

Indiana Navigability Report

Summary

Indiana law provides access to public waters for all Indiana citizens for purposes of recreation and boating. When the waters are private, however, Indiana allows free and unmolested use to the owners of the water beds above which the water lies. Whether the waters are navigable is the decisive factor in determining the limitations of the private use of waters.

State Test of Navigability

Indiana courts consider water to be navigable if the water is navigable in fact under the federal test.¹ Waters are navigable in fact when they are used or are susceptible to be used, in their ordinary condition, as highways for commerce, over which trade and travel may be conducted in the customary manner of trade and travel on the water.² The characteristic of waters connecting multiple states or foreign countries, so as to form a continuous highway capable of sustaining commerce, is additional evidence of navigability.³ Constructions that may negate the definition of navigability are dams, rapids, falls, bridges, and other obstructions that hinder interstate commerce.⁴ But “the mere fact that the presence of sandbars or driftwood or stone, or other objects, which at times renders the stream unfit for transportation, does not destroy its actual capacity and susceptibility for that use.”⁵

Water may be declared navigable by a court, the Indiana General Assembly, the U.S. Army Corps of Engineers, the Federal Energy Regulatory Commission, a board of county commissioners,⁶ or the Indiana Natural Resources Commission.⁷ The Indiana Natural Resources Commission has available online a list of waters considered navigable, sorted by name and by county.⁸

Extent of Public Rights in Navigable and Non-Navigable Waters

All public freshwater lakes are held in trust by Indiana for use by all citizens of Indiana for recreational purposes,⁹ and once the status of the lake is changed from private to “public freshwater lake,” the riparian owners' rights are limited in the same way as are the rights of riparian owners bordering navigable or public water.¹⁰ When “public” or “navigable” water

¹ State *ex rel.* Ind. Dept. of Conservation v. Kivett, 95 N.E.2d 145, 148 (Ind. 1950).

² *Id.*; *see also* The Daniel Ball, 77 U.S. 557, 563 (1870).

³ Soloman v. Blue Chip Casino, Inc., 772 N.E.2d 515, 518 (Ind. Ct. App. 2002).

⁴ *Id.* at 519.

⁵ Kivett, 95 N.E.2d at 148 (citations omitted).

⁶ Ind. Code Ann. §§ 14-29-1-1 and 14-29-1-2 (2020).

⁷ *Id.* § 4-21.5 (2020).

⁸ Navigable Waterways Roster, Ind. Nat'l. Res. Comm'n, <https://www.in.gov/nrc/2390.htm> (last accessed Jan. 27, 2021).

⁹ Ind. Code Ann. § 14-26-2-5 (2020); *see also* Gunderson v. States, Ind. Dep't of Nat'l Res., 90 N.E.3d 1171, 1173 (Ind. 2018).

¹⁰ *Id.*

borders private property, the public's right to use the water is broad, as the riparian owner's rights to the water are not exclusive and are limited to the point of navigability, where the water becomes public.¹¹ Indiana law defines the point of navigability as the point of practical navigability,¹² or the ordinary high-water mark.¹³ The point of navigability is important because it delineates where the riparian owner's right ends and the public's right to use the waters begins. The line of navigability shifts, as it is not a fixed boundary;¹⁴ however, the current test used to determine the rights of a riparian owner bordering navigable waters is one of "reasonableness" that does not exclude the public,¹⁵ so that on navigable waters, the riparian owners have the right to build piers for commerce, navigation, or pleasure,¹⁶ as long as the pier does not interfere with public use.¹⁷

Miscellaneous

For businesses conducted on the water, such as casino boats, the definitions of liability may turn on the navigability status of the waters.¹⁸ There is a line of cases in Indiana that hold that riparian owners of non-navigable streams may enjoin pollution or contamination in perpetuity, unless such effects are allowed by statute, as is the case with sewage treatment projects.¹⁹ Indiana law governing watercourses and streams is the same as general Indiana law governing public highways.²⁰ Regardless of a water's navigability, the fish in public waters generally belong to the public until caught,²¹ or unless the right to fish in public waters is acquired by an individual for exclusive private use only.²² In private waters, the exclusive right to fish belongs to the owner of the soil beneath the waters; and in the case of multiple riparian owners of a non-navigable stream, each owner has the exclusive right to fish on his or her own side of the center of the stream.²³ The fact that a private stream has been stocked by the state does not take away from the owners' exclusive right to fish in those waters.²⁴

The Indiana Natural Resources Commission has promulgated extensive specific rules regarding fishing, hunting, and using boats and equipment on and from the water.²⁵ See <https://www.in.gov/nrc/2390.htm> for additional information.

¹¹ *Id.*

¹² *Illinois ex rel. Hunt v. Ill. Cent. R.R. Co.*, 91 F. 955, 958 (7th Cir. 1899), *aff'd in part*, 184 U.S. 77 (1902).

¹³ 312 Ind. Admin. Code 6-1-1(b) (2020); *see also* *Gunderson*, 90 N.E.3d at 1173.

¹⁴ *Ill. Cent. R.R. Co.*, 91 F. at 959.

¹⁵ *Zapffe v. Srbeny*, 587 N.E.2d 177, 181 (Ind. App. 1992). *See also* Ind. Code Ann. § 14-29-1-4 (2020).

¹⁶ Ind. Code Ann. § 14-29-1-4 (2020).

¹⁷ *Bath v. Courts*, 459 N.E.2d 72, 76 (Ind. Ct. App. 1984).

¹⁸ *Soloman v. Blue Chip Casino, Inc.*, 772 N.E.2d 515, 520 (Ind. Ct. App. 2002).

¹⁹ *Town Bd. of Orland v. Greenfield*, 663 N.E.2d 523, 528 (Ind. 1996).

²⁰ Ind. Code Ann. § 14-26-1-3 (2020).

²¹ *Sanders v. De Rose*, 207 Ind. 90, 95 (1934).

²² *Millspaugh v. N. Ind. Pub. Serv. Co.*, 104 Ind. App. 540, 548 (Ind. Ct. App. 1938).

²³ *Id.* at 548–49.

²⁴ *Id.* at 549.

²⁵ 312 Ind. Admin. Code 8, 9 (2020).