational Rights—A Determination of the Public Status of West Virginia Streams, 80 W. VA. L. REV. 356, 361 (1978).

11. See text accompanying notes 80-83 infra.

12. For example, in Idaho a navigable stream is "any stream which, in its natural state, during normal high water, will float 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." IDAHO CODE § 36-1601 (1977). Michigan, using a modification of the navigable-in-fact test, defines a navigable water as "any waterway now navigable in fact by vessels, or capable of being made navigable by vessels through artificial improvements." MICH. COMP. LAWS. ANN. § 281.501 (1979). Mississippi's statutory definition of navigable water reflects its economic history: "All rivers, creeks and bayous in this state, twenty-five miles in length, that have sufficient depth and width of water for thirty days in the year for floating a steamboat with a carrying capacity of two hundred bales of cotton. . . ." MISS. CODE. ANN. § 51-1-1 (1972). New Hampshire provides: "Navigable streams or waters are those which are used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel is or may be conducted in the present customary modes of trade or travel on water. . . ." N.H. REV. STAT. ANN. § 271:9 (1977).

13. City of Chicago v. McGinn, 51 Ill. 266, 272 (1869); Middleton v. Pritchard, 4 Ill. (3 Scam.) 510, 520 (1842).

14. The Mississippi River was not navigable under the common law definition. Middleton v. Pritchard, 4 Ill. at 521. In addition, neither the Illinois River nor the Chicago River was a navigable stream in the sense of this definition. City of Chicago v. McGinn, 51 Ill. at 272.

15. Healy v. Joliet & C.R.R., 2 Ill. App. 435, 439-40 (1878), rev'd, 94 Ill. 416 (1880), aff'd, 116 U.S. 191 (1886). This test also is used in many federal cases. For example, the United States Supreme Court, in The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870), enunciated the now-standard federal definition of public, navigable rivers as those rivers navigable in fact—that
a waterway "must in its ordinary, natural condition furnish a highway over
which commerce is or may be carried on in the customary modes in which
such commerce is conducted by water."16 This test has turned out to be
very restrictive as interpreted by the Illinois courts. The cases have
emphasized that a waterway is navigable only if it affords a channel for useful
commerce.17 Indeed, Illinois courts have frequently questioned whether a
particular waterway actually was used for substantial periods of time for pas-
sage of commercial boats.18 The fact that a stream is capable of floating
boats and logs for a few weeks during the rainy season is not sufficient to
render it navigable. Instead, it must be capable of fairly continuous support
of commercial vessels.19 In contrast to one federal view of navigability,20

wrst of error dismissed, 234 U.S. 497 (1914). See also DuPont v. Miller, 310 Ill. 140, 145, 141
N.E. 423, 425 (1923), wrst of error dismissed, 269 U.S. 528 (1925); Sanitary Dist. v. Boening,
267 Ill. 118, 126, 107 N.E. 810, 812 (1915); Schulte v. Warren, 218 Ill. 108, 119, 75 N.E. 783,
785 (1905).
17. The definition clearly is grounded in the view of waterways as passages for commercial
vessels. One case specifically mentioned "vessels for the transportation of property conducted
by the agency of man" and thus made it apparent that the capability of supporting recreational
or other noncommercial boats did not determine navigability. Sanitary Dist. v. Boening, 267 Ill.
at 126, 107 N.E. at 812. Another decision discussing the purpose of state jurisdiction over
navigable waterways within its borders explicitly stated that "the object to be obtained was the
promotion of commerce, and the [public] rights secured are purely commercial." People v. City
of St. Louis, 10 Ill. (5 Gilm.) 351, 369 (1848).
18. E.g., DuPont v. Miller, 310 Ill. 140, 144-45, 141 N.E. 423, 425 (1923) (slip adjacent to
Chicago River found navigable on basis that steamboats, barges, and other commercial vessels
used it); Healy v. Joliet & C.R.R., 94 Ill. 416, 421-24 (1880) (slough fed by Chicago River found
not navigable because no proof that it ever was used other than by light-draft freighting vessels);
People v. City of St. Louis, 10 Ill. at 373, (channel of Mississippi River held navigable since it
had been used for years by trading vessels).

The restrictive application of the navigability-in-fact standard by Illinois courts is reflected in
a case involving a suit to enjoin construction of a dam across the Des Plaines River. Both Illinois
and federal courts heard cases involving the same defendant, the same river, and similar issues
with reference to the construction of the dam. The United States Supreme Court, in reviewing
the evidence of navigability, held that the Des Plaines River was navigable because it once had
been used for navigation. Although it had not been used for that purpose for 100 years, it was
possible that removing artificial obstructions and other improvements could render it navigable
again. Economy Light & Power Co. v. United States, 256 U.S. at 124. In contrast, the Illinois
Supreme Court found that the river was not navigable because of "the uncontroverted fact that
the river has never been used as a public highway for commerce." People v. Economy Light &
Power Co., 241 Ill. at 336-37, 89 N.E. at 773. The Illinois court, rather than relying principally
on the historical evidence, seemed to emphasize that the river in its current condition was not
capable of navigation. Id. at 338, 89 N.E. at 773.
19. Hubbard v. Bell, 54 Ill. 110, 121 (1870).
the Illinois definition does not classify as navigable those waterways that could be rendered navigable by means of man-made improvements.\textsuperscript{21}

Thus, even though a river had a sufficient volume and flow of water to allow the passage of boats, it would not be considered navigable in those places where trees or other natural barriers obstructed their passage.\textsuperscript{22}

\textbf{The Problem of Riparian Ownership}

The existence of public recreational rights in waterways is partially contingent upon the extent to which the lands abutting the waterways are privately owned. Private riparian ownership, as well as private bed ownership, can severely restrict any public claims to use the waterways for recreational purposes.\textsuperscript{23} The only individuals who enjoy rights of use and access to non-navigable rivers are riparian proprietors and bed owners.\textsuperscript{24} In order to be a riparian owner one must own land abutting a waterway.\textsuperscript{25} Land near the water but not in physical contact with it is not riparian land.\textsuperscript{26} Bed ownership, however, is not required for riparian proprietorship.\textsuperscript{27} In addition, lessees and grantees of riparian rights and owners of rights-of-way or easements are also riparian owners to the extent of their title.\textsuperscript{28}

The rights of the riparian owner are the right of accretion\textsuperscript{29} and the right of access, which includes the right to use the water.\textsuperscript{30} The right of access

\begin{itemize}
  \item \textsuperscript{21} People v. Economy Light & Power Co., 241 Ill. at 326, 89 N.E. at 769. If the river is navigable in its natural condition, however, the state may improve its navigability and the public may avail itself of that improvement. \textit{Id.}
  \item \textsuperscript{22} The river would, on the other hand, be considered navigable in those portions that can support commercial boats. Schulte v. Warren, 218 Ill. at 119-20, 75 N.E. at 785.
  \item \textsuperscript{23} Where the bed of a nonnavigable stream and the land adjoining it are in private ownership, the public has no right to have access to it or to use it for any purpose. Hubbard v. Bell, 54 Ill. at 121.
  \item \textsuperscript{24} The rights of bed owners are discussed below. See text accompanying notes 56-64 infra.
  \item \textsuperscript{25} Leitch v. Sanitary Dist. of Chicago, 369 Ill. 469, 473, 17 N.E.2d 34, 36 (1938).
  \item \textsuperscript{27} Bouris v. Largent, 94 Ill. App. 2d at 256, 236 N.E.2d at 18.
  \item \textsuperscript{28} Indian Ref. Co. v. Ambrarw River Drainage Dist., 1 F. Supp. 937, 938 (E.D. Ill. 1932); J. CRIBBET, WATER RIGHTS IN ILLINOIS 12 (1957) [hereinafter cited as CRIBBET]. But cf. F. MANN, H. ELLIS, & N. KRAUSZ, WATER-USE LAW IN ILLINOIS 25 (University of Illinois Agricultural Experiment Station Bull. No. 703, 1964) [hereinafter cited as MANN]. It is suggested there that Illinois courts would not regard lessees and grantees of riparian rights, or owners of rights-of-way or easements, as riparian owners to the extent of their title. The authors, however, maintain that a grant or right-of-way or easement to the water's edge should be presumed to permit the holder to have the riparian right of access to the water at that point. \textit{Id.} at 26.
  \item \textsuperscript{29} Bouris v. Largent, 94 Ill. App. 2d at 254, 236 N.E.2d at 17. Accretion is the addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of the owner. Brundage v. Knox, 279 Ill. 450, 462, 117 N.E. 123, 127 (1917).
  \item \textsuperscript{30} Bouris v. Largent, 94 Ill. App. 2d at 254, 236 N.E.2d at 17.
\end{itemize}
also gives riparian owners power to prevent members of the public from gaining access to the waterbody. Illinois has accumulated considerable case law on the riparian owner’s usufructuary right to take water from the stream and consume it. This body of law offers very little guidance, however, to the riparian owner interested in recreational use of adjacent water. Recreational activities do not normally consume the water or divert it from its natural course. Instead they involve use of the water surface for swimming or boating. Nevertheless, the law concerning riparian owners’ consumptive or diversionary use of water may have a constricting effect on the extent to which the water may be used for recreational purposes. It is therefore necessary to examine relevant common law doctrine.

Under Illinois common law, the “reasonable-use” doctrine governs consumptive and diversionary uses of water. According to this doctrine, a riparian owner is allowed reasonable use of the water in a natural water-course. The measure of reasonableness under Illinois common law varies according to whether a use is natural or artificial. Each riparian owner in his or her turn may consume all the water in a stream or river to satisfy

31. The significance of this right of access may diminish, however, if the riparian owner does not also own the stream bed. Under Illinois common law, the owner of the river bed is given certain exclusive rights, such as the right to enter upon the water over that segment of the bed that he or she owns and the right to hunt and fish over it, regardless of the rights given the riparian owner. See text accompanying notes 62-64 infra. Presumably, then, without bed ownership riparian owners are limited in their recreational enjoyment of the water to appreciating its scenic qualities or possibly diverting some of the water to a private swimming hole. In most cases, however, riparian owners will own both the bed and banks of the stream because, absent an express intent to the contrary, a conveyance of land abutting a waterway extends to the center of the stream. Allot v. Wilmington Power Co., 288 Ill. 541, 550, 123 N.E. 731, 734 (1919); Board of Trustees of Ill. & Mich. Canal v. Haven, 10 Ill. (5 Gilm.) 548, 558 (1849); Heckman v. Kratzer, 43 Ill. App. 3d 944, 948, 357 N.E.2d 1276, 1280 (2d Dist. 1976). The opposite presumption holds with respect to a natural navigable lake—that is, the conveyance of land abutting the lake extends only to the water’s edge. Wilkinson v. Watts, 309 Ill. 607, 610, 141 N.E. 383, 384 (1923).

32. In the water law context, a usufructuary right refers to the riparian owner’s right to use or enjoy the water without altering its substance and without actually owning the water itself. See Druley v. Adam, 102 Ill. 177, 193 (1882).

33. See, e.g., Bliss v. Kennedy, 43 Ill. 67 (1867); Plumleigh v. Dawson, 6 Ill. (1 Gilm.) 544 (1844); Evans v. Merriweather, 4 Ill. (3 Scam.) 492 (1842); MANN, supra note 28, at 26-37.

34. Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 496 (1842). The Evans case is probably the earliest Illinois case in which the court attempted to define fully the scope and nature of the reasonable-use doctrine. The parties in Evans were mill operators who owned land along a stream that ran low one autumn. Defendant, the upper riparian owner, allowed his servant to erect a dam across the stream that diverted all of the water onto his land. Plaintiff brought suit for diversion of the water. The court held that the defendant’s use of all the stream water for industrial purposes was not reasonable and sustained the judgment for the plaintiff.

35. Under common law doctrine there were two principal allocation theories: the natural-flow theory and the reasonable-use theory. The natural-flow theory stated that each riparian owner had the right to have the watercourse flow by his or her land unimpaired in quality or quantity by the actions of other riparian owners. Each owner, however, could use the water to satisfy “natural” and “artificial” wants so long as such use did not materially diminish the natural quantity or quality of water. On the other hand, the reasonable-use doctrine allowed each ripar-
“natural” wants.  

Natural wants are those that must be satisfied to sustain life in a direct and immediate sense, such as quenching thirst, bathing and laundring, and supplying cattle. Artificial uses merely increase the landowner’s comfort and prosperity beyond the bare minimum necessary to sustain life. They include industrial uses, such as propelling machinery by steam or hydraulic power, and agricultural uses, such as irrigating land. An owner may not consume the water for artificial purposes in a manner such that other riparian owners cannot satisfy their natural wants. If, however, there is enough water to fulfill all natural uses, then each owner may use his or her “just proportion” of the remaining water for artificial purposes. The question of what constitutes an owner’s just proportion is normally a factual one to be determined on the basis of all the facts and circumstances involved.

It is doubtful that more than a few riparian owners living along an urban stream derive their drinking and household water supply from the stream. Thus, the natural uses of water seldom may be at issue. Commercial use of water in a neighboring stream, however, can be extensive. Such use may include air conditioning of a factory, hotel, or office building. Even if each commercial riparian owner takes only its just proportion of the stream water for these artificial consumptive uses, the quantity of water in the stream may be reduced to barely more than a trickle. The flow in an urban area may be diminished to the point where satisfactory recreational uses are virtually impossible. If this happens, not only will the public be denied all rights in the use of the navigable waterway, but the private riparian owners themselves also may be deprived of any rights in the recreational use of such waterway. Thus, the result would be the preclusion of all recreational uses of the waterway because there would be insufficient water remaining.

On the other hand, artificial consumptive uses and recreational uses logically might be equated. If so, the measure of each riparian owner’s “just proportion” would be determined according to the total volume of water and the total spectrum of actual uses, including recreational ones. Co-riparians would be required to leave enough water in the stream so that all could use it satisfactorily for such activities as boating, swimming, and fishing. Similarly, riparian owners could enjoin their co-owners from polluting the water to such a degree as to render it unfit for recreational uses.

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36. Evans v. Merriweather, 4 Ill. (3 Scam.) at 496.
37. Id. at 495.
38. Id.
39. Id.
40. Id. at 496.
41. Id.
42. Id.
The Illinois courts have not, however, established the limits of this type of use by a riparian owner. Very few cases address the use of waterways for recreational activities. Most are concerned with the use of the water in a stream or river for consumptive or diversionary purposes. Yet, it is likely that an Illinois court, faced with determining whether a riparian owner's conduct of recreational pursuits on a waterway exceeded permissible limits, would employ the reasonable-use doctrine developed in the water consumption context. A recreational use probably would not be considered a natural one under the common law definition. Boating, swimming, fishing, and wading are not activities necessary to sustain life or to provide for sanitary living conditions. Although recreational pursuits may contribute to an individual's emotional and physical well-being, they are hardly essential to the continuation of life. Moreover, recreational activities can be pursued elsewhere than on water, whereas water is necessary to quench thirst and to cook food. Thus, it is likely that Illinois courts would classify recreational activities as artificial uses.

The result of categorizing recreational activities as artificial uses is that each owner may use his or her just proportion of the waterway for these pursuits. Each owner's use would be judged by a standard of reasonableness, according to the extent of his or her riparian ownership. On a nonnavigable waterway this standard should result in an equitable apportionment of the space and time available for recreational pursuits. Thus, under a modern adaptation of the reasonable-use doctrine to recreational uses, it is

44. One modern Illinois case stated the reasonable-use doctrine in very general terms without specifically restricting it to instances of consumption, pollution, or diversion of water:

The riparian rights of property owners abutting on the same body of water are co-equal. Such rights being equal, the general rule is that no riparian owner can exercise his riparian rights in such a way as to prevent the exercise of the same right by the owners of other riparian rights. That this principle cannot be applied in the literal sense is obvious. To the extent that there is any use of water by one, such use diminishes the quantity or quality of a like use by another. Accordingly it is the reasonableness of the use, together with the absence of unreasonable effect upon others, with which we are concerned.

Bouris v. Largent, 94 Ill. App. 2d at 254, 236 N.E.2d at 17. Other jurisdictions have applied the reasonable-use doctrine to recreational uses of waterbodies. See notes 46, 48-49 infra and cases cited therein.


47. The value of a nonnavigable waterway in the nineteenth century was derived chiefly from the consumptive or diversionary uses of the water itself. Thus, the reasonable-use doctrine at common law emphasized the consumption or diversion by a riparian owner of his just proportion of the quantity of water flowing in the stream.
no longer as important to apportion the volume of water in a stream among the various owners as it was in the context of water consumption or diversion. It is important, however, to allocate the surface area of the water among the various riparian owners, as well as the time that each may engage in recreational activities on the water. Thus, an owner's just proportion of water use should be determined by reference to the total surface area of the river or stream, the number of riparian owners adjacent to the stream, the extent of the individual riparian owner's holdings, and the type and frequency of the recreational uses in which the owner engages. If a fellow riparian owner believed that another riparian proprietor's use was unreasonable, he or she could then sue to enjoin the unreasonable aspects of the neighbor's activities.

This approach has the advantage of consistency with prior law and adaptation of it to modern water conditions and uses. It can provide a fair allocation among co-riparian owners of the surface of waterways suitable for recreational activities. On the other hand, this view presents several disadvantages when examined from the perspective of the public interest in recreational use of nonnavigable waterways. The reasonable-use doctrine was developed at a time when Illinois enjoyed an abundance of water. In fact, a primary concern in the nineteenth century was to eliminate excess water and prevent flooding. The doctrine, therefore, was developed with reference to a land development company to prevent the company from building a sports club on the shoreline of the lake. The court found that the unrestricted use the club members of the lake would constitute an unreasonable use and thus an interference with the rights of the co-riparian owners. The injunction restricted the number of individuals that could use the defendant's facilities at any one time and limited the number and type of boats that could be launched from the defendant's property.

Wisconsin lake property owners believe that lake management organizations should exercise control over motorized recreation—in particular, hours of use and areas on lakes should be designated for power boating. At other times and in other parts of the lake motorized recreation should not be allowed. L. Klessig & D. Yanggen, The Role of Lake Property Owners and Their Organizations in Lake Management 5-6 (Environmental Resources Unit, Univ. of Wis.-Extension, 1975) [hereinafter cited as Klessig & Yanggen].

49. The Michigan Supreme Court has developed a list of factors to be considered in determining whether a riparian owner's recreational use of the surface of a waterbody is reasonable: (1) the size and character of the watercourse; (2) the kind of use, its effect on the quantity and quality of the water, and the purposes of the user; (3) the impact of the use on the correlative rights and interests of the other riparian owners and of the state, which protects the public's navigational easement. Thompson v. Enz, 379 Mich. 688-89, 154 N.W.2d at 484-85 (1967). The court remanded the case to the trial court for specific findings on these factors but indicated some disapproval of defendant's proposed commercial exploitation of the relatively small lake. In assessing the benefits and hardships, the trial court was instructed to examine defendant's profit-making goals in relation to plaintiffs' interest in peace and repose. Id.

50. Evans v. Merriweather, 4 Ill. (3 Scam.) 492 (1842).

51. Id.

52. The problems of excess water and flooding have plagued Illinois since the area was first heavily settled in the nineteenth century. Encroachment on the flood plains by settlers removed much of the natural drainage area and aggravated the tendency of many Illinois rivers to flood...
ence to abundance and is not easily adaptable to a situation of scarcity. Another deficiency of the reasonable-use doctrine is that it was designed to settle disputes between parties in a litigation setting. It is, therefore, a piecemeal approach to water-use allocation. This doctrine also has been criticized because of courts' ambiguous language and because of the limited number of contexts in which the doctrine has been defined. Finally, and most importantly, the reasonable-use doctrine makes no accommodation for public recreational uses of nonnavigable waterways.

Operating within the restrictions and inadequacies of the common law, a government can still free some areas on an urban nonnavigable stream or river for public recreational use. For example, a municipality or park district itself could become a riparian owner by purchasing strategically located parcels of land along an urban waterway. It could then allow members of the public access to the stream and permit them to enjoy the same usufructuary rights that it, as the riparian owner, possesses. The public, however, would be limited in its activities by the reasonable-use doctrine. If any large numbers of individuals were given access to the stream, they might interfere with the neighboring riparian owner's use and enjoyment of the water. Therefore, governmental ownership of portions of the riparian land provides at best an incomplete and unreliable answer to the problem of public use of nonnavigable waterways. Before exploring potential solutions, however, it is necessary to examine another obstacle to public rights in Illinois waterways.

The Problem of Bed Ownership

Public rights in Illinois waterways are also dependent upon the bed ownership of the river or stream. Where the bed is privately owned, the public's right to make use of the waterway is severely restricted. It is important,

during the spring snow melt and rains. ILLINOIS TECH. ADVISORY COMM. ON WATER RESOURCES, WATER FOR ILLINOIS: A PLAN FOR ACTION 240-41 (1967) [hereinafter cited as ILLINOIS TECH. ADVISORY COMM.]. The riparian doctrine has been adopted only in the wet, eastern states and has not been followed in most of the arid western states, which adopted the prior appropriation doctrine. 1 WATER AND WATER RIGHTS, supra note 10, at § 51.
53. CRIBBET, supra note 28, at 27-38.
54. Id.
55. The inadequacies of the common law doctrine in the water allocation context have prompted several commentators to recommend that the Illinois General Assembly consider the statutory revisions of it. See CRIBBET, supra note 28, at 44-52. The author advises the General Assembly not to adopt sweeping changes in Illinois water law but to commence a comprehensive study of water problems and to consider legislation recognizing the interrelatedness of all categories of water and setting up administrative control of water use. See also Wolff, The Need for a Reform of Water Use Law in Illinois, 53 CHI-KENT L. REV 22 (1976) (establishment of state water allocation board urged); ILLINOIS ECONOMIC & FISCAL COMM'N, WATER RESOURCES MANAGEMENT IN ILLINOIS 93-125 (1974) (water permit statute proposed); ILLINOIS TECH. ADVISORY COMM., supra note 52 at 388-89 (clarification of state law regarding riparian rights suggested).
therefore, to determine how bed ownership is obtained and the effects of such ownership on public recreational rights in the waterway.

According to federal common law, upon a state’s admission to the Union it acquires ownership of the lands under navigable waters. Many states have retained title to submerged lands and hold this title in trust for the people of the state so that they may enjoy the rights of navigation, fishing, and swimming absent the interference of private riparian owners. In such jurisdictions the state cannot grant parcels of a river bed to private owners except insofar as the grant will serve the public interest. This rule, however, is not followed in Illinois; it appears that Illinois has established that the state may unconditionally give up the ownership of submerged lands of navigable waterways. Although it has retained title to the beds of navigable or meandered lakes, the state has granted to private owners title to beds of navigable streams and rivers. In addition, many beds are conveyed because a grant by an owner of riparian land is presumed to convey title to the center of the thread of a stream. Thus, the beds of most Illinois rivers and streams are privately owned.

Private ownership of river beds severely inhibits the public’s right to engage in recreational activities on Illinois waterways. Under Illinois common law the owner of a river bed has the exclusive right to hunt and fish over the water lying above the bed. Furthermore, only the bed owner may enter upon the water covering that segment of the bed owned by him or her. Consequently, swimming by members of the public may be prohibited by the bed owners.


57. Bolsa Land Co. v. Burdick, 151 Cal. 254, 262, 90 P. 532, 535 (1907); State v. Gerbing, 56 Fla. 603, 612, 47 So. 353, 356 (1908); Cook v. Dabney, 70 Ore. 529, 532, 139 P. 721, 722 (1914); City of Galveston v. Mann, 135 Tex. 319, 328-30, 143 S.W.2d 1028, 1032-33 (1940).

58. MANN, supra note 28, at 83.


60. Tempel v. United States, 248 U.S. 121, 129 (1918); Leitch v. Sanitary Dist. of Chicago, 369 Ill. at 474, 17 N.E.2d at 36; McCartney v. Chicago & E.R.R., 112 Ill. 611, 634 (1884); Braxon v. Bressler, 64 Ill. 488, 493 (1872); City of Chicago v. Laffin, 49 Ill. 172, 176 (1868).


63. See MANN, supra note 28, at 49. This right is subject to the public’s easement of navigation in navigable waterways. See text accompanying notes 80-92 supra.

64. Many of the cases that declare these exclusive rights in bed owners date from the nineteenth century, and almost all concern lakes or ponds rather than rivers or streams. It is, questionable, therefore, whether an Illinois court if presented today with the question of public rights to fish, hunt, or swim over privately owned beds in navigable waterways would accept the rulings on older decisions. As will be discussed later in this article, recreational activities
Although the common law of bed ownership remains largely in effect, one Illinois statute purports to declare state ownership of submerged lands under certain circumstances. This statute specifies that the State of Illinois asserts and reclaims title to submerged lands under public waters and to lands that were submerged but were illegally filled in. Under this statute, the state also reasserts title to submerged lands that may have been granted to private individuals or public bodies and that have been unlawfully filled in or that are not used for the purposes for which they were granted.

It is not clear whether the statute actually expands Illinois common law or merely codifies it. The statutory language refers to protecting "the trust wherein the State holds certain lands for the People." This wording could be interpreted in two ways. The legislature may have intended to reassert title only over those submerged lands to which it retained formal title after Illinois' admission to the Union. These lands include the beds of most navigable or meandered lakes. On the other hand, the General Assembly may have wanted to reclaim the state's title to all submerged lands to which it gained ownership upon Illinois' admission to the Union. This category of submerged lands is much larger than the first and would include not only the beds of navigable or meandered lakes but also the beds of navigable rivers and streams having passed into private ownership.

The latter interpretation would, of course, have a dramatic effect on the ownership of the beds of most Illinois waterways and would serve to expand considerably the scope of public rights in such waterbodies. It is questionable, however, whether such a broad interpretation is justified. The statute additionally provides that the state reasserts title to submerged lands that have been granted to private individuals, corporations, or public bodies and that have been illegally filled in or occupied or that are not used for the

are not incompatible with the notion of private bed ownership. See text accompanying notes 138-47 infra. They are logically concomitant with the public navigational easement if that easement is interpreted to include recreational boating. Inclusion of hunting, fishing, and swimming rights in the definition of public rights in navigable waterways will not seriously interfere with private expectations nor impair the private owner's exclusive right to remove sand, gravel, and minerals from the stream bed. Sikes v. Moline Consumers Co., 293 Ill. at 125, 127 N.E. at 346 (1920); Braxon v. Bressler, 64 Ill. at 489 (1872).

66. Ill. Rev. Stat. ch. 19, § 150 (1977), provides:

The Attorney General of the State of Illinois is hereby directed to make such inquiry of the aforesaid subject matter as he deems desirable and advantageous to protect the interests of the People of the State of Illinois under said trust, and to bring such suit or suits as he may deem necessary to recover such lands, or to protect any such lands from illegal occupation or encroachments.

67. Id.
68. Id. The attorney general may bring suit to recover submerged lands of the state illegally occupied or filled in. Id. § 151.
69. Id. § 150.
70. See notes 59 and accompanying text supra.
71. See text accompanying notes 58-61 supra.
purposes for which they were granted.\textsuperscript{72} This implies that there are certain beds that the state recognizes as being privately owned; it reclaims its previous ownership in all instances but only where the grantee has illegally filled in the bed or where the grantee is using the land contrary to the limitations imposed in the original grant.\textsuperscript{73} The statute's purpose can be seen, therefore, as a reclamation of title to beds in navigable waterways only in certain specified instances in which the existing public interest has been injured by private individuals.\textsuperscript{74}

The statute probably does not go much beyond the common law doctrine. It merely reiterates the attorney general's power to remove encroachments that interfere with the public navigational easement and his or her power to prevent filling in of those lake beds already owned by the state. Unless it can be said that all of the state's original conveyances of submerged lands were subject to the public trust,\textsuperscript{75} then the statute does not significantly aid the public or local governmental units in procuring additional public recreational rights in navigable or nonnavigable waterways. At most it expresses a firm intention not to allow private interference with the rights that already exist.

\textit{Public Recreational Rights in Illinois Waterways}

In virtually all jurisdictions the beds of nonnavigable waterways are privately owned.\textsuperscript{76} If the lands abutting the waterways are also privately owned, the public has neither the right of access to the waterway nor the right to make use of the waterway for recreational purposes. If riparian ownership rests in the state, however, the public may be granted access to the stream and permitted to enjoy the same usufructuary rights that the state, as a riparian owner, possesses.

\textsuperscript{72} [\textit{Ill. Rev. Stat.} ch. 19, § 150 (1977). See note 66 \textit{supra}.]

\textsuperscript{73} All grants of submerged lands arguably carried with them the condition that the grantee could not use the bed so as to interfere with the public easement of navigation. See Bolsa Land Co. v. Burdick, 151 Cal. 254, 262, 90 P. 532, 535 (1907). Thus conceivably if a private bed owner built a structure on the submerged land that obstructed navigation, the state could reassert title to the stream bed.

\textsuperscript{74} The broader interpretation of the statute is even less likely when one considers the aspect of compensation. Bed ownership, like riparian rights, is a property right that the state cannot take from private individuals except for public purposes and upon payment of just compensation. Leitch v. Sanitary Dist., 369 Ill. 469, 17 N.E.2d 34 (1938) (filling of Chicago River by sanitary district held to be "taking" of riparian proprietorship). See Barrington Hills Country Club v. Village of Barrington, 357 Ill. 11, 191 N.E. 239 (1934) (pollution by village of stream held to constitute a "taking" of riparian rights). Hence a legislative declaration that privately owned stream beds now belong to the state almost certainly would run afoul of due process notions. It seems equally clear that the statute, passed in 1937, made no provision for compensating the owners of the submerged lands in which the state was reasserting its title. The statute is probably unconstitutional, see Livingston, \textit{supra} note 4, at 760-66, if it is interpreted to transfer title from submerged lands under navigable waters from private individuals to the state except in circumstances where the owners were using the beds in contravention of the public interest in navigation.

\textsuperscript{75} See note 57 and accompanying text \textit{supra}.

\textsuperscript{76} See note 10 \textit{supra}.
On the other hand, many jurisdictions have retained ownership of the beds of navigable waterways. These jurisdictions hold title to the beds in trust for the people of the state so that they may enjoy the rights of navigation, fishing, and swimming. Illinois does not follow this rule and has adopted the position that the state may unconditionally relinquish the bed ownership of navigable waterways. By granting title to the beds of navigable streams and rivers to private owners, the state has severely curtailed any public rights to engage in recreationally activities on Illinois waterways.

It is clear that the right of the public to use nonnavigable waterways for recreational activities is at best tenuous. Because most waterways in Illinois are not navigable under the common law definition, very few opportunities exist for extensive public recreational use of waterways. One solution to this problem might be to modify the definition of navigability to include waterways traditionally considered nonnavigable. Before an attempt to redefine navigability is made, however, it is necessary to examine further the rights currently afforded the public in navigable waterways through the device known as the public easement of navigation.

Because navigability is the principal determinant of public rights in waterways, the narrow definition of navigability used in Illinois has had the effect of severely restricting these rights. As on nonnavigable waterways, owners of riparian land adjacent to a navigable watercourse generally may use the surface of the water as they wish. The riparian landowner may not, however, interfere with the right of the public to use the waterway for the passage of boats. This right is known as the public easement of navigation. The Illinois cases do not specify whether the easement is confined to public commercial uses or whether it extends to include navigation by individual pleasure crafts. Given the early decisions' emphasis on navigable waterways as highways for commerce, an Illinois court adhering to the older views possibly would exclude recreational boats. There is no reason, however, to limit the navigational easement to public commercial

77. Id.
78. See text accompanying notes 58-61 supra.
79. See text accompanying notes 119-27 infra.
80. See notes 29-55 and accompanying text supra. Their use of the surface of the waterway is, of course, constrained by the reasonable-use doctrine. See text accompanying notes 47-50 supra.
81. Braxton v. Bressler, 64 Ill. at 491-92; City of Chicago v. McGinn, 51 Ill. at 272. The easement of navigation also includes the right to do any act necessary to enjoy the easement such as use of the banks of a navigable waterway to moor a boat temporarily. Alexander v. Tolleston Club, 110 Ill. 65, 75 (1884); Braxon v. Bressler, 64 Ill. at 459, MANN, supra note 28, at 65-66.
82. Schulte v. Warren, 218 Ill. at 119, 75 N.E. at 785 (1905); MANN, supra note 28, at 65-67.
83. Many of the early courts spoke generally of navigable waterways as "public highways" and referred to the public's right to use such waterways for the passage of "vessels." E.g., Braxton v. Bressler, 64 Ill. at 491-92.
84. See text accompanying notes 16-22 supra.
uses. While rivers at one time may have maintained much trade by boat—a once-important means of transporting goods—they no longer maintain such common public use. Pleasure boating, on the other hand, has increased dramatically over the last twenty years and has probably surpassed commercial shipping as the predominant public use of some navigable waterways.

Apart from boating, it appears that no other recreational uses on navigable waterways are expressly allowed by the Illinois cases. No mention of swimming or waterskiing is made, and, if the stream bed is privately owned, hunting and fishing are not allowed without the consent of the bed owner. Because most river and stream beds in Illinois are privately owned, there is little opportunity for the public to hunt and fish waterways.

Whatever limits exist with respect to the public easement of navigation, the state has jurisdiction over this public right. For example, the state may improve the navigational usefulness of a navigable river, and the public may take advantage of such improvements.

85. See text accompanying notes 128-49 infra.


88. See text accompanying notes 62-64 supra.

89. The state’s jurisdiction over navigable waters derives from the “equal footing” doctrine, under which all new states are admitted to the Union on an equal basis with the thirteen original states. Illinois, for example, on its admission to the Union gained all the rights of sovereignty and dominion that the original states had, and it thus could exercise full control over its navigable waters. Sands v. Manister River Improvement Co., 123 U.S. 288, 295-96 (1887). The legislation admitting Illinois to the Union contained “equal footing” language. Act of April 18, 1818, ch. 67, 3 Stat. 428 (1818), 3 Stat. 536 (1818).

The state’s power over navigable waterways is subject to the paramount power of Congress to regulate interstate commerce on such waterways. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 423-24 (1940); Economy Light & Power Co. v. United States, 256 U.S. at 121; DuPont v. Miller, 310 Ill. 140, 145, 141 N.E. 423, 425 (1923).

90. People v. Economy Light & Power Co., 241 Ill. at 326, 89 N.E. at 769. If the improvements involve alteration of the stream channel below the high water mark, then the riparian owner may not recover from the state for any injury that he has suffered. On the other
obligation to prevent interference with the public’s easement of navigation. At common law the state could bring an action for public nuisance against any person who obstructed the clear passage along any navigable waterway. This policing function now resides by statute in the Illinois Department of Transportation, which has jurisdiction over every “public waterbody” within the state.

TOWARDS A SOLUTION

Operating Within the Existing System

In most cases, a local governmental unit that has embarked on an urban stream beautification project will want to maximize the extent of the public’s recreational rights in the urban waterway. Accepting the present state of Illinois water law, the local government has several possible, though imperfect, options. None of these alternatives will necessarily open up the river or stream to large-scale public use, particularly if the private riparian owners choose to challenge the public’s invasion of what has been their private do-

hand, the riparian owner must pay the state just compensation for any interference with the public’s easement of navigation. United States v. Meyer, 113 F.2d 387, 398 (7th Cir.), cert. denied, 311 U.S. 706 (1940). See People v. Economy Light & Power Co., 241 Ill. at 330, 89 N.E. at 771.

See McCartney v. Chicago & E.R.R., 112 Ill. 611, 634 (1884). 92. ILL. REV. STAT. ch. 19, § 52 (1977). The statutory definition of either “public waters” or “public body of water” is fairly broad and encompasses waterbodies not considered navigable or public under the Illinois common law definition. They include 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 waters into navigable lakes or rivers within, or upon the borders of the State of Illinois, together with all bayous, sloughs, backwaters, and submerged lands that are open to the main channel or body of water and directly accessible thereto.

Id. § 65.

Among the many functions of the department of transportation is the duty to investigate and hold hearings on citizen complaints of wrongful encroachments on public bodies of water or any other interference with any citizen’s right to use any public waterway. Id. §§ 55-57. The department is also directed to investigate every body of water in the state to determine to what extent private persons have encroached upon the public waterways. Id. § 60. If an unlawful occupation is found, the department must commence an action to either recover damages for the encroachment or regain use of the waterway for the public. Id. Furthermore, the department regulates potential encroachments by administering a permit system for structures built on public rivers and lakes and for deposits of earth or other fill material. Id. § 65.

It is questionable whether these statutory provisions enlarge the public easement in navigation beyond what it was at common law. If the use of public waters within the above statute was merely intended to codify the common law definition of “navigable waterbody,” then the statute has not expanded the state’s common law jurisdiction over waterways. In addition, it is unclear whether the statute empowers the department to go beyond its common law duty of guarding the public’s right to boat. Thus, it is not known whether the department is permitted to protect or improve waterways for recreational purposes.
main. But each of the approaches described allows a local government to make an urban waterway at least partially available for public recreational activities.

Acquisition of Riparian Land

In order to provide access to an urban waterway, a local government such as a municipality or park district could purchase or otherwise acquire parcels along the waterway. Ownership of land adjacent to the water would, of course, confer riparian and, in most cases, bed ownership rights on the local government. It could then allow the members of the public to use the waterway as its licensees.

Under this scheme, the rights of individuals, as licensees, to use the waterway for waterskiing, swimming, and fishing would be no greater than a local government's rights as riparian owner. In a navigable waterway the public could avail itself of its easement of navigation and could engage in boating and canoeing without restriction. On a nonnavigable waterbody, however, the public's right to boat would be limited by the extent of the local government's rights to use the waterway. According to the reasonable-use doctrine, a riparian owner's right to use the waterway will be measured by a standard of reasonableness. This standard, if applied to recreational uses, might be interpreted as permitting only the riparian owner, his or her family, and a few guests to engage in recreational activities on the water's surface. Therefore, unless the local government was financially able to acquire long stretches of riparian land, it is possible that the availability of the stream to public use would be more illusory than real.

Similarly, the difficulties posed by the doctrine governing bed ownership arise again. A narrow interpretation of the common law in this area would restrict the public's swimming, fishing, and, on nonnavigable streams, boating to only that portion of the surface lying above the bed owned by the local government. Thus, unless large portions of beds are obtained, the area in which the public may enjoy these activities would be severely limited. Purchase of extensive sections of the stream bed, however, may be

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93. Purchase and condemnation of shoreline land are examined more fully in Livingston, supra note 4 at 771-78.
94. See text accompanying notes 24-27 supra.
95. To minimize the costs of acquisition, selected parcels could be purchased at various points along the stream.
96. See text accompanying notes 45-50 supra.
97. A riparian owner seeking an injunction against a co-riparian proprietor's recreational use of a river would have the burden to prove that the defendant's use was unreasonable. Thus, unless there were some evidence that the public access to the river was producing overcrowding on the water, pollution, lowering of the water level, or some other deleterious effect on plaintiff's riparian rights, dissatisfied private landowners might be unable to obtain an injunction to restrain a city from allowing unrestricted public access to a river or stream. See Thompson v. Enz, 379 Mich. 667, 693-700, 154 N.W.2d 473, 474-77 (1967) (Brennan, J., dissenting).
98. See text accompanying note 62-64 supra.
more feasible than acquisition of riparian land. Presumably a private homeowner or commercial concern will be more willing to sell at a reasonable price its portion of the urban stream bed rather than the waterfront property. Nonetheless, acquisition of all or nearly all of the stream bed may be prohibitively expensive. 99

**Dedication and Prescriptive Rights**

In some cases local governments may find that the public has acquired prescriptive rights to use waterways for certain recreational activities or that some private owners have dedicated land adjacent to the waterway or the river bed to the public. 100 Despite being low cost methods of providing access to waterways, they do not, however, present attractive or practical means of acquiring additional access in urban areas where the public does not enjoy rights or access. A prescriptive easement is not established until the easement holder has used the path or waterway for twenty years. 101 Furthermore, although dedication and donation of water rights may be encouraged by municipalities and other local governmental bodies, it is uncertain whether significant contributions will result. Moreover, as was discussed with reference to purchase of riparian and submerged lands, the reasonable-use doctrine and a restrictive interpretation of bed ownership rights will limit public use. The riparian or bed owner cannot dedicate or donate more than what is owned. In short, dedication of water rights is of limited value in securing additional public access to waterways.

**Cooperation with State Agencies Under Statutory Authority**

A third approach to be taken in conjunction with the two outlined above is for the local government in charge of the urban stream project to seek the assistance of state agencies. Two departments in particular, that of the attorney general and the department of transportation, have statutory power that could aid a local government in increasing public access to an urban waterway.

The attorney general may bring suit to reassert the state's title in the submerged lands of certain waterbodies. 102 Although this authority is not much greater than the attorney general's common law power to protect the public trust in waterways and to prevent unlawful filling in of submerged land, 103 a local government may find the services of the attorney general's

99. The stream bed will be particularly expensive where it is commercially feasible to remove and sell sand and gravel from it for commercial sale.

100. For a detailed discussion of dedication and prescription easements, see Livingston, *supra* note 4, at 781-84.


102. *See* note 68 *supra*.

103. *See* text accompanying note 91 *supra*.
office useful if private bed owners are using the stream bed for purposes contrary to the terms of the original grant from the state. In addition, if a private owner has illegally filled in part of the stream or otherwise interfered with the public navigational easement, the attorney general may sue to restore title to the bed to the state. Bed ownership by the state will, of course, open the surface of the water to the public.

Similarly, the local government may bring a complaint before the department of transportation to remove any encroachments or deposits made without a permit in a public waterbody. In addition, the department may compel removal of other barriers that interfere with navigation or increase the hazards of flooding. The department also has general jurisdiction to protect the public's right in the "full and free enjoyment" of all public waterbodies in the state. The term "public bodies of water," as defined in the statute, includes waterways that would not be considered navigable at common law. A public waterbody is a lake or stream that can be navigated by commercial watercraft, one that could be made navigable by man-made improvements, or one that flows into a navigable waterbody. Although the first definition appears to reiterate the common law's emphasis on the commercial aspects of navigation, the second and third significantly expand the older concept. Under Illinois common law, a waterway that could be rendered navigable by artificial means was not considered navigable-in-fact. The statutory definition classifies such waterbodies as public. Moreover, the statute places under the department's jurisdiction waterways not considered navigable under most state and federal definitions: those that discharge their waters into a navigable waterway. The statute does not specify whether a direct connection is required or whether an indirect connection is sufficient. If the latter is enough, then conceivably all streams and rivers in Illinois would be considered public waterbodies because the waters in each eventually flow into one of the major navigable rivers.

104. See notes 65-68 and accompanying text supra.

105. The public has a right of navigation in all navigable waterways. Thus, ownership of the river bed by the state will enlarge the public's rights in two ways. First, the public will gain additional rights to hunt, fish, and swim over those state-owned segments of the beds of navigable waterbodies. Second, in nonnavigable waterways the public will acquire all the rights to use the bed and the overlying water that a private bed owner has including the right to swim, canoe, boat, hunt, and fish. See notes 62-64 and accompanying text supra.


107. Id. § 54.

108. Id. § 73.

109. See note 92 supra (definition of "public waters" is set forth).


111. See text accompanying note 21 supra.

112. Thus larger streams that are connected directly to the major Illinois rivers such as the Illinois, Ohio, Mississippi, and Wabash Rivers would be public waterways under this definition even though they have never been used by commercial vessels and are not capable of actual navigation.
Thus, the department's jurisdiction is potentially quite broad and could be asserted over small urban streams to ameliorate the flow of water and to prevent interference by private owners with public use of the waterway. The statute, however, is not phrased in terms of protecting certain types of uses by the public. Instead, several references throughout the Act imply that the department's authority is primarily directed towards guarding the commercial navigability of waterways. Other references, however, suggest that the department's purposes extend to preserving public waterbodies for recreational uses. In interpreting its powers under the statute, the department should recognize that the recreational value of waterbodies has become as important as their commercial value.

The statute's ambiguities leave a local government in limbo concerning the extent to which it will be able to unlock the recreational potential of waterways within its jurisdiction. If the waterway can be classified as navigable, it is possible to ensure that it will be open to boating, but to guarantee that the public will be able to use the water's surface and bed for other recreational activities is more problematical. A judicial or legislative reformulation of the Illinois law in this area is desirable to insure that waterways with unusual recreational value are available to the public. In addition, reformulation is needed both to redefine recreational water policy, without interfering extensively with private expectations, and to develop a policy that recognizes and accommodates the heavy demands made by competing water users, both public and private.

**Judicial or Legislative Modification of Common Law Doctrine**

Even when stretched to the limits of permissible interpretation, the common law doctrine and current statutory law still leave the extent of public recreational rights in Illinois waterways unclear. It seems certain that present law imposes outmoded and unnecessary restriction on such rights. It will become increasingly important for the courts, and preferably the legisla-

113. The department is charged with protecting "the rights of the citizens of the State of Illinois to fully and in a proper manner enjoy the use of any and all of the public waters of the State." ILL. REV. STAT. ch. 19, § 73 (1977). Because the statute does not define specifically the nature and scope of these "rights," presumably the public has only those rights afforded at common law, i.e., the right to use the waters for navigation.

114. E.g., id. § 58 (department to gather data on navigability of Illinois' public waterbodies); id. § 59 (department to collect data on deep waterways and to encourage navigation and "carrying trade" on those waterways); id. § 70 (department to prevent encroachments that inhibit carrying capacity of stream).

115. E.g., id. § 63 (department to devise methods for "beautifying" public bodies of water); id. § 66 (department to acquire lands along public waterbodies for the public to use for "pleasure, recreation, and sport"); id. § 69 (department to encourage fish propagation in public waters).

116. It is anticipated that in Illinois demand for water-based recreational activities will increase 107% between 1970 and 1985. During the same period the population will increase only 15.8%. ILLINOIS DEP'T OF CONSERVATION, ILLINOIS OUTDOOR RECREATION 62-65 (1974).
ture, to clarify and redefine public water rights in light of modern conditions. The demand for recreational land will continue to grow throughout this century. At the same time, it may be expected that energy shortages will persist. The public will therefore desire recreational outlets as close to home as possible. Rather than a few trips to a regional or state park each year, a family may make several visits to a local park. Thus, a clarification of the law relating to public recreational rights in waterbodies will allow local governments to plan for the increased demand for local, accessible recreational areas.

Redefinition of Navigability

The American common law concept of navigability was developed to distinguish between those waterbodies that were subject to certain public rights—and thus to special governmental regulation—and those that could be privately owned. In Illinois, navigability determines in which waterbodies the public has an easement of navigation. The navigable-in-fact test used in Illinois has resulted in classification of most Illinois rivers and streams as nonnavigable. Few waterways in Illinois can furnish much of a highway for commerce if one assumes that most commercial traffic is carried out by fairly large boats. Moreover, natural barriers may in many cases impede commercial navigation and hence prevent a river's classification as navigable.

This definition of navigability, while useful at a time when commercial carriage by water was common and vital to the economy, is archaic in contemporary society. Today, waterways are valued at least as much for their scenic beauty and recreational potential as they are for their commercial attributes. In some sense much of their remaining commercial value stems from their recreational use, including boat rental, river tours of scenic areas,

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117. Id. at 62-70.
120. See text accompanying note 80-92 supra.
121. Of nearly 500 rivers and streams in Illinois, 11 Encyclopedia Britannica 1080 (1970), only 30 rivers in Illinois are classified as "public" by the Illinois Department of Public Works and Buildings, Division of Waterways. Mann, supra note 19, at 284-85. Interestingly, in a recent federal district court case involving the jurisdiction of the United States Army Corps of Engineers over Illinois' navigable waterways, the court declared 33 Illinois rivers and streams as navigable waters of the United States within the meaning of the Rivers and Harbors Act and other federal statutes governing waterbodies. Scott v. Hoffman, No. P-Civ-76-0045, Attachment A (S.D. Ill. Feb. 20, 1979). See note 144 infra. Twenty of these rivers and streams also are classified as public by the Illinois Department of Public Works and Buildings, Division of Waterways.
riverside cafes, and entertainment events. A contemporary definition of navigability should take into account these factors.

A revised view of navigability that could be adopted initially either by the courts or the legislature would use the broader concept of "public" waterbodies rather than "navigable" ones. The shift in terminology would reflect the new emphasis on a variety of uses by the public beyond commercial navigation.\footnote{122} Further, the definition should no longer refer to those waterways that may be used as a highway for commerce but should instead include as public waterbodies those streams, rivers, and lakes that have a significant recreational potential.\footnote{123} As an alternative, public waterbodies could be defined as all the bodies of water that, for a significant portion of the year, have been used, are being used, or are capable of being used in their natural and ordinary condition for floating any boat, canoe, skiff, or craft with at least one person aboard.\footnote{124}

This definition has a basis in the common law standard of navigability but is enlarged to include streams and rivers that can carry small recreational...
The reference to streams that are capable of floating boats in their "natural and ordinary condition" excludes waterways that never have had a sufficient flow and volume of water to support watercrafts. It would include, however, waterways that have been rendered nonnavigable by man-made encroachments or urban development if at one time small boats could have navigated the waterways. By excluding rivers or streams that were never navigable in any sense, the definition comports with expectations of private owners that certain small creeks that have always been dry for much of the year are not open to the public. Similarly, the limitation that the stream be floatable for a "significant portion of the year" would classify as public only those waterways that have a steady flow of water, but not those that may be floatable occasionally during flood stages. Again, however, the standard refers to the ordinary and natural condition of the stream, and thus comprises streams that once had a sufficient flow of water during a significant portion of the year.

In order to prevent unnecessary interference with the rights of private riparian and bed owners, a proviso should be included in the statute that the river or stream be rendered navigable or floatable before the public may use it for recreational purposes. The public could, of course, use a currently dry or nearly dry stream that was once navigable for certain recreational activities such as driving dune buggies in the dry creek bed or wading in the shallow water. There is no particular reason why these activities need to be carried out in a dry or nearly dry stream. Other places exist where such activities may be accommodated. The feature of rivers, lakes, and streams that accounts for their uniqueness and that caused the public to be accorded special rights in them is the flow of water. Unless the public is willing to restore that feature to a now dry stream, it would seem that the bed and channel are no more deserving of special public use than any other privately owned land. Any legislative restructuring of the definition of public waterbodies must balance the desires and needs of the public for waterbased recreational areas against the legitimate expectations of private riparian owners. Where even a formerly navigable stream has been dry for many years,

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125. This definition is proposed with reference to delineating public recreational rights in waterways and thus it is structured around determining which waterways have significant recreational value. If the Illinois General Assembly undertook the drafting of a comprehensive water code, it should consider a broader or more generalized definition of public waters, such as the ones used in Minnesota and Indiana. See note 123 supra.

126. A potential difficulty with this definition is the necessity for using historical evidence to determine whether a stream was at any time in the past capable of navigation by small boats. Evidence of this type may be almost impossible to obtain in some cases. Hence in drafting such a definition, the General Assembly should consider whether a cut-off date should be chosen for evidence of navigability. Evidence dating from before that time would not be accepted by the department of transportation or other agency charged with designating public waterbodies.

127. Oklahoma City residents living near the dry South Canadian River bed sought an injunction to restrain dune buggy enthusiasts from racing their noisy vehicles in the river bed. The Sunday Oklahoman, June 26, 1977, § A, at 14, col. 2.
the value of that stream as a public recreational area is low compared with
the private landowners' strong expectations that the stream bed is within
their exclusively private domain.

A Revised View of Bed Ownership

A legislative or judicial redefinition of navigability in terms of recrea-
tional craft will represent a beginning towards moving Illinois water law into the
twentieth century. Enlarging the classification of public waterbodies, how-
ever, will do little to increase public recreational rights if the current law of
bed ownership remains in effect. In Illinois, private bed ownership presently
carries with it certain exclusive rights. Additionally, because most river
and stream beds are privately owned in this state, the public recreational
rights are either nonexistent or extremely uncertain.

One solution to the problem of bed ownership would be to declare that
the beds of all public waterways are now owned by the state. The state,
therefore, would be reasserting the title that it acquired in the beds of all
navigable waterways upon its admission to the Union. This declaration
would extend considerably beyond the present statutory reassertion of title
to certain submerged lands. It would also align Illinois law with that of
several other jurisdictions. The state then would hold title to these lands
in trust for the people and would be prevented from allowing private use of
ownership of them in contravention of the trust. With state ownership of
the beds of all public waterbodies private individuals would no longer have
the exclusive rights to hunt, fish, and swim on the water lying above these
beds. The water's surface would be open to all members of the public who
wish to engage in these recreational pursuits. The right to commercial use of
the beds also would be controlled by the state and could be licensed to
private individuals under certain conditions.

Although this proposal has the advantage of immediately securing to the
public extensive rights in navigable rivers and streams, it would clearly work

128. See text accompanying notes 62-64 supra.
129. See note 56 and accompanying text supra.
131. In most states the state holds the title to submerged lands under navigable or public
waters in trust for the people of that state. See 1 WATER AND WATER RIGHTS, supra note 10, at
197, and cases cited therein. A legislative declaration of state ownership of beds of navigable or
public waterways would harmonize Illinois law on bed ownership. Under current Illinois law
beds of navigable lakes are publicly owned whereas beds of navigable rivers and streams are
not. Wilkinson v. Watts, 309 Ill. 607, 141 N.E. 383 (1923); Wilton v. Van Hessen, 249 Ill. 182,
94 N.E. 134 (1911); Fuller v. Shedd, 161 Ill. 462, 44 N.E. 286 (1896).
132. The public trust doctrine is discussed at note 140 infra. For a complete discussion of the
doctrine, see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Inter-
133. For example, private licensees could be permitted to remove minerals from the stream
bed provided that they did not interfere unduly with the public's navigational and recreational
activities. They could be precluded from operating their equipment during certain hours or
seasons when recreational use is at its peak.
a hardship on private bed owners and almost certainly would constitute an unconstitutional "taking" of private property for public purpose without just compensation. 134 There could be no more direct governmental invasion of a private individual's land except perhaps physical occupation. 135

Another solution that is more fair and less intrusive to private bed owners is simply to expand public recreational rights in public waterbodies without reference to bed ownership. Even at common law the public had an easement of navigation in navigable waterbodies whether or not the state owned the water bed. 136 Applying the concept to modern social conditions, the legislature or the courts should specify that the public has a recreational easement in all public waterbodies even if the bed is privately owned. The recreational easement would include the right to boat, swim, and fish on public waterbodies. 137 The public's exercise of these rights would be subject to state or local regulations pertaining to these activities. 138

Expansion of public recreational rights in this way should cause minimal interference with private expectations regarding waterways currently classified as navigable. It is also consistent with the public rights described by the Illinois Supreme Court with reference to Lake Michigan, the state's prime recreational waterbody. In Scott v. Chicago Park District, 139 the Illinois Supreme Court held that the public's rights in the submerged lands of Lake Michigan are not limited to navigation but comprise fishing, swimming, bathing, and other water-related activities. 140 Although the state

136. See text accompanying notes 81-83 supra.
137. Other jurisdictions have long recognized that the public's easement in navigable waters includes the right to engage in recreational pursuits. E.g., Witke v. State Conservation Comm'n, 244 Iowa 261, 268, 56 N.W.2d 582, 587 (1953); Park Comm'n v. Diamond Ice Co., 130 Iowa 603, 608, 105 N.W. 203, 205 (1905) (public may boat, skate, and pursue other sports on navigable waters); Johnson v. Seifert, 257 Minn. 159, 165, 100 N.W.2d 689, 695 (1960); Lamprey v. Metcalf, 52 Minn. 181, 199-200, 53 N.W. 1139, 1143-44 (1893) (public has right to fish, boat, and engage in other recreational activities on public waterbodies); Muench v. Public Serv. Comm'n, 261 Wis. 492, 504-05, 53 N.W.2d 514 (1952); Baker v. Voss, 217 Wis. 415, 417, 259 N.W. 413, 414 (1935).
138. For example, states regulate the procurement of fishing or hunting licenses.
139. 66 Ill. 2d 65, 360 N.E.2d 773 (1976).
140. Id. at 78, 360 N.E.2d at 780. This case involved the validity of a legislative enactment purporting to grant almost 200 acres of land beneath Lake Michigan to the United States Steel Corporation for construction of plant facilities. The court held that the act was in violation of the public trust doctrine and therefore void. The court declared that the state holds title to the submerged lands of Lake Michigan in trust for the people, and any attempted abrogation of state ownership must be closely scrutinized by the courts. The state cannot cede these lands to private individuals or even to local governments if such a grant will impair the public interest in the waterbody. Reviewing the development of the public trust doctrine in Illinois, the court found that in only one case had the court upheld a grant of submerged lands beneath Lake Michigan to a private party. In that case, however, a clear public purpose was shown in that the
owns title to the bed of Lake Michigan, the same principle can be extended to all public waterbodies, even those beds of which are privately owned. In those waters that are currently defined as navigable the private bed owner’s property interests are already subject to the public navigational servitude. Addition of certain public recreational rights to that servitude should not interfere unduly with the bed owner’s interests nor diminish significantly the value of his or her property or of the property of adjacent riparian owners. Because the chief economic value of the bed derives from the possibility of removing sand and gravel or other minerals from it, it is debatable how much of the bed’s value may be traced to the bed owner’s exclusive right to hunt and fish over it. Similarly, the value of the adjacent riparian owner’s property should not decrease substantially because of additional public recreational rights in a navigable waterway. If the riparian land and the bed are owned by different individuals, the riparian owner technically does not have the right to go upon the bed. Neither should the value of the riparian land attributable merely to its proximity to the water be diminished as the recreational rights grow out of and are incidents of navigation. Noise, crowds, and refuse should not increase dramatically on rivers and streams where the public currently has the right to boat.

On waterways now classified as nonnavigable under the common law definition, the interference with private expectations caused by affording the public recreational rights will be somewhat greater than that on navigable waterbodies. Some of these “nonnavigable” waterways must be reclassified as public bodies of water under the proposed definition. At common law the public had no rights to use or go upon nonnavigable waterways. The supremacy of private interests in such waterways, however, has slowly eroded over the years, with many of these waterways now subject to the department of transportation’s jurisdiction and to the laws regarding construction or structures and deposit of fill material. In addition, they are subject to the extensive state and federal water pollution laws and regulations. Nevertheless, the reclassification of what were essentially private land was to be used for an extension of Lake Shore Drive. Maloney v. Kirk, 162 Ill. 138, 45 N.E. 830 (1896). In this case, however, the benefit to the public by the construction of the steel plant would be incidental to the private purpose. Scott v. Chicago Park Dist., 66 Ill. 2d at 81, 360 N.E.2d at 781. See also Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Bowes v. City of Chicago, 3 Ill. 2d 175, 120 N.E.2d 15 (1954). The courts could extend the public trust doctrine to all navigable waterways within the state. Although the state does not own the beds of navigable rivers and streams, it essentially owns the easement of navigation in trust for the people. By allowing private riparian owners to interfere with that easement, the state has in effect abrogated its trust responsibilities. The public should be able to sue to restore state control over the easement of navigation, which should be defined as including recreational as well as commercial activities.

141. Scott v. Chicago Park Dist., 66 Ill. 2d at 78, 360 N.E.2d at 7
142. See text accompanying notes 124-26 supra.
144. The Federal Water Pollution Control Act Amendments of 1972 subject all “navigable waters” to the requirements of the Act. 33 U.S.C. §§ 1251-1376 (1979). “Navigable waters” are
waterways as public waters raises some serious constitutional questions. Such a statutory redefinition of public rights could be challenged as an overly broad police power regulation or as an unconstitutional "taking" of property for public use without payment of just compensation.¹⁴⁵

The intrusion upon private interests in presently navigable rivers and streams can be minimized. One means of accomplishing this is by providing

defined as the "waters of the United States, including the territorial seas." Id. § 1362(7). By defining the term in that way, Congress intended to assert jurisdiction over the nation's waters to the limits permitted under the commerce clause. Natural Resources Defense Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

Recently, a federal district court, adopting an expansive interpretation of "navigable," greatly expanded the number of "navigable" waterbodies within Illinois over which the United States Army Corps of Engineers has jurisdiction under the Rivers and Harbors Act, 33 U.S. §§ 401-426n (1976). Scott v. Hoffman, No. P-Civ-76-0045 (S.D. Ill. Feb. 20, 1979). The court placed under the Corps' jurisdiction several waterbodies previously not considered "navigable" within the meaning of the statute. Unfortunately, the court did not explain why the 33 rivers and streams listed were determined to be navigable waters of the United States. The court did state that the specific river that was the subject of the suit, the Mackinaw River, was navigable water of the United States because it "[had] been used in historical times for trade and commerce." By implication, the court was employing the standard commercial navigability test, which is used in the Corps' own regulations: "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (1979). The court also issued a permanent injunction restraining the Corps of Engineers from engaging in any dredging, construction, or depositing of fill material on the navigable waterways listed in the opinion without first obtaining a permit from the Illinois Department of Transportation. Thus this agency's jurisdiction over public waterbodies may have been indirectly expanded by this decision.

¹⁴⁵. Two recent United States Supreme Court decisions cast considerable doubt on whether federal or state governments can permit public access to nonnavigable waterbodies without exercising the eminent domain power and paying just compensation to private riparian owners. Kaiser Aetna v. United States, 48 U.S.L.W. 4045 (December 4, 1979); Vaughn v. Vermilion Corp., 48 U.S.L.W. 4053 (December 4, 1979).

In Kaiser Aetna, the Court held that the federal navigational easement did not extend to a former inland pond that, through private alterations, had been opened to the Pacific Ocean. If the federal government wished to provide public access to the pond, it had to pay just compensation to the private riparian owners whose exclusive right of access would be impaired. 48 U.S.L.W. at 4049. The Court distinguished between Congress' broad regulatory power over the "navigable waters" of the United States and the extent of the federal navigational servitude, which allows the public to engage in navigation on navigable waters. Although a waterbody such as the inland pond in this case may be considered "navigable" for the purposes of Congressional regulation, it is not necessarily subject to the federal navigational servitude. The Court must balance the expectancies of the private property owners who improved the pond and made it accessible from the ocean against the public interest in navigation. Here the balance was found to be in favor of the private property interests; the government could not actually physically invade the pond without paying for the rights so taken. Id. at 4049-50.

If applied in a state law context, these decisions could restrict the power of the state legislatures to provide public access to formerly private waterways by simply declaring them to be public waterbodies. The resulting physical occupation of these waterways by the public would constitute a "taking" of private property for public use without just compensation. For a discussion of "taking" in the context of open space preservation zoning, see Livingston, supra note 4, at 763-66. See also F. Bosselman, D. Collier, & J. Banta, The Taking Issue (1973).
that only those waterways that have a significant potential for public recreational use can be classified as public.\textsuperscript{146} In addition, the legislature or the courts could borrow the reasonable-use doctrine from common law and apply it in modified form to public recreational activities on public waterbodies. To illustrate, a statute could specify that the public is permitted a reasonable use of any public waterway for recreational pursuits. What constitutes a reasonable use will vary according to the characteristics of the waterbody, such characteristics including the depth of water, regularity of flow, and extent of natural impediments. To define specifically the scope of the reasonable-use doctrine, the legislature could direct the department of transportation to develop categories for river and stream types and to classify each waterway within Illinois according to its appropriateness for recreational uses.\textsuperscript{147} For example, on certain rivers, no motorized craft would be permitted, while on others only swimming and canoeing would be allowed. Hours of use could be set for each category and each kind of recreational activity.\textsuperscript{148} Areas of a given lake or river could be isolated for particular activities such as fishing. Notice and a hearing on the classification of waterbodies could be afforded, and judicial review could be made available to aggrieved riparian owners.\textsuperscript{149} In this way conflicts between private owners and public recreational users would be minimized, and a uniform, equitable scheme for regulating public use of Illinois’ water resources would be developed.

CONCLUSION

Illinois water law in general and the law regarding public recreational rights in waterbodies in particular need to be revamped and clarified. A comprehensive water code dealing with all aspects of water regulation would contribute much towards modernizing the musty recesses of the Illinois common law and streamlining the rough edges of the current statutory law.

It is recognized that Illinois’ rivers, streams, and lakes are a unique natural resource with substantial recreational value and that Illinois law does not delineate the contours of permissible public use. Greater public use than

\textsuperscript{146} See text accompanying notes 122-26 supra.
\textsuperscript{147} A survey of Wisconsin lake property owners revealed that most did not oppose public access to “their” lake but did fear unrestricted use of the lake by the public. They were particularly concerned about potential conflicts between different types of uses, e.g., swimming versus motor boating. KLESSIC & YANGCHEN, supra note 48, at 4-8.
\textsuperscript{148} Enforcement of time restrictions might be difficult and expensive whereas space restrictions could be enforced more readily by the placing of barriers between different areas of the river or lake, such as roping off a swimming area in a shallow portion of the waterbody. To enforce time limitations, the department of transportation probably would have to rely on cooperation by local officials.
\textsuperscript{149} Notice and a hearing on the initial classification of a waterbody as “public” could also be provided, as is done in other jurisdictions. E.g., MINN. STAT. ANN. § 105.391 (West 1977) (public hearing held on classification if commissioner of natural resources and county board in which waterbody is located cannot agree on designation).
is now provided for should be allowed. At the same time it is recognized
that private riparian and bed owners have legitimate expectations that they
may exclude public users from nonnavigable waterways. Accommodating
these conflicting interests is a delicate task and one best suited to the hands
of the legislature, which can deal comprehensively with the entire area.
Some suggestions have been made in this article as to how these conflicting
interests can be most equitably reconciled.

A state water code will vest authority, of course, in a state agency such as
the department of transportation to administer the regulatory system. This
article dealt with local governmental initiation and development of an urban
stream project. Although the issue of state and local cooperation in supervis-
ing public waterbodies was not addressed extensively, enactment of a water
code and promulgation of recreational regulations alone should do much to
ease a local government’s difficulties in freeing an urban waterway for public
recreational use. In addition, the state can assist a local government in pur-
suing its urban stream project by providing funds for planning, land acquisi-
tion, and construction of facilities. The extent of this cooperation will
vary with the local government’s enthusiasm and commitment and the state’s
sympathy towards the local body’s approach to developing its urban water-
way. In some cases the state and local views of the most appropriate man-
agement of the waterbody will clash, and the parties will be left to reconcile
their differences in light of local needs and the state agency’s overall goals
for the public water recreational system.

150 The department of transportation is not currently authorized to provide funds to local
governments for beautification and development of urban waterways. However, the General
Assembly can provide specific authorization and the necessary funds for the department to assist
local governments with such projects. Letter from Langhorne Bond, Secretary, Illinois Depart-
ment of Transportation, to author (Aug. 4, 1976). In one case the department’s division of water
resources was able to obtain authorization for a grant of $30,000 to be used for a local urban
stream project. The funds, matched by local contributions of $30,000, were used to develop a
master plan for the beautification of Boneyard Creek in Champaign-Urbana, Illinois. Scott Park
"Paves" the Way, Champaign-Urbana News Gazette, April 4, 1976, at 1, col. 1.