

Understanding Riparian and Water Rights

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- History and development of riparian rights
- Determining land boundaries near the water line
- Determining access rights to surface waters
- Overview of regulations restricting access to and use of surface water and groundwater

This paper outlines property law issues related to water in the Commonwealth of Kentucky. The paper is broken into two parts: (1) rights associated with the ownership of property beneath and abutting waterways in Kentucky and (2) rights associated with the use of the water itself.

I. Ownership of Lands Beneath and Abutting Waterways¹

Kentucky is home to more than 13,000 miles of stream and over 1,500 miles of navigable waterways, the most in the contiguous United States.² As these waterways are prevalent throughout the state, they have played a historic role in defining property lines. This paper will address Kentucky's current water boundary law in two parts. First, through an examination of the precedent that makes up Kentucky's current law, and second, by considering the specific property rights associated with these waterfront boundaries.

A. Kentucky Water Boundaries

Under the Equal Footing Doctrine, title to the streambed of navigable watercourses in the Commonwealth of Kentucky was vested with the state upon its entry to the Union in 1792.³ The test for what is considered "navigable for title purposes" was first set forth in historic case, *The Daniel Ball*:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.⁴

¹ Thank you to Connor Egan, 2013 summer associate at Stites & Harbison, PLLC and member of the class of 2015 at the University of Kentucky Law School for the research and drafting in this section.

² C.M. Dupier, Jr., "Rivers," The Kentucky Encyclopedia, <http://www.kyenc.org/entry/r/RIVER02.html>, (last visited Jul. 7, 2013).

³ *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012).

⁴ *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 563, 19 L. Ed. 999 (1871).

The states are free, however, to transfer title to these streambeds as they see fit, subject to the overriding federal interest in navigation.⁵

With the exception of portions of the Ohio River, for which the Commonwealth of Kentucky itself holds title to the streambed,⁶ under Kentucky law, if a watercourse bounds a property, the riparian property owner's title extends to the "thread," or middle, of the water unless explicitly stated otherwise.⁷ Kentucky's legislature has defined "watercourse" as "a flowing body of water or a section or portion thereof, including rivers, streams, and creeks."⁸ The effect of a transfer property abutting a navigable stream in Kentucky is described in *Kentucky Lumber Co. v. Green*:

The grant of land, as bounded by the Cumberland river, or lying upon the side of it, passes the title to the bed of the river to the middle of the stream, unless the terms of the grant clearly limit the grantee's right of property to the margin of the river; also, the usufruct of the water to the middle of the stream is the property of the grantee, subject to the public easement of navigation, and subject, of course, to the usufruct rights of other proprietors, above and below.⁹

As watercourses are ever changing, Kentucky courts have developed precedent to deal with the many fluctuations that may occur at a waterfront boundary. Accretion and erosion are common alteration that occurs at water boundaries. Accretion is the increase of a property owner's land due to a "gradual and imperceptible addition of soil by gradual deposition through the operation of natural causes."¹⁰ Erosion, by contrast, is "the direct opposite of accretion."¹¹ Accordingly, erosion is "the eating or gnawing away of soil by operation of water so that the water encroaches upon an area that was dry land prior to the erosion."¹²

In Kentucky, accretion and erosion directly affect water boundaries. Kentucky courts hold that, "where the channel of a stream has gradually and imperceptibly changed to a new channel, attended by the extension of one of the banks by accretions slowly deposited thereon," any bounded property "changes with the changes in the thread of the new channel."¹³ Kentucky's highest court has further explained, "[i]f [the property owner's] land increases, he is

⁵ *PPL Montana*, 132 S. Ct. at 1228

⁶ KRS 56.220. Kentucky is unique in this regard with regard to the title to the streambeds of navigable streams: "States with more restrictive tests for title have ranged from the five states that adhere exclusively to a tidal test for title, to Michigan, and Ohio, which claim title only to each state's share of the beds of the Great Lakes, *to Kentucky, which limits state ownership to the bed of the Ohio River.*" 1-6 *Waters and Water Rights* § 6.03 (Amy L. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2011) (citing *Commonwealth v. Henderson Cty.*, 371 S.W.2d 27 (Ky. 1963))

⁷ *Whitson v. Morris*, 201 S.W.2d 193, 195 (Ky. 1946).

⁸ 2010 KY H.B. 393.

⁹ *Kentucky Lumber Co. v. Green*, 87 Ky. 257, 258, 8 S.W. 439 (1888)

¹⁰ U.S. Department of the Interior, *Basic Law of Water Boundaries*, Public Lands Surveying Casebook, 2 (1975), available at <http://www.blm.gov/cadastral/casebook/basicwater.pdf>.

¹¹ *Id.* at 2.

¹² *Id.* at 2.

¹³ *Johnson v. Lainhart*, 118 S.W.2d 204, 208 (Ky. 1938).

not accountable to any one for the gain; if it is diminished, he has no recourse for the loss.”¹⁴ There are, however, exceptions.

In *Wathen v. Wathen*,¹⁵ Kentucky’s highest court recognized that when a watercourse changes suddenly to follow a new course, through a process called avulsion, the property line does not shift. In *Wathen*, the court held that when a creek changed suddenly to create an entirely new channel, it ceased to define the property’s boundary.¹⁶ In such instances, the property in question remains with the party who acquired the land at the last conveyance.¹⁷

Another common occurrence at a watercourse is reliction. Reliction is “dry land formed by the withdrawal of water from the shores of a river, lake or sea.”¹⁸ The actual process of the water withdrawal is termed “dereliction.”¹⁹ Similar to accretion and erosion, Kentucky courts hold that with reliction, “boundaries shift with the shifting of the channel or shore.”²⁰

It is important to note, however, that while a waterfront property’s boundary often extends to the thread of a watercourse, the owner’s right to this water is not absolute, specifically when the watercourse is navigable.

B. Watercourse Property Rights

Kentucky recognizes a riparian or littoral system of rights for property abutting water. Under this system, a riparian owner is “one owning land, which is bounded by a natural water course, or through which a stream flows, and the rights to which such owner is entitled are appurtenant and annexed to the land.”²¹ Analogous to riparian rights are littoral rights, which apply to property abutting lakes and ponds. A littoral property owner “has a right to the water frontage belonging by nature to his land... and exists by virtue and in respect of riparian proprietorship.”²² Accordingly, riparian and littoral rights are identical.

Riparian owners are entitled to “the natural flow of the water, unimpaired in quality, except as may be occasioned by reasonable use of the [water] by other proprietors.” *Id.* at 291. Kentucky law, however, bars riparian owners from actions that may “inflict any substantial injury” to others who share the water. *Id.* at 291.

Kentucky further limits riparian owners’ use of their property when the watercourse is navigable. By way of regulation, Kentucky has adopted the federal government’s definition of

¹⁴ *Morris*, 201 S.W.2d at 195.

¹⁵ 149 S.W. 902, 902 (Ky. 1912).

¹⁶ *Id.* at 902.

¹⁷ *Id.* at 902.

¹⁸ U.S. Department of the Interior, *supra* at 2.

¹⁹ *Id.* at 2.

²⁰ *Kentucky River Coal Corp. v. Maynard*, 120 S.W.2d 401, 403 (Ky. 1938) (internal citation omitted).

²¹ *Kraver v. Smith*, 177 S.W. 286, 291 (Ky. 1915).

²² *Nugent v. Mallory*, 141 S.W. 850, 853 (Ky. 1911).

“navigable water.”²³ Accordingly, navigable waters 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 commerce.”²⁴ The boundary for navigable waters is “the mean high water mark in its unobstructed, natural state.”²⁵

For riparian owners of navigable water in Kentucky, their rights to the water “are held in subordination to the right of the public to navigate such waters and to make improvements in aid of such navigation.”²⁶ Kentucky’s public navigation rights include a wide range of uses such as travel and navigation, “in the strictest sense,” but also for “recreational purposes such as boating, swimming, and fishing.”²⁷

Kentucky’s riparian system does preserve some rights for riparian owners of navigable water. Specifically, the public is not granted a right to “anchor indefinitely off the riparian owner’s premises.”²⁸ Courts have held that riparian property owners can sue for trespass in such instances.²⁹

II. Property Interests in the Use of Water

“Whiskey’s for drinking, water’s for fighting about.”

- Mark Twain (attributed)

A. Nature of the Right

The ability to withdraw and use water (“water rights”) are property rights, but are in the nature of usufructuary rights.³⁰ One does not “own” any particular molecule of water. Rather one owns the right to use water subject to certain limitations. The nature and form of those limitations depend on whether the user is in the arid western part of the United States or in the wetter, eastern portion.

B. Water Right Regulatory Schemes

Water rights are regulated under two vastly different regulatory schemes depending on location in the United States. States that are located to the west of the 100th Meridian typically utilize a system called “prior appropriation” to regulate water rights. Those to the east rely on a “riparian” system.

²³ 301 KAR 6:040, adopting the federal definition of “navigable water” found in under 33 C.F.R § 329.

²⁴ 33 C.F.R. § 329; *see United States v. Alameda Gateway*, 953 F. Supp. 1106, 1111 (N.D. Cal. 1996).

²⁵ *Id.* at 1111.

²⁶ *Commonwealth, Department of Highways v. Thomas*, 427 S.W.2d 213, 215-16 (Ky. 1967).

²⁷ *Pierson v. Coffey*, 706 S.W.2d 409, 412 (Ky. App. 1985).

²⁸ *Id.* at 412.

²⁹ *Id.* at 412.

³⁰ *Anderson v. Cincinnati Southern Railway*, 86 Ky. 44, 48-49 (1887)

1. Prior Appropriation

States in the generally arid western portion of the United States typically regulate the use of water within their states under a prior appropriation system. Prior appropriation systems are based on two principles: “First in time, first in right” and “use it or lose it.” The prior appropriation doctrine was developed to provide farmers and miners in the arid west the incentive and security for the development of water resources.

Originally, an individual obtained a water right in a prior appropriation system by putting a particular quantity of water to beneficial use (typically defined to include irrigation, mining, power production, or municipal uses, among others) at a designated location. That person would then register that use with the government (usually the County Clerk) where it would be recorded in the public records. The date the water was first put to beneficial use becomes the “priority date” for the water right.

A prior appropriation water right has four key characteristics: (1) amount of water used, (2) purpose of use, (3) place of use, and (4) priority date. Under the prior appropriation system, a water right holder’s right to use the amount of water identified in his or her right is senior to all those whose priority date comes later. A senior water right holder who is unable to divert the full quantity of his or her right may “call the river” and shut down junior rights holders, both up and downstream from the senior right holder. Maintaining this water right requires that the holder actually put the water to beneficial use. Should a water right holder fail to use the water, without excuse, for an identified period of time (typically five years), that water right is subject to forfeiture.

Most states in the west have adopted a centralized registration and permitting scheme to manage water rights within their jurisdiction. Obtaining a water right now is conceptually similar to obtaining one in the Frontier Era, except that prior to constructing whatever diversion works are necessary to get the water to the place of use, a potential right holder must get a permit from the appropriate state regulatory agency. The key analysis in that permitting process is often whether there is water available for appropriation in the desired watershed. Where there is no water available (often the case due to over-appropriation and the creation of in-stream flow rights), new users must either go elsewhere or obtain rights transferred from other users.

2. Riparian Water Rights

In the east, where surface water is more abundant, the use of water is controlled by what is referred to as the “riparian” system. Under the riparian system, a property owner adjacent to a running stream (a “riparian owner”) may use the water in that stream provided it does not unreasonably harm downstream owners. The nature of a riparian water right has been described in Kentucky as follows:

A riparian owner has been defined to be one owning land, which is bounded by a natural water course, or through which a stream flows, and the rights to which such owner is entitled are appurtenant and annex to the land, and the person owning such lands is entitled to the natural flow of the water, unimpaired in quality, except as may be occasioned by the reasonable use of the stream by other proprietors, and he has a right to

make any use of the water, which is beneficial to himself, so long as he does not inflict any substantial injury to those below him upon the stream.³¹

Kentucky courts have only on a few occasions addressed what is considered “reasonable use” by other riparian owners. When they have, they have found that actions such as constructing a reservoir upstream of a grist mill that dramatically reduces flow to the mill,³² dumping untreated sewage and industrial waste into a stream,³³ and discharging copperas water into a stream³⁴ all are unreasonable uses.

C. Regulated Riparianism in Kentucky

Kentucky, like many other states, has instituted a water withdraw permitting scheme that codifies the principles of reasonable use found in the common law regarding riparian water rights. Kentucky requires a water withdrawal permit for certain classes of users that withdraw water at an average rate in excess of 10,000 gallons per day.³⁵ In reviewing applications for water withdrawal permits, the Division of Water (“Division”) must evaluate whether the proposed quantity, time, place and rate of withdrawal will be detrimental to the public interest or the rights of other public water users.³⁶ Water withdrawal permits must specifically set forth the authorized quantity, time, place and rate of withdraw.³⁷ Water withdrawal permits grant only a limited right to use the water and do not vest ownership or an absolute right to use the water.³⁸ A permit may authorize the withdrawal of water beginning up to three years after the date it issued, but if the withdrawal is to begin more than six months after permit issuance, the water is only reserved for the permit holder if the permit holder can show that (1) water is available for the proposed use, (2) there is enough water available for other users, and (3) there is sufficient progress towards project construction.³⁹

Permit holders must submit reports of the amount of water actually withdrawn to the Division.⁴⁰ If the water withdrawal reports show that the permit holder is withdrawing substantially less than the amount authorized, the Division may amend the permit.⁴¹ Also, in the event that a water emergency is declared by the Governor, the Division may “temporarily allocate the available public water supply among water users and restrict the water withdrawal rights of permit holders, until such time as the condition is relieved and the best interests of the

³¹ *Kraver v. Smith*, 164 Ky. 674, 683-84 (1915).

³² *Anderson*, 86 Ky. at 51-52.

³³ *Kraver*, 164 Ky. at 684.

³⁴ *Beaver Dam Coal Co. v. Daniel*, 227 Ky. 423 (1929).

³⁵ KRS 151.140, 401 KAR 4:010, Section 1.

³⁶ KRS 151.170(2).

³⁷ KRS 151.170 (1)

³⁸ *Id.*

³⁹ 401 KAR 4:010, Section 2.

⁴⁰ KRS 151.160(1), 401 KAR 4:010, Section 3.

⁴¹ KRS 151.170(4). The permit may also be amended upon application to the Division by the permit holder.

public are served.”⁴²

One of the key provisions of Kentucky’s water withdrawal permitting statute is the list of exemptions. The statute exempts the following categories of uses from the permitting requirements:

- Agricultural uses (including irrigation)
- Domestic uses
- Production of steam at generating plants owned by companies whose retail rates are regulated by the Kentucky Public Service Commission (“PSC”)
- Production of steam at generating plants owned by companies that require a certificate of environmental compatibility from the Kentucky PSC
- Injection of water underground in conjunction with operations for the production of oil or gas.⁴³

As the fiscal year 2011 annual report from the Division⁴⁴ shows, these exempted diversions constitute the overwhelming majority of water withdrawals in the Commonwealth.

D. Current Issues in Surface Water Right Regulation

1. Withdrawals in Kentucky

The Division of Water’s Fiscal Year 2011 Annual Report (“Annual Report”) summarizes the recent activity in all branches of the Division including the Water Withdrawal Program.⁴⁵ The Water Withdrawal Program oversees the water withdrawal permitting program in the Commonwealth.⁴⁶ The 2011 Annual Report shows that the Division processed 13 applications for new withdrawal permits and issued 8 new permits.⁴⁷ Not surprisingly, the areas with the highest water withdrawals correlated to the areas within the state with the highest population and industrial activity.⁴⁸

The Annual Report notes that during the 2011 fiscal year, users in the state withdrew a total of 4,452 million gallons per day (“MGD”).⁴⁹ Of this amount the overwhelming majority 3,591 MGD (over 80%) was used for thermoelectric power production.⁵⁰ Removing thermoelectric power from the analysis shows that public water supplies (544 MGD) and

⁴² KRS 151.200(2).

⁴³ KRS 151.140.

⁴⁴ The Division’s Fiscal Year 2012 Annual Report did not include data on the water withdrawal program.

⁴⁵ Kentucky Division of Water, Annual Report, Fiscal Year 2011 (“Annual Report”). Available at www.water.ky.gov.

⁴⁶ Annual Report at 40.

⁴⁷ *Id.*

⁴⁸ *Id.* at 42.

⁴⁹ *Id.* at 41.

⁵⁰ *Id.*

industry (235 MGD) are the predominant users.⁵¹

2. Equitable Apportionment / Interstate Disputes

Long relegated to the arid west, disputes between states over the allocation of water between them are creeping east, especially to the southeast. In the west, lengthy disputes among states regarding the allocation of water between them are common place. For example, California and Arizona have engaged in decades of litigation in an original action before the United States Supreme Court regarding each state's portion of the water allocated to the so-called "Lower Basin" states in the Colorado River Compact.⁵²

These complicated, multi-state water allocation disputes are no longer exclusively found in the west. The states of Florida, Georgia and Alabama (along with United States Army Corps of Engineers, customers of the federal power system and several municipalities and environmental groups) have been in litigation in various forums over the allocation of water from the Apalachicola, Chattahoochee and Flint river systems.⁵³ In particular, the case focuses on the use of water stored behind Buford Dam in Lake Lanier (located about 45 miles northeast of Atlanta) as a source of public water supply for the City of Atlanta.

In 2009, Federal District Court Judge Paul Magnuson ruled that the Corps of Engineers decision to reallocate a portion of the water stored in Lake Lanier for the public water supply in Atlanta without Congressional approval violated the Act that authorized the construction of the reservoir.⁵⁴ Before the results of Magnuson's judgment could be felt, a 2011 decision by the 11th Circuit Court of Appeals reversed his decision, finding that the Corps of Engineers was authorized "to allocate storage in Lake Lanier for water supply."⁵⁵ Alabama and Florida appealed the 11th Circuit's decision to the United States Supreme Court, but the Court denied certiorari on June 25, 2012.⁵⁶ The issue, while at an end in the courts, appears headed for a political showdown as the Congressional delegations from Alabama and Florida are pushing legislation that would prohibit the Corps of Engineers from allocating water to Atlanta without Congressional approval.⁵⁷

Another eastern interstate water allocation battle has been resolved more peacefully. South Carolina sued North Carolina in the United States Supreme Court seeking an equitable allocation between the states of water from the Catawba River basin.⁵⁸ In particular, South Carolina complained that North Carolina had authorized transfers out of the Catawba River basin

⁵¹ *Id.*

⁵² See *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1982).

⁵³ See *In re Tri-State Water Rights Litigation*, 639 F. Supp.2d 1308, 1333-1339 (M.D. Fla., 2009) for a description of the history of the various litigations leading to the consolidated, multi-district litigation.

⁵⁴ *Id.* at 1356.

⁵⁵ *In re MDL-1824 Tri-State Water Rights Litig.*, 644 F.3d 1160, 1192 (11th Cir. Fla. 2011).

⁵⁶ *In re MDL-1824 Tri-State Water Rights Litig.*, 133 S. Ct. 25 (U.S. 2012).

⁵⁷ Greg Bluestein and Daniel Malloy, *Latest phase of Water Wars plays out in Congress*, Atlanta Journal-Constitution (Jun. 14, 2013), <http://www.ajc.com/news/news/latest-phase-of-water-wars-plays-out-in-congress/nYKnC/>.

⁵⁸ *South Carolina v. North Carolina*, 130 S. Ct. 854, 859, 175 L. Ed.2d. 713 (2010).

to Charlotte in excess of its equitable share. The two states were able to reach a settlement in the fall of 2010 and the case was subsequently dismissed.⁵⁹

While the Carolinas have avoided lengthy and costly litigation before the Supreme Court, the increasing demands of a growing population coupled with a limited resource means that the types of disputes seen in the Carolinas and regarding Atlanta's water supplies are likely to increase in number. States and local communities with the vision to anticipate potential water use conflicts will be in a better position to avoid costly and uncertain litigation.

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⁵⁹ *South Carolina v. North Carolina*, 2010 U.S. LEXIS 9830 (U.S., Dec 14, 2010). See also <http://www.charlestonbusiness.com/news/37392-north-and-south-carolina-end-water-dispute?rss=0> for a discussion of the settlement terms.