



VANDERBURGH COUNTY ENGINEERING DEPARTMENT

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To: Alan Kissinger
From: John Stoll
Subject: Pigeon Creek
Date: July 17, 1995

At the last Pigeon Creek Greenway meeting, Shirley James asked me if I could get a legal interpretation of what the declaration of Pigeon Creek as a navigable waterway actually means. I got the attached copies of the Indiana statutes on this, and it seems fairly vague to me. It seems that the only thing the County could do would be to authorize the use of funds to remove obstructions, and it does not say what departments would be responsible for that work if the Commissioners authorized the use of County funds.

Since Shirley requested this information, I sent her copies of everything that I have attached to this memo. As a result, she said that she would like to request the use of County money to remove obstructions in the creek. She also asked if you had reviewed this information, and I told her that I would forward it to you. Please review this and let me know if, in your opinion, there are any other issues other than removal of obstructions that the County could be responsible for. I told Shirley that County money is very limited, so she should not count on getting any money to do anything to clean up the Creek. However, I think she will still request some funds from the Commissioners.

If you have any questions concerning this, please contact me.

order such person, firm, or corporation to cease the use of such potable ground water. [Acts 1957, ch. 309, § 2; P.L.34-1987, § 33.]

13-2-3-3. Penalty for violations of chapter. — A person who violates this chapter commits a Class C infraction. Each day of violation constitutes a separate offense. [Acts 1957, ch. 309, § 3; 1978, P.L. 2, § 1314.]

Cross References. Infraction and ordinance violations enforcement proceedings, IC 34-4-32.

CHAPTER 4

NAVIGABLE WATERWAYS

SECTION.	SECTION.
13-2-4-1. Stream declared navigable — Petition.	13-2-4-5. Piers, wharves, and docks.
13-2-4-2. Examination of stream.	13-2-4-6. Mills not affected.
13-2-4-3. [Repealed.]	13-2-4-7. Fund to remove obstructions.
13-2-4-4. Penalty for obstructing.	13-2-4-8. Gates at river banks.
	13-2-4-9. Permit required by department.

13-2-4-1. Stream declared navigable — Petition. — The boards of commissioners in the several counties in this state are authorized to declare any stream or watercourse in their respective counties navigable, on the petition of twenty-four [24] freeholders of the county, residing in the vicinity of the stream which it is intended to be declared navigable. [Acts 1905, ch. 167, § 24, p. 521.]

Cross References. Jurisdiction of municipality over watercourses, IC 36-1-3-9.

Indiana Law Journal, Public Rights in Indiana Waters, 37 Ind. L.J. 467.

Ree Gestae. Navigable Waters in Indiana: Searching for Solutions to Problems of Identification and Administration, 32 *Ree Gestae* 272 (1988).

Opinions of Attorney General. Riparian rights of land owners along streams must be determined in each particular case and depends upon whether the stream is navigable or nonnavigable in fact and court opinions are confusing as to what date should be used to determine navigability. 1933, p. 538.

NOTES TO DECISIONS

ANALYSIS

In general.
Determination of navigability.
Navigability.
Navigable streams.
Nonnavigable streams.

In General.

All navigable rivers, creeks and waters within the Indiana territory, were deemed to be and remain public highways by Act of March 6, 1804, section 6, Vol. 2, U.S. Statute at Large, p. 279. *Depew v. Board of Trustees*, 5 Ind. 8 (1854); *Neaderhouser v. State*, 28 Ind. 257 (1867).

Wherever, in the course of a stream, it ceased to be a public highway for the com-

merce between this and other states, at that point its national character terminated, and above that it was within the exclusive jurisdiction of the state. *Neaderhouser v. State*, 28 Ind. 257 (1867).

Public policy dictated the ownership of the beds of nonnavigable, freshwater streams by riparian proprietors. *Ross v. Faust*, 54 Ind. 471, 23 Am. R. 655 (1876).

Determination of Navigability.

Nature is competent to make a river navigable without the help of the legislature and the question of navigableness was one of the facts put in issue by the pleadings, and its existence was correctly left to the jury upon the evidence before them. *Martin v. Bliss*, 5 Blackf. 35, 32 Am. Dec. 62 (1838).

The limited use made of a river for navigation and its use for other purposes did not change the ultimate fact that it was a navigable stream and as such a public highway. *Depew v. Board of Trustees*, 6 Ind. 8 (1854); *Board of County Comm'rs v. Pidge*, 5 Ind. 13 (1854).

A stream could not be said to be navigable in the legal sense of the term, unless it was of such a character as to be useful to the public as a channel of travel or commerce. *Neaderhouser v. State*, 28 Ind. 257 (1867).

Streams, where they were only navigable for certain kinds of inferior craft, or for certain distances within the State, and where they were not visited by vessels of commerce coming from and going to the navigable waters of other States, by continuous voyages, were subject only to the jurisdiction of the State, and the legislature, in its own discretion could authorize their obstruction, at pleasure when deemed proper for the public good. *Neaderhouser v. State*, 28 Ind. 257 (1867).

It is navigability in fact, which constitutes navigability in law. *Ross v. Faust*, 54 Ind. 471, 23 Am. R. 655 (1876).

Navigability.

The limited use made of a river for navigation and its general use for other purposes did

not change the ultimate fact that it was a navigable stream and as such a public highway. *Bissell Chilled Plow Works v. South Bend Mfg. Co.*, 64 Ind. App. 1, 111 N.E. 932 (1916).

Navigable Streams.

The Wabash River is a navigable stream, the bed of which has never been surveyed or sold. *Dawson v. James*, 64 Ind. 162 (1878).

The Wabash River is a navigable river and hence a public highway. *State v. Wabash Paper Co.*, 21 Ind. App. 167, 48 N.E. 653 (1897), rehearing overruled, 21 Ind. App. 172, 51 N.E. 949 (1898).

Nonnavigable Streams.

The court knows judicially, as matter of fact, that White River, in Marion County, Indiana, is neither a navigated nor a navigable river and it follows, of course, that by the express enactment of Congress, the title of its riparian proprietors extends to the thread of the stream notwithstanding the bed of the stream was not surveyed by the United States surveyor, nor, in terms, sold to purchasers of the bordering lands. *Ross v. Faust*, 54 Ind. 471, 23 Am. R. 655 (1876).

White River in Marion County is not a navigable stream. *Indianapolis Water Co. v. Kingan & Co.*, 165 Ind. 476, 58 N.E. 715 (1900).

Collateral References. 78 Am. Jur. 2d, Waters, §§ 59-116.

Right of public in shore of inland navigable lake between high and low water marks. 40 A.L.R.3d 776.

Way by necessity where property is accessible by navigable water. 9 A.L.R.3d 600.

13-2-4-2. Examination of stream. — On the filing of the petition provided for in section 1 [IC 13-2-4-1] of this chapter, any such board shall cause an examination of the stream or watercourse intended to be declared navigable to be made by some suitable person, who shall ascertain and report to the board the length of the same, and how much thereof is capable of being declared navigable, which report such board shall confirm if satisfied that the stream, if navigable, would be of public utility; and thereupon such board shall declare such stream navigable and cause the report to be recorded on the records of the board, as public highways are recorded. [Acts 1905, ch. 167, § 25, p. 521; P.L.34-1987, § 34.]

13-2-4-3. [Repealed.]

Compiler's Notes. This section, concerning the removal of obstructions in streams

and watercourses, was repealed by P.L.1-1990, § 205, effective March 20, 1990.

13-2-4-4. Penalty for obstructing. — Any person obstructing any stream or watercourse declared navigable shall be liable to the same pains and penalties as persons guilty of obstructing public highways; and the general laws governing public highways, and the laying out and working thereof in all other respects, shall, so far as applicable, govern in the defining and working of navigable watercourses. [Acts 1905, ch. 167, § 27, p. 521.]

NOTES TO DECISIONS

In General. obstruction of navigable streams a crime. Cox v. State, 3 Blackf. 193 (1833).
The legislature has power to make the

Collateral References. Liability of person debris or waste, for damages caused by obstructing stream, ravine, or similar area by flooding or the like. 29 A.L.R.2d 447.

13-2-4-5. Piers, wharves, and docks. — Any riparian owner of lands within this state bordering upon a navigable stream may build and maintain within his premises so bordering on such stream, and upon the submerged lands beneath the water thereof, piers, wharves, docks or harbors in aid of navigation and commerce, and may use, occupy and enjoy the same as appurtenant to his said lands: Provided, That such piers, docks and wharves shall not extend into such stream further than is necessary to accommodate shipping and navigation, and in no case so as to obstruct the same. [Acts 1905, ch. 167, § 28, p. 521.]

13-2-4-6. Mills not affected. — The declaration of watercourses as navigable by county boards shall not affect any mill, dam, aqueduct, viaduct, bridge or machinery on any such stream, except in cases where the same have been abandoned for a period of twelve [12] months. [Acts 1905, ch. 167, § 29, p. 521.]

13-2-4-7. Fund to remove obstructions. — The boards of commissioners of the several counties shall have power to use such sums as may be appropriated from the county treasury, and as they may deem necessary, to remove obstructions from streams that have been heretofore or may be hereafter declared navigable according to law. [Acts 1905, ch. 167, § 30, p. 521.]

13-2-4-8. Gates at river banks. — Persons living on or owning property along any watercourse that is navigable for boats of a large size, are hereby authorized to hang gates at or near the top of the bank, across any road leading down the bank and terminating at such watercourse, save in the limits of towns and cities. [Acts 1905, ch. 167, § 34, p. 521.]

13-2-4-9. Permit required by department. — (a) A person, other than a public or municipal water utility, may not:

- (1) Place, fill, or erect a permanent structure in;
- (2) Remove water from; or
- (3) Remove material from;

a navigable waterway without a permit from the department.

(b) An application for a permit under this section must be made in a manner prescribed by rule.

(c) The department shall issue a permit if its issuance will not:

- (1) Unreasonably impair the navigability of the waterway;
- (2) Cause significant harm to the environment; or
- (3) Pose an unreasonable hazard to life or property.

(d) A separate permit is not required under this section for an activity permitted under IC 13-2-22, IC 13-4.1, IC 13-8, IC 14-3-1-14.5, or IC 14-3-3.4. However, a permit issued under any of those statutes must also apply the requirements of this section with respect to an activity within a navigable waterway.

(e) A separate permit is not required under this section for an activity for which a permit has been issued under 16 U.S.C. 1451 (Coastal Zone Management Act), 33 U.S.C. 1344 (Clean Water Act), or 40 U.S.C. 6930 (Comprehensive Recovery Compensation and Liability Act).

(f) The department shall adopt rules under IC 4-22-2 to implement this section.

(g) A person who violates this section commits a Class B infraction. [P.L.75-1989, § 7.]

Cross References. Infraction and ordinance violation enforcement proceedings, IC 34-4-32.

CHAPTER 5

NAVIGABLE STREAMS—KANKAKEE RIVER

SECTION.

13-2-5-1. Kankakee River declared navigable stream.

13-2-5-1. Kankakee River declared navigable stream. — The portion of the Kankakee River that flows through the state of Indiana from the Indiana-Michigan border to the Indiana-Illinois border is hereby declared to be a navigable stream for the purpose of exercise of the police power of the sovereign state of Indiana. [Acts 1961, ch. 241, § 1.]

Cross References. Kankakee River state park and forest, IC 14-6-10-1, 14-6-10-2.

Section

13-2-2 Conservation of potable ground water; mixing of potable and nonpotable waters; use of prolific aquifer; water flood projects

13-2-3 Violations

13-2-3-1 Flowing water wells; reduction of flow

Sec. 1. The department of natural resources hereby authorized to require owners of flowing water wells to reduce the flow from such wells as may deem advisable to prevent the loss or waste of potable water which is not being put to a beneficial use. (Formerly: Acts 1957, c.309, s.1.) As amended by P.L.34-1987, SEC.32.

13-2-3-2 Conservation of potable ground water; mixing of potable and nonpotable waters; use of prolific aquifer; water flood projects

Sec. 2. A permit, to be issued free of charge, must be obtained from the department of natural resources to inject, pump, or otherwise introduce potable ground water into any underground formations which contain nonpotable water. Application for said permit shall be made on forms prescribed by the department of natural resources, and the permit shall be issued upon receipt of application, unless the department determines from the application that an investigation is necessary. The department of natural resources shall have the right, after an investigation has been conducted and a hearing has been held, to deny permission to any applicant to inject, pump, or otherwise introduce potable ground water into any underground formations which contain nonpotable water when such practice would constitute a waste of potable ground water or threaten to impair or exhaust the supply of the area and when available nonpotable waters could be used in lieu of potable waters. The use of potable water obtained from a prolific aquifer adjacent to a permanent flowing stream which is rapidly recharged is hereby excluded, provided that the operator shall notify the department of natural resources, on a form prescribed by said department, of any use of said prolific aquifer and include thereon a fair approximation of the volume of potable waters to be used. Any person, firm, or corporation operating a water flood

project using potable ground water on March 11, 1957, shall have the right to continue such flood and to use such additional potable water as may be necessary, provided, however, that should an emergency arise affecting the water supply for household or farm use, in which event the department may, after notice and hearing, order such person, firm, or corporation to cease the use of such potable ground water. (Formerly: Acts 1957, c.309, s.2.) As amended by P.L.34-1987, SEC.33.

13-2-3-3 Violations

Sec. 3. A person who violates this chapter commits a Class C infraction. Each day of violation constitutes a separate offense. (Formerly: Acts 1957, c.309, s.3.) As amended by Acts 1978, P.L.2, SEC.1314.

Chapter 4. Navigable Waterways

Section

13-2-4-1 Authority to declare navigability; petition
13-2-4-2 Examination of stream or watercourse; declaration of navigability
13-2-4-3 Repealed
13-2-4-4 Obstructing navigable stream or watercourse; penalties
13-2-4-5 Piers, wharves, docks or harbors
13-2-4-6 Effect of declaration of navigability on mills, dams, aqueducts, bridges, etc.
13-2-4-7 County expenditures to remove obstructions
13-2-4-8 Gates across roads leading to water
13-2-4-9 Erection of structures in or removal of water or material from navigable waterways; permits

13-2-4-1 Authority to declare navigability; petition

Sec. 1. The boards of commissioners in the several counties in this state are authorized to declare any stream or water-course in their respective counties navigable, on the petition of twenty-four (24) freeholders of the county, residing in the vicinity of the stream which it is intended to be declared navigable. (Formerly: Acts 1905, c.167, s.24.)

13-2-4-2 Examination of stream or watercourse; declaration of navigability

Sec. 2. On the filing of the petition provided for in section 1 of this chapter, any such board shall cause an examination of the stream or watercourse intended to be declared navigable to

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be made by some suitable person, who shall ascertain and report to the board the length of the same, and how much thereof is capable of being declared navigable, which report such board shall confirm if satisfied that the stream, if navigable, would be of public utility; and thereupon such board shall declare such stream navigable and cause the report to be recorded on the records of the board, as public highways are recorded. (Formerly: Acts 1905, c.167, s.25.) As amended by P.L.34-1987, SEC.34.

13-2-1-3 Repealed

(Repealed by P.L.1-1990, SEC.205.)

13-2-1-4 Obstructing navigable stream or watercourse; penalties

Sec. 4. Any person obstructing any stream or water-course declared navigable shall be liable to the same pains and penalties as persons guilty of obstructing public highways; and the general laws governing public highways, and the laying out and working thereof in all other respects, shall, so far as applicable, govern in the defining and working of navigable water-courses. (Formerly: Acts 1905, c.167, s.27.)

13-2-1-5 Piers, wharves, docks or harbors

Sec. 5. Any riparian owner of lands within this state bordering upon a navigable stream may build and maintain within his premises so bordering on such stream, and upon the submerged lands beneath the water thereof, piers, wharves, docks or harbors in aid of navigation and commerce, and may use, occupy and enjoy the same as appurtenant to his said lands: Provided, That such piers, docks and wharves shall not extend into such stream further than is necessary to accommodate shipping and navigation, and in no case so as to obstruct the same. (Formerly: Acts 1905, c.167, s.28.)

13-2-1-6 Effect of declaration of navigability on mills, dams, aqueducts, bridges, etc.

Sec. 6. The declaration of water-courses as navigable by county boards shall not affect any mill, dam, aqueduct, viaduct, bridge or machinery on any such stream, except in cases where the same have been abandoned for a period of twelve (12) months. (Formerly: Acts 1905, c.167, s.29.)

13-2-4-7 County expenditures to remove obstructions

Sec. 7. The boards of commissioners of the several counties shall have power to use such sums as may be appropriated from the county treasury, and as they may deem necessary, to remove obstructions from streams that have been heretofore or may be hereafter declared navigable according to law. (Formerly: Acts 1904, c.167, s.30.)

13-2-4-8 Gates across roads leading to water

Sec. 8. Persons living on or owning property along any water-course that is navigable for boats of a large size, are hereby authorized to hang gates at or near the top of the bank, across any road leading down the bank and terminating at such water-course, save in the limits of towns and cities. (Formerly: Acts 1905, c.167, s.34.)

13-2-4-9 Erection of structures in or removal of water or material from navigable waterways; permits

Sec. 9. (a) A person, other than a public or municipal water utility, may not:

- (1) place, fill, or erect a permanent structure in;
- (2) remove water from; or
- (3) remove material from;

a navigable waterway without a permit from the department of natural resources.

(b) An application for a permit under this section must be made in a manner prescribed by rule.

(c) The department shall issue a permit if its issuance will not:

- (1) unreasonably impair the navigability of the waterway;
- (2) cause significant harm to the environment; or
- (3) pose an unreasonable hazard to life or property.

(d) A separate permit is not required under this section for an activity permitted under IC 13-2-18.5, IC 13-2-22, IC 13-4.1, IC 13-4.2