

August 21, 2013

**OFFICIAL OPINION 2013-6**

Mr. Cameron Clark  
Director  
Department of Natural Resources  
402 W. Washington St.  
Indianapolis, IN 46204

**RE: State Boundary on the Wabash River**

Dear Mr. Clark:

By letter dated May 7, 2013, you requested the Attorney General’s opinion concerning how the Indiana Department of Natural Resources (DNR) should best determine the ownership of oil and gas interests and other minerals located underneath the bed of the Wabash River, recognizing that the course of the river has change over time. This question could be restated as, how the DNR can determine the border between Indiana and Illinois on that portion that is determined by the Wabash River?

**BRIEF ANSWER**

The doctrines of accretion and avulsion which apply to private property owners also applies to state borders when the border is described as the “middle of the river.” Therefore, the Wabash River portion of the Indiana-Illinois border varies as the river meanders from time to time but would become fixed at that locations were an avulsion has occurred. The DNR can best determine the ownership of oil and gas interests by determining the current course of the Wabash River and accounting for any avulsions over the years. Indiana would control the eastern portion of the river up to its thalweg.

**ANALYSIS**

The Indiana Constitution defines the borders of Indiana as follows:

The state of Indiana is bounded, on the East, by the meridian line, which forms the western boundary of the State of Ohio; on the South, by the Ohio river, from the mouth of the Great Miami river to the mouth of the Wabash river; *on the West, by a line drawn along the middle of the Wabash river, from its mouth to a point where a due north line, drawn from the town of Vincennes, would last touch the north-western shore of said Wabash river;* and, thence, by a due north line, until the same shall intersect an east and west line, drawn through a point ten miles north of the southern extreme of Lake Michigan; on the North, by said east and west line, until the same shall intersect the first mentioned meridian line, which forms the western boundary of the State of Ohio.

Ind. Const. Art. 14, § 1 (emphasis added). This language mirrors both the 1816 Indiana Constitution and the Indiana Enabling Act passed by Congress in 1816.<sup>1</sup>

Since rivers meander from time to time, the U.S. Supreme Court has on several occasions had to decide the question regarding whether the border between two states was the river's course as it was when the state was established or whether it is the river's course as it is presently.<sup>2</sup> The court has made decisions that both allow for a river's meandering as well as those which set the border using a specific historical point.<sup>3</sup> In *Indiana v. Kentucky*, 136 U.S. 479 (1890), the Court held that the Indiana-Kentucky border was the low water mark on the Indiana side of the Ohio as that mark was in 1792 when Kentucky became a state regardless of how the river meandered over time. *Indiana v. Kentucky* 136 U.S. at 519. This decision has been upheld over the years.<sup>4</sup> Nevertheless, other Supreme Court cases have determined that a state's border will move according to the doctrines of accretion and avulsion. The doctrine of accretion states that the border will move as the river slowly changes over time.<sup>5</sup> The doctrine of avulsion states that when a sudden change occurs to a river then the border remains the center of the former course.<sup>6</sup> In determining the Nebraska-Iowa border along the Missouri River, the court concluded that:

...the law of accretion controls on the Missouri river as elsewhere; and that not only in respect to the rights of individual landowners, but also in respect to the boundary lines between states. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.<sup>7</sup>

In determining whether a fixed historical point or a varied meandering river marks the border of a state the Court has opined that the general rule is for the border to move as the river changes, but exceptions can be made in special instances. *Ohio v. Kentucky*, which upheld the holding of *State of Indiana v. Commonwealth of Kentucky*, stated the following:

It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, see, e. g., *Nebraska v. Iowa*, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892), or the Mississippi River between Arkansas and Mississippi. See *Mississippi v. Arkansas*, 415 U.S. 289, 94 S. Ct. 1046, 39 L.Ed.2d 333 (1974), and 415 U.S. 302, 94 S. Ct. 1052, 39 L.Ed.2d 342 (1974). See also *Iowa v. Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. Ed. 55 (1893); *Missouri v. Nebraska*, 196 U.S. 23, 25 S.

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<sup>1</sup> See Ind. Const. (1816) Art. 11, § 17. See also An Act to enable the people of the Indiana Territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, 14<sup>th</sup> Congress, Chapter LVII (1816).

<sup>2</sup> The Supreme Court has original jurisdiction over controversies between states regarding their borders. See e.g., *State of Indiana v. Commonwealth of Kentucky*, 136 U.S. 479 (1890), *State of Nebraska v. State of Iowa*, 143 U.S. 359 (1892), *State of Missouri v. State of Nebraska*, 196 U.S. 23 (1904), and *State of Washington v. State of Oregon*, 211 U.S. 127 (1908).

<sup>3</sup> Compare *State of Missouri v. State of Nebraska*, 196 U.S. 23 (1904) with *State of Indiana v. Commonwealth of Kentucky*, 136 U.S. 479 (1890).

<sup>4</sup> See e.g. *Ohio v. Kentucky*, 444 U.S. 335 (1981) and *Illinois v. Kentucky*, 500 U.S. 380 (1991).

<sup>5</sup> See *State of Missouri v. State of Nebraska*, 196 U.S. 23, 35 (1904).

<sup>6</sup> *Id.*

<sup>7</sup> *State of Nebraska v. State of Iowa*, 143 U.S. 359, 370 (1892).

Ct. 155, 49 L. Ed. 372 (1904); *Minnesota v. Wisconsin*, 252 U.S. 273, 40 S. Ct. 313, 64 L. Ed. 558 (1920); *New Jersey v. Delaware*, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847 (1934); *Arkansas v. Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362 (1940). In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.<sup>8</sup>

Additionally, in a dispute between Washington and Oregon regarding the Columbia River, the Court stated that because Congress made the border the “middle of the north channel” that the border would remain the north channel and not change to another channel that had since become the better shipping channel due to the river slowly changing its course.<sup>9</sup> It also opined that when the border was stated as “the middle of the main channel of the river” or “the middle of the river” then the border would vary as the river meandered except in the cases of an avulsion.<sup>10</sup>

In the case of the Wabash River, the Indiana-Illinois border is described as “by a line drawn along the middle of the river.” Additionally, No known historical factors exist, which would lead to a conclusion that the border should remain as it was in 1816. Therefore, the Indiana-Illinois border is more like the Missouri River in *State of Nebraska v. State of Iowa* and the rules of accretion and avulsion would apply to determine the location of the Wabash River portion of the Indiana-Illinois border.

Having established that the Wabash River border would follow the current course of the river, the question remains as to what point in the river is the “middle.” The Court has been clear that unless Congress expresses an intent to the contrary, the middle is generally considered to be the middle of the main channel or the thalweg.<sup>11</sup>

The Indiana Enabling Act provides no evidence that Congress intended for the geographic center of the river or any other specified point in the river to be the border. Therefore the phrase “middle of the river” as used in the Indiana Constitution and the Indiana Enabling Act would mean the thalweg of the Wabash River.

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<sup>8</sup> *Ohio v. Kentucky*, 444 U.S. 335, 337 (1981).

<sup>9</sup> *State of Washington v. State of Oregon*, 211 U.S. 127, 135 (1908)

<sup>10</sup> *Id.*

<sup>11</sup> See e.g., *State of Iowa v. State of Ill.*, 147 U.S. 1 (1893), *State of New Jersey v. State of Delaware*, 291 U.S. 361 (1934), and *Texas v. Louisiana*, 410 U.S. 702 (1973).

## CONCLUSION

The Indiana-Illinois border along the Wabash River varies as the river meanders except in cases of an avulsion. Therefore, Indiana controls the eastern portion of the Wabash River up to its thalweg unless there has been an avulsion in which case the Indiana portion would be the eastern portion of the previous course. Indiana therefore would own the oil and gas rights under those portions of the river.

Sincerely,

Gregory F. Zoeller  
Attorney General

Misty Mercer  
Deputy Attorney General