

## NATURAL RESOURCES COMMISSION

## Information Bulletin #3

## (Third Amendment)

**Subject:** Roster of Indiana Waterways Declared Navigable or Nonnavigable

**HISTORY:** The original bulletin was published at 15 IR 2385 (July 1, 1992). The Natural Resources Commission in March 1997 approved a first revision (published at 20 IR 2920) that superseded the original bulletin. The second revision made technical amendments correcting code citations and an Internet address. (20061011-IR-312060440NRA). This third amendment adds sections of the Tippecanoe River as navigable in White County, Starke County, and Pulaski County, and corrects an Internet address.

A searchable version of this bulletin is available through the Natural Resources Commission Internet Website at:

<http://www.in.gov/nrc/2443.htm>

## I. NAVIGABILITY

Property rights relative to Indiana waterways often are determined by whether the waterway is "navigable." Both common law and statutory law make distinctions founded upon whether a river, stream, embayment, or lake is navigable.

A landmark decision in Indiana with respect to determining and applying navigability is *State v. Kivett*, 228 Ind. 629, 95 N.E.2d 148 (1950). The Indiana Supreme Court stated that the test for determining navigability is whether a waterway:

*was available and susceptible for navigation according to the general rules of river transportation at the time [1816] Indiana was admitted to the Union. It does not depend on whether it is now navigable.... The true test seems to be the capacity of the stream, rather than the manner or extent of use. And the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times render the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use.*

A modified standard for determining navigability applies to a body of water that is artificial. The test for a man-made reservoir, or a similar waterway that did not exist in 1816, is whether it is navigable in fact. *Reed v. United States*, 604 F. Supp. 1253 (1984).

The court observed in *Kivett* that "whether the waters within the State under which the lands lie are navigable or non-navigable, is a federal" question and is "determined according to the law and usage recognized and applied in the federal courts, even though" the waterway may not be "capable of use for navigation in interstate or foreign commerce." Federal decisions applied to particular issues of navigability are useful precedents, regardless of whether the decisions originated in Indiana or another state.

The primary issue in *Kivett* was ownership of the riverbed from which the defendant was removing materials. If the waterway was navigable on the date of statehood, title to the bed of the river passed to the state of Indiana and could not ordinarily be conveyed incident to the adjoining riparian property. Also, once a waterway is found to be navigable it remains so, even if the waterway is no longer used for purposes of commercial navigation. *United States v. United States Steel Corporation*, 482 F.2d 439 (7th Cir. 1973).

In the absence of a contrary state boundary, the appropriate line of demarcation for a navigable waterway is the ordinary high watermark. The Indiana Water Resource, Governor's Water Resource Study Commission, State of Indiana (Indiana Department of Natural Resources, 1980), page 107. The Natural Resources Commission has also adopted this standard by rule. 312 IAC 6-1. If not navigable, title to the bed of the river passes to the adjacent property owner or owners.

Ownership is not the only issue determined by whether a waterway is navigable. Public recreational and commercial usage of the surface of a river or stream often depends upon whether the water is navigable. Other legal foundations may, however, authorize public usage. A prescriptive easement may exist. A waterway may be a "public freshwater lake" subject to IC 14-26-2 and 312 IAC 11-1 through 312 IAC 11-5. Pursuant to IC 14-29-8, the Natural Resources Commission may, by rule, declare a waterway to be a "recreational stream."

State legislation also establishes regulatory functions that rest upon a determination of navigability. For example, a permit is typically required from the Indiana Department of Natural Resources before a person can

- place, fill, or erect a permanent structure in;
- remove water from; or
- remove material from;

a navigable waterway. IC 14-29-1-8 and 312 IAC 6.

Other notable regulatory standards applicable to navigable waters include IC 14-18-6 (Lake Michigan fills), IC 14-29-4-5 (dedication of channels into navigable waters), IC 14-19-1-1 (general charge of Indiana navigable waters placed in DNR), and IC 14-29-3 (removal of sand and gravel from the beds of navigable waters).

## II. ESTABLISHING A ROSTER

Despite the legal significance of determining whether a particular waterway is or is not navigable, a

comprehensive roster of Indiana waters declared navigable has not existed. In part, this absence can be explained by the essentially judicial character of the doctrine of navigability. Since a determination of navigability is ultimately based upon a judicial finding which is both waterway and site specific, any roster is subject to criticism because it is incomplete.

In addition, legislative declarations have identified specific waters as being navigable (or public highways). Although most legislative declarations occurred before 1850, more recently governmental agencies have also determined questions of navigability. Notable examples include the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, and, at the state level, the Indiana Natural Resources Commission. A determination by any of these legislative or administrative entities is subject to judicial scrutiny and modification.

Even within these limitations, a roster of waters declared navigable can be productive for efforts to regulate and manage the state's waters. With an understanding that any listing of waterways declared navigable is necessarily imperfect and subject to adjustments as new decisions are made, the roster which follows is intended to aid in the regulatory process and in a general public awareness of waterway usage.

A few explanatory remarks are appropriate to the structure of the roster. A waterway is presumed to be navigable at all points downstream from a determination of navigability. A judicial determination as to whether a particular water is or is not navigable generally supersedes a legislative or administrative decision. Unless otherwise refuted, a legislative determination of navigability is presumed to demonstrate historical usage of a waterway for navigation, and a later statutory repeal does not negate the navigability of the waterway.

A declaration of navigability or nonnavigability must be based upon a primary source. These primary sources are a declaration by a court, the legislature, or an agency with jurisdiction over navigable waters. A waterway declared by a primary source to be nonnavigable is identified in brackets. If a waterway is unlisted, no declaration of navigability or nonnavigability has been located from a primary source.

Secondary sources may be applied to determine the geographic limitations of navigability for a particular waterway. Secondary sources include courthouse records, published county histories, periodicals, newspaper articles, interviews, and similar evidence. For example, in the early 19th century, the Indiana General Assembly sometimes identified a stream as being a public highway downstream from a particular mill. Secondary sources are typically applied to determine where the mill is believed to have been located.

Reported state or federal court decisions are applied in seeking to resolve legal issues of navigability which bear upon particular waters (example: where a navigable river is channelized, the new channel becomes navigable and the former channel loses its navigable character when sedimentation causes the bed to surface). Although this roster does not include citations to the authorities applied in determining navigability, these authorities can be obtained through the Indiana Natural Resources Commission.

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### III. ROSTER OF INDIANA WATERS DECLARED NAVIGABLE OR NONNAVIGABLE (LISTED BY WATERWAY NAME)

#### A

**Anderson River (including Middle Fork):** Navigable in Spencer County from its junction with the Ohio River for 28.4 river miles to the Perry-Spencer county line. The Middle Fork is navigable from its junction with the Anderson River for 3.3 river miles.

**Armuth Ditch:** See Black Creek.

**Arnold Creek:** Navigable in Ohio County from its junction with the Ohio River for 4.4 river miles.

#### B

**Baker Creek:** Navigable in Spencer County from its junction with Little Pigeon Creek 1.8 river miles.

**Bald Knob Creek:** Navigable in Perry County from its junction with Oil Creek for 0.5 river miles.

**Banbango Creek:** See Baugo Creek.

**Baugo Creek:** Navigable from its junction with the St. Joseph River in South Bend for 15.2 river miles to the main forks (near Wakarusa).

**Bayou Creek:** Navigable in Vanderburgh County from its junction with the Ohio River for 1.5 river miles.

**Beanblossom Creek:** Navigable in Monroe County from its junction with the West Fork of the White River for 17.7 river miles to Griffy Creek.

**Bear Creek:** Navigable in Perry County from its junction with the Ohio River for 1.6 river miles.

**Big Blue River:** Navigable from its junction with Sugar Creek (to form the Driftwood River) for 55.46 river miles to the Henry-Rush county line.

**Big Blue River:** See, also, Blue River.

**S**

**St. Joseph County**

- (1) Baugo Creek (formerly Banbango Creek): Navigable from its junction with the St. Joseph River throughout the county.
- (2) Kankakee River: Navigable throughout the county.
- (3) St. Joseph River: Navigable throughout the county.

**Scott County**

- (1) Cammie Thomas Ditch: Navigable as a channelization of the Muscatatuck River.
- (2) Muscatatuck River: Navigable throughout the county.
- (3) South Fork of Muscatatuck River: Navigable from its junction with the Muscatatuck River upstream to its junction with Graham Creek at river mile 28.1.

**Shelby County**

- (1) Big Blue River: Navigable throughout the county.
- (2) Conns Creek: Navigable from its junction with the Flatrock River throughout the county (but with private ownership of the creek bed).
- (3) Flatrock River: Navigable throughout the county.
- (4) Little Blue River: Navigable from its junction with the Big Blue River (Shelbyville) throughout the county.
- (5) Sugar Creek: Navigable to Hough Cemetery (near Boggsstown).

**Spencer County**

- (1) Anderson River: Navigable from its junction with the Ohio River throughout the county.
- (2) Baker Creek: Navigable from its junction with Little Pigeon Creek for 1.8 river miles.
- (3) Caney Creek: Navigable from its junction with the Ohio River for 2.8 river miles.
- (4) Clear Creek: Navigable from its junction with Little Pigeon Creek for 2.4 river miles.
- (5) Crooked Creek: Navigable from its junction with the Ohio River for 7.7 river miles.
- (6) Garrett Creek: Navigable from its junction with the Ohio River for 2.2 river miles.
- (7) Honey Creek: Navigable from its junction with the Ohio River for 1.8 river miles.
- (8) Jackson Creek: Navigable from its junction with the Ohio River for 1.8 river miles.
- (9) Lake Drain: Navigable from its junction with the Ohio River for 1.6 river miles.
- (10) Little Pigeon Creek: Navigable from its junction with the Ohio River for 15.8 river miles.
- (11) Little Sandy Creek: Navigable from its junction with the Ohio River for 2.0 river miles.
- (12) Ohio River: Navigable throughout the county.
- (13) Sandy Creek: Navigable from its junction with the Ohio River for 2.6 river miles.

**Starke County**

- (1) Kankakee River: Navigable throughout the county.
- (2) Tippecanoe River: Navigable throughout the county.
- (3) Yellow River: Navigable from its junction with the Kankakee River throughout the county.

**Steuben County**

No waterway has been declared navigable or nonnavigable.

**Sullivan County**

- (1) Busseron Creek: Navigable to near Caledonia.
- (2) Kelly Bayou: Navigable from its downstream junction with an oxbow of the Wabash River to its upstream junction of the Wabash River.
- (3) Turman Creek: Navigable from its junction on the Wabash River for 7.9 river miles.
- (4) Wabash River: Navigable throughout the county.

**Switzerland County**

- (1) Bryant Creek: Navigable from its junction with the Ohio River for 2.6 river miles.
- (2) Goose Creek: Navigable from its junction with the Ohio River 1.5 river miles.
- (3) Grants Creek: Navigable from its junction with the Ohio River for 2.5 river miles.
- (4) Indian Creek: Navigable from its junction with the Ohio River for 4.1 river miles.
- (5) Log Lick Creek: Navigable from its junction with the Ohio River for 2.3 river miles.
- (6) Ohio River: Navigable throughout the county.
- (7) Plum Creek: Navigable from its junction with the Ohio River for 2.9 river miles.
- (8) Sand Creek: Navigable from its junction with the Ohio River for 0.9 river miles.
- (9) Turtle Creek: Navigable from its junction with the Ohio River for 1.3 river miles.

**T**

**Tippecanoe County**

- (1) Tippecanoe River: Navigable from its junction with the Wabash River.
- (2) Wabash River: Navigable throughout the county.

**Tipton County**

No waterway has been declared navigable or nonnavigable.

**U**

**Union County**

- (1) East Fork of Whitewater River: Navigable throughout the county.

**V**

**Vanderburgh County**

- (1) Bayou Creek: Navigable from its junction with the Ohio River for 1.5 river miles.
- (2) Locust Creek: Navigable from its junction with Pigeon Creek for 1.5 river miles.
- (3) Ohio River: Navigable throughout the county.
- (4) Pigeon Creek: Navigable from its junction with the Ohio River for 5.9 river miles.

**Vermillion County**

- (1) Big Vermillion River: Navigable for 10.8 miles from its junction with the Wabash River throughout the county (and for a total of 22.6 river miles to Carmargo, Illinois).
- (2) Wabash River: Navigable throughout the county.

**Vigo County**

- (1) Wabash River: Navigable throughout the county.

**W**

**Wabash County**

- (1) Mississinewa River: Navigable throughout the county.
- (2) Wabash River: Navigable throughout the county.

**Warren County**

- (1) Wabash River: Navigable throughout the county.

**Warrick County**

- (1) Baker Creek: Navigable from its junction with Little Pigeon Creek for 1.8 river miles.
- (2) Big Pigeon Creek: See Pigeon Creek.
- (3) Clear Creek: Navigable from its junction with Little Pigeon Creek for 2.4 river miles.
- (4) Cypress Creek (including Cypress Creek Diversion Channel): Navigable from its junction with the Ohio River for 6.6 river miles. (The original bed of Cypress Creek is also navigable west of Cypress Creek Diversion Channel, except where the creek bed has emerged and is no longer inundated.)
- (5) Little Pigeon Creek: Navigable from its junction on the Ohio River for 15.8 river miles.
- (6) Ohio River: Navigable throughout the county.

**Washington County**

- (1) Big Blue River: Navigable to the town of Fredricksburgh at river mile 57.2.
- (2) Cammie Thomas Ditch: Navigable as a channelization of the Muscatatuck River.
- (3) East Fork of White River: Navigable throughout the county.
- (4) Elk Creek: Navigable from its junction with the Cammie Thomas Ditch to river mile 3.0.
- (5) Muscatatuck River: Navigable from its junction with the East Fork of the White River throughout the county.
- (6) Twin Creek: Navigable from the East Fork of White River to river mile 7.98.

**Wayne County**

No waterway has been declared navigable or nonnavigable.

**Wells County**

- (1) Wabash River: Navigable throughout the county (with navigability terminating at the Adams County line).

**White County**

- (1) Tippecanoe River: Navigable throughout the county.

**Whitley County**

No waterway has been declared navigable or nonnavigable.

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