

Kentucky Navigability Report

Summary

The public has the right to use navigable waters for recreational purposes such as boating, fishing, or swimming. Kentucky uses the “navigable in fact” test to determine navigability. State courts look to see whether, in the legal or technical sense, water has a useful capacity and can be used as a public highway for transportation. The law in Kentucky does not consider streams to be navigable if they are only sufficient to allow pleasure boaters, hunters, or fisherman to “float their skiffs or canoes.”¹ Therefore, when determining navigability, the case law appears to err on the side of larger streams and not smaller streams that would not allow true commerce or transportation through the water.

State Test of Navigability

Kentucky, through its case law, has adopted a state test of navigability that makes streams navigable if they are navigable in the legal or technical sense and not the ordinary sense.² The criteria for navigability of a river is whether it is “generally and commonly useful for some purpose of trade or commerce of a substantial and permanent character, for, if this were not so, then there is scarcely a creek or stream in the entire country which is not navigable water of the United States.”³ This essentially means that “if the stream, in its natural condition, is capable of being used for floating vessels, rafts, logs, etc., and has in the past been used for that purpose, the public has an easement in it.”⁴ However, the “use of a stream by a boat a few times in many years for a picnic or excursion cannot be deemed a navigation.”⁵ The courts in Kentucky also implicitly reject the recreational boating test, having held that the fact that a skiff, small raft, or canoe are able to float a stream is not sufficient to constitute navigability.⁶ State courts have even gone so far as to state that streams that have pools of water formed in which a ferry could pass does not constitute a navigable stream throughout its length, but only in that particular area.⁷

The Kentucky Supreme Court has held Rockcastle River to be navigable.⁸ The Kentucky Supreme Court has held Chestnut Creek to be non-navigable because it had not been used for log driving, nor was it useable for floating logs without assistance from persons on the banks,⁹ and

¹ *Natcher v. City of Bowling Green*, 95 S.W.2d 255, 259 (Ky. 1936).

² *E.g., Id.* at 259; *Goodin’s Ex’r v. Kentucky Lumber Co.*, 14 S.W. 775, 775 (Ky. 1890); *see also* Ky. Rev. Stat. Ann. § 182.010 (West 2021) (prohibiting obstructions on streams “which is navigable for the running of push boats, or the floating of sawlogs, staves or ties”).

³ *Natcher*, 95 S.W.2d at 259 (citing *Leovy v. United States*, 177 U.S. 621, 633 (1900) and *United States v. Utah*, 283 U.S. 64, 76 & n.8 (1931)).

⁴ *Goodin’s Ex’r*, 14 S.W. at 776.

⁵ *Natcher*, 95 S.W.2d at 259.

⁶ *Id.*

⁷ *Id.* at 259-60.

⁸ *Baxter v. Davis*, 67 S.W. 2d. 678 (Ky. 1934).

⁹ *Murray v. Preston*, 50 S.W. 1095, 1096 (Ky. 1899).

Straight Creek, a ten-foot wide and four-foot deep creek, to be non-navigable because timber could not be floated without the aid of splash dams.¹⁰

Extent of Public Rights in Navigable and Non-Navigable Rivers

The riparian owners of land on a stream that is navigable own to the center of the stream, though the property right “is subject to the dominant rights of the public in the stream” and the state has plenary powers up to the high-water mark to aid navigation.¹¹ The public can use navigable streams, including the stream bottoms,¹² despite the fact that streambeds of navigable rivers are owned by the adjacent riparian landowner.¹³ The public’s right of navigation includes not only the right to use the waters for transportation, but also for recreational purposes such as boating, swimming, and fishing.¹⁴ The public right of navigation also includes the right of temporary anchorage and “incidental use of the riverbed.”¹⁵

A non-navigable stream is the private property of the owners of the adjoining lands and cannot be taken for public use without just compensation.¹⁶

There are no cases that address the existence of a right to portage in Kentucky.¹⁷ However, the Court of Appeals of Kentucky indicated in 1985 that boats have a right of “incidental use of the riverbed” on navigable streams, though the extent of the right was not clarified.¹⁸ Temporary anchorage appears permitted.¹⁹ The Kentucky Supreme Court, in addressing incidental use in 1899, held that a person can go up on the banks of a stream when it is necessary for driving logs down a navigable stream.²⁰ One could argue that the right to portage is akin to the right of incidental use of the riverbed for driving logs, but Kentucky courts have not squarely addressed the issue. However, as the public easement appears to extend only to the high-water mark,²¹ it is unlikely that the right to portage, if it exists, would permit going above the high-water mark.

¹⁰ *Asher v. McKnight*, 112 S.W. 647, 647 (Ky.1908).

¹¹ *Natcher*, 95 S.W.2d at 257; *see also* *Comm’r, Dep’t of Highways v. Thomas*, 427 S.W.2d 213, 215-216 (Ky. 1967); *Pierson v. Coffey*, 706 S.W.2d 409, 412 (Ky. Ct. App. 1985).

¹² *Id.* at 259; *see also* *Goodin’s Ex’r.*, 14 S.W. at 775.

¹³ *E.g.*, *Robinson v. Wells*, 135 S.W. 317, 318 (Ky. 1911); *Pierson*, 706 S.W.2d at 412.

¹⁴ *Pierson*, 706 S.W.2d at 412.

¹⁵ *Id.*

¹⁶ *See Natcher*, 95 S.W.2d at 260 (holding a municipality liable for a taking where improvements to a non-navigable waterway damaged a riparian owner’s property); *Murray*, 50 S.W. at 1096.

¹⁷ *See Pierson*, 706 S.W.2d at 411 (“[T]he issue of whether the particular activities complained of in the instant action are included within the scope of the ‘public right of navigation’ has never been addressed in a reported case.”). It does not appear that a state court has since opined on the right.

¹⁸ *Pierson*, 706 S.W.2d at 412 (citation omitted).

¹⁹ *Id.*

²⁰ *See Murray*, 50 S.W. at 1096.

²¹ *Natcher*, 95 S.W.2d at 257.

Miscellaneous

The law in Kentucky forbids obstruction of navigable streams below ten miles from the head of the stream with a dam or other structure, except for hydroelectric projects.²²

Trespass in Kentucky is a Class B misdemeanor punishable by a fine up to \$250 for someone who enters private land that is fenced or posted stating no trespass or where an owner has communicated it to a trespasser.²³

For more information on boating, fishing, hunting, and parks in Kentucky, please refer to the Kentucky Department of Fish & Wildlife Resources at <https://fw.ky.gov/Pages/default.aspx>.

²² Ky. Rev. Stat. Ann. § 182.010.

²³ *Id.* §§ 511.070, 511.090 (West 2021).