CONSERVATION, DEPARTMENT OF: Permit, authority to issue for building bridge across old channel of Wabash River.

October 10, 1939.

Hon. V. M. Simmons, Commissioner,
Department of Conservation,
Indianapolis, Indiana.

Dear Sir:

I have your letter wherein you state that an application has been made to the Department of Conservation for a permit to construct a bridge over the old channel of the Wabash River in township 5 South, Range 4 West, which channel surrounds what is now known as Ribeyre Island. You state that this channel is the boundary line between the states of Indiana and Illinois, and that the War Department has refused to permit the construction of a bridge until a permit is obtained from the Department of Conservation.

You ask whether or not the Department of Conservation has authority to issue a permit to construct such a bridge at the permittee's expense across the above described channel. An aerial photograph accompanied your letter and is being returned herewith.

It first should be observed that the authority to construct bridges over navigable waters within the State is not derived from any absolute right existing in any person or legal entity; such authority does not spring from ownership of the adjacent land (People, ex rel., Lehigh Valley Railway Co. v. State Tax Commission New York, 159 N. E. 703), but is solely of legislative origin dependent upon specific legislative creation or general statutory provision. To this effect, the General Assembly has authorized governmental units and specially created commissions and bodies to build highway bridges under specific conditions named in the statutes. The most recent Act upon this subject is chapter 79, p. 461, Acts 1939, whereby the Indiana State Toll Bridge Commission was created and its powers and duties defined.

The General Assembly has authorized the construction of bridges across navigable waters by railroads empowered to construct lines to points beyond navigable streams, provided that such bridges shall not obstruct the free navigation of such streams. (Sec. 55-633; 1 R. S. 1852, ch. 84, sec. 8, p. 421.)
With the exception last noted, no provision is found in the statutes which specifically authorizes the construction of a bridge over a navigable stream other than as a highway bridge, and none of the bridge statutes make provision for the exercise of any control over the construction or maintenance of highway bridges by the Department of Conservation.

However, the proposition seems tenable that clause 9 of section 60-718, gives to the Conservation Department the authority to issue a permit for the construction of a bridge across navigable waters, provided such bridge shall not be a toll bridge, does not affect the free navigability of the stream and is not to be constructed at public expense.

Section 60-718, Burns Ind. Stat. 1933 Acts 1919, ch. 60, sec. 18, p. 375; (Acts 1929, ch. 198, sec. 1, p. 660) by its ninth clause, gives to the Department of Conservation "general charge and supervision of the navigable waters of the State." The language of clause 9 is very broad and its terms quite general, but taken in connection with its position in the Act of which it is a part, it gives to the department the authority to act with a view toward keeping the navigable waters of the State free for navigation and commerce, and at the same time conserving, so far as practical, the natural life contained in said waters.

In the situation you have described, the stream sought to be bridged once constituted the regular channel of the Wabash River the bed of which, belongs to the State of Indiana, having never been sold.

State v. Wabash Paper Co. (1898), 21 Ind. App. 167;

Dawson v. James (1878), 64 Ind. 172.

The supervision and control of Indiana's side of such channel, would therefore remain in the State, since it continues to form a part of the Wabash River, even though it is not so available to all forms of navigation as it may formerly have been.

You also ask whether, in the event the authority exists to permit the construction of such a bridge, the issuance of such a permit would prejudice the department in any way under clause 10 of section 60-718, supra. Clause 10, supra, gives to the department the power of issuing a permit to take coal, sand, gravel, stone, gas, oil or other mineral or substance from
or under the bed of any of the navigable streams of the state, provides a permit fee, and requires payment for the sand or other products taken. It appears that in acting pursuant to clause 10, the department will proceed with a view of obtaining for the State the greatest possible revenue from the sale of the material resources owned by it in keeping with accepted principles of conservation.

The issuance of a permit to bridge a navigable stream would in no way create a right to take any of the resources referred to in clause 10, and would not amount to a determination to permit the taking, in any given instance, of the resources owned by the State in or under the bed of the navigable stream.

ADJUTANT GENERAL: Liability of State Armory Board in regard to building of Lafayette Armory.

October 11, 1939.

Hon. Elmer F. Straub, Adjutant General,
State House,
Indianapolis, Indiana.

Dear General Straub:

I have before me your letter of October 3, 1939, wherein you request an official opinion concerning the liability of the State Armory Board or the trustees of such board, in the matter of the Lafayette Armory. Attached to your letter, I find enclosed, copies of the minutes of such Armory Board, agreements of such board, indentures and a mortgage deed of trust of such board of trustees to the Peoples State Bank of Indianapolis, Indiana, trustee under such deed of trust.

I have carefully read such enclosures and have noted the obligations of the Armory Board and its trustees for the Lafayette Armory construction and the retirement of the bonds issued to finance such construction. Under the sixth provision of said mortgage deed of trust, I find a covenant and agreement with the Peoples State Bank as trustee which provides that after the performance of the mortgage deed of trust, such trustee will, "at the expense of parties of the first part (the trustees of said Armory Board), and upon satisfactory proof to the trustee that said parties have discharged and performed all obligations and covenants of this inden-