CONSERVATION DEPARTMENT: Navgability of streams and ownership of beds, banks and islands—mooring houseboats on White river; rights of land owners.

November 17, 1933.

Hon. Kenneth M. Kunkel, Director,
Fish and Game Division,
Conservation Department,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of November 1, 1933, which reads as follows:

"I have had several inquiries concerning the ownership of islands formed in White river by the deposit of sediment. These islands sometimes deflect the course of the current to one side or other of the island, making the other side a backwater. Some of these islands have been established so long that the timber thereupon is becoming valuable and is being cut by the adjoining landowners. If White river is non-navigable, according to federal regulations, I presume the deeds to the adjacent property read ‘to the center of the river bed’ or, in any case, the entire river bed is set out as part of the land owned by the adjacent landowners. Could you give me a list of the rivers in the State of Indiana which are classified as navigable by the federal government? It is also my understanding that the area covered by the river course other than navigable rivers are included in land deeds. May I have some information on this subject?

"There are numerous house boats cruising White river in the vicinity of Martinsville. The inhabitants of these house boats are not desirable citizens or neighbors and the farmers are having considerable trouble with them in regard to thievery and trespass. Has a farmer, owning the land bordering on White river, the right to forbid a house boat from mooring to a tree or some other object on his land? I suggested to the interested parties that they could file charges of trespass against the offending parties and should like to have your opinion concerning the matter."
Your first question, regarding the navigability of streams in general, and the ownership of islands and bars created in streams by the deposit of sediment, presents considerable difficulty. The answer as to both phases of this question depends upon the facts of each individual case. It is generally held that the question of whether or not a stream is navigable is a question of fact—that it is navigable in law where navigable in fact. And a stream is navigable in fact, where it is of sufficient capacity to be capable of being used for useful purposes of navigation; that is, for trade and travel in its usual and ordinary modes.

29 Cyc. 289;
Neaderhouser v. State, 28 Ind. 257;
Ross et al. v. Faust et al., 54 Ind. 471.

A statute cannot make a stream navigable, which is in fact not navigable. On the other hand, a statutory declaration that a river is navigable is not necessary to make it so.

29 Cyc. 293-294;
Ross et al. v. Faust et al., supra;
Seymour Water Co. v. Leblin, 195 Ind. 481.

The courts of this state have held that the fact that United States surveyors may have meandered the banks of a stream without including the bed, does not establish the navigability of the stream so as to exclude ownership in the bed by riparian proprietors.

Ross et al. v. Faust et al., supra.

In the case of State v. Wabash Paper Co., 21 App. 167, at 174, the court refers to an act of Congress, March 6, 1804, which provided that: “All navigable rivers, creeks and waters, within the Indiana territory, shall be deemed to be and remain public highways.” Relying upon this act, the court held that the navigability or non-navigability of any stream in 1804 was the proper test; in other words, any stream or portion of a stream which was navigable in fact in 1804, must be held as navigable forever after. It should be noted, however, that the question involved was that of the status of the Wabash River as a “public highway,” and not the rights and titles of riparian owners.

On the other hand, the question of the title of riparian proprietors to the bed of the stream was directly in question
in the case of Ross et al. v. Faust et al., *supra*. There the court laid down the rule that the ownership of the bed of freshwater rivers *not navigable for vessels used in interstate commerce* lies in the opposite riparian proprietors to the thread of the stream (which is the middle of the stream as measured between the water lines), in the absence of terms in the conveyance restricting ownership to the banks as a boundary. And in holding that White River, in Marion County, was not navigated or navigable within such a definition, the court apparently applied a test of *present navigability* without regard to the question of the navigability or non-navigability of the stream either in 1804, or in 1796 when the act of Congress relating to surveys of public lands was passed. This act, while providing that navigable rivers should not be included in public surveys, did not indicate what rivers should be considered as navigable; and the court, in discussing the act, holds that the decision of surveyors could not be conclusive.

It is evident that the decisions in this state are extremely confusing as to the *date* that should be used as a criterion in determining the navigability or non-navigability, in fact, of any of our watercourses. In my opinion, where the question is a question of the title that has been either granted or retained by the government, the better rule would be that the result should be governed by the navigability or non-navigability, in fact, of the respective watercourse *at the time the original patent to the adjoining land was issued by the United States*. If the stream was not navigable at that time, the riparian proprietor took the title to the thread of the stream in the absence of any restriction in the terms of the conveyance, even though the description included only the meander lines of the banks. Likewise, if the stream were navigable at the time, the riparian proprietor took no title to the bed of the stream unless expressly granted in the conveyance. For a further discussion of the navigability of streams in general, and of White River in particular, I would refer you to an opinion rendered by my predecessor, under date of July 25, 1931, to Paul V. Brown, of the department of conservation. (Opinions, Attorney-General of Indiana, 1931-32, p. 444.)

The question of ownership of the bed of a stream, and islands or bars, in this state, unless answered by the express terms of the conveyance, as discussed hereinafore, depends
upon the character of the stream, as being navigable or otherwise. If a non-navigable stream forms the boundary between the lands of two proprietors, each owns the land under the stream, on his own side, up to the middle thread of the stream.

40 Cyc. 620;
Ross v. Faust, supra.

The ownership of an island generally follows the ownership of the bed of the water. An island in a non-navigable river, not legally appropriated otherwise, if it is on one side of the dividing line, belongs to the owner of the bank on that side; if it is in the middle of the river, the owners of the banks hold it in severalty, the dividing line running as if there were no island; and if there are several borderers, the island is apportioned according to their lines on the mainland. If the course of the river changes abruptly and cuts off a point of land on one side, making an island, such island still belongs to the original owner.

29 Cyc. 354;
40 Cyc. 620;
Grand Rapids, etc., R. Co. v. Butler, 159 U. S. 87; Bonewits v. Wygant, 75 Ind. 41.

Where islands are formed and surveyed by the United States before the admission of the state into the Union, they are subject to disposition by the federal government, the same as other public lands. Otherwise, they belong to the state or the riparian owners, according to the prevailing local rule.

29 Cyc. 354.

The prevailing local rules of the several states regarding the ownership of beds and banks of non-tidal navigable rivers are considerably in conflict. Some states hold the title of adjoining riparian owners to extend to the thread of the stream, as in case of non-navigable watercourses. Still others adopt the view that the title of the riparian owner stops at the highwater mark, and that title to the bed and banks is in the state.

5 Cyc. 897, and cases cited.

Indiana, however, together with some of the other states, appears to have adopted the rule that riparian proprietors along navigable streams hold the title to the lowwater mark. The higher courts of this state have applied this rule repeat-
edly with regard to lands along the Ohio River, and the language of the decisions would appear to indicate that they consider it a rule of general application to all navigable streams within the state.

5 Cyc. 897;
Irvin v. Crammond, 58 Ind. App. 540;
Clarke v. Evansville Boat Club, 44 Ind. App. 426;
Sherlock et al. v. Bainbridge, 41 Ind. 35;
Martin et al. v. City of Evansville, 32 Ind. 85;
Bainbridge v. Sherlock et al., 29 Ind. 364.

Under this rule, the title to the bed of a navigable stream between the low water marks is in the state. And where the title to the bed is in the state, islands therein not surveyed or claimed by the government or conveyed by the government prior to the admission of the state, belong to the state.

29 Cyc. 355;
State v. Akers (Kans.) 140 Pac. 637;

Your letter asks for a list of the rivers in this state that are classified as navigable by the federal government. This information may be obtained from the plats and other records in the files of the auditor of state. However, as pointed out in the foregoing discussion, the meanderings by the government surveyors are not conclusive on the question of navigability. The question of title in each case, is a question to be determined from an exhaustive investigation of all the facts, including an examination of the abstracts of title on the lands involved, and no specific rule may be laid down that would apply to all cases.

Your second question is whether or not a farmer, owning the land bordering on White River, has the right to forbid the mooring of a house boat to a tree or other object on his land. If the stream at the point in question is not navigable and therefore, not a public highway, there is no right of navigation that could transcend the inherent right of an owner of property to the exclusive use of such property. If the stream should be, in fact, navigable, nevertheless, the right of navigation that would attach would not include the right to use the banks for landing or mooring without the consent of the
owner, except in cases of peril or emergency, or where the place has, by dedication or otherwise, become a public landing place.

Clarke v. Evansville Boat Club, supra.

The landowner would have a civil action in trespass and, in a proper case as defined by the statute (Section 2493 Burns Annotated Indiana Statutes, Revision of 1926), the trespasser could be charged with a misdemeanor.

LIEUTENANT GOVERNOR: Mines and Mining.

November 18, 1933.

Hon. M. Clifford Townsend,  
Lieutenant Governor,  
Indianapolis, Indiana.

My dear Governor:

I have before me your letter of November 15, in which you submit two questions for my consideration.

1. Whether or not under the Indiana mining laws, where a mine that employed more than ten men had been closed by the inspector, this mine can be opened again, if they employed less than ten men without having remedied the conditions that caused the inspector to close them.

In reply to this question, I desire to call your attention to section 25 of chapter 177 of the Acts of 1923, as amended by section 4, chapter 171, of the Acts of 1925, which is as follows:

"The provisions of this act shall not apply to any mine that does not employ ten or more men, except that it shall be unlawful to use or operate any gasoline propelled engine or machinery inside any mine in this state."

Therefore, in answer to your question, will say that so long as the operator of the mine does not employ more than ten men and does not operate any gasoline propelled engine or machinery in the mine, the act does not apply.

2. Your second question is as to whether or not one man can perform the duties defined in paragraph H, found in Section 10028, of the Revised Statutes of 1926, and paragraphs B and E, found in Section 10032, Burns Revised Statutes of 1926.