1972

Indiana's Receding Southern Boundary

Leon H. Wallace
Indiana University School of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the State and Local Government Law Commons, and the Water Law Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/2160

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
Indiana's Receding Southern Boundary

Proposed construction of Mt. Vernon Port emphasizes important legal questions currently involved. Leon H. Wallace, I. U. Law Professor, discovers and reports interesting history of location of Indiana-Kentucky border and the deep penetration into Hoosier territory as construction of dams pushes river's low water line, the accepted boundary, northward.

Has Kentucky's Ohio River boundary moved northward since it was established in 1792? An Indiana University law professor, after eight years of digging through old maps and surveys, says it has.

Leon H. Wallace, former Dean of I. U. School of Law who now teaches in the school at Bloomington, believes that the low water mark of the Ohio River in 1792 can now be established. Kentucky's northern boundary, which separates it from Indiana and Ohio, has always been the low water mark of the north bank of the Ohio River.

Wallace searched government archives and libraries in six states; in Washington, D.C., and in London, England. He found maps and Ohio River surveys dating back to 1766. Although there is no indication the course of the river has changed significantly since the earliest recorded survey, the normal water level has.

He doesn't make any claims as to where the precise boundary lies, but Wallace, after talking to engineers, believes that the north bank of the Ohio River at low mark in 1792 is now 200 to 600 feet south of the Indiana bank in some areas.

Dams Cause Change

The difference, he says, is caused by construction of 46 low dams on the river between 1910 and 1930 and a series of high dams, started in 1950 and still under construction. These have raised the water level and when the series is completed will raise it even higher.

Wallace first became interested in the Ohio River when he was asked to do some research for the Indiana Legislative Advisory Commission in 1965. Later, he was hired as a consultant and worked on the project in his spare time for about three years. He developed a personal interest in the project and continued his research after his contract with the state ended.

Wallace's research led him to Louisville's Filson Club (historical library), the Corps of Engineers offices in Louisville and Cincinnati, and archives in Virginia, West Virginia, Pennsylvania, California, and Washington. He and Mrs. Wallace also spent a month doing research at the British Museum and the British Public Records Office in London.

The goal of Wallace's search was to find and establish conclusively the low water mark of the north bank of the Ohio River in 1792 and later periods. He has approached his work with the objective viewpoint of the scholar. He has emphasized this to his reference sources who were concerned that they might become involved in a boundary squabble between Indiana and Kentucky. Wallace is quite willing to share his findings with any interested parties.

Chronology of River Mapping

Here is Wallace's chronology of Ohio River mapping, charting, and surveys:

In 1766, two British army engineers, a Captain Gordon and a Lieutenant Hutchins, made what they called a hydrographic survey of the Ohio River. In the British Records Office in London, there is correspondence from Gen. Thomas Gage to three different secretaries of state about the project. General Gage commended the two men on their competence.

The detailed, handwritten notes of the entire survey are in the Hunting- ton Library, in San Marino, Calif. There is even the expense account turned in by the men in the British Public Records Office. Wallace obtained copies of these documents.

To see what changes may have occurred in the course of the river, Wallace had an engineer take the notes and plat the river from Indiana's Ohio border to the Illinois border. Then he matched this with an overlay of a Corps of Engineers survey made around 1900 and they were in near perfect alignment.

In 1796, a Freshman named Collot made a survey similar to the earlier ones. Wallace found the map that Collot made in the Library of Congress, but he has not yet found the field notes. The map was published in 1824, 18 years after Collot's death.

In 1817, the Commonwealths of Virginia, Kentucky, and Pennsylvania and the State of Ohio authorized a survey of the shoals of the Ohio River from Pittsburgh to the Falls of the Ohio at Louisville. The survey was made by Magnus Murray and was completed in 1818.

Old Maps' Similarity Noted

After writing to archivists of the four states, Wallace found a hand-drawn copy of the survey in the land (Continued on page 7)
INDIANA'S RECEI NG
SOUTHERN BOUNDARY

(Continued from page 6)

office in Harrisburg, Pa. He found that they were similar to some old maps he found at the Corps of Engineers office in Louisville. He went to Harrisburg and arranged to have scale color photographs made of the maps.

The survey by the four states stirred some national interest, Wallace says. In 1821, the Corps of Engineers for Fortification made a hydrographic survey from Louisville down the Ohio River to the mouth of the Mississippi. Wallace found copies of the survey in the national archives and he was able to identify an unidentified copy in the Library of Congress.

All through the 19th Century, beginning about 1826, the Corps of Engineers made improvements along the Ohio River. Each project was reported to Congress in what was called executive documents, Wallace says. These were accompanied by large-scale maps which showed what was done and how this would affect the low water mark of the river. Most of these are now stored in the national archives with a few scattered around in different libraries. Wallace found some of them in the I. U. Library.

In the summer of 1967, Wallace and his wife spent a month in the British Museum and the Public Records Office following up leads they had uncovered in this country. They didn't find anything they didn't already know about, but they did acquire copies of new maps and documents to support his earlier findings.

Wallace has noted the periodic differences between Indiana and Kentucky over the boundary line, and has followed with special interest a case pending before a Supreme Court-appointed hearing judge concerning claims by Ohio and Kentucky concerning the boundary (the U.S. Supreme Court has original jurisdiction in action brought between states).

Boundary Fixed In 1972

Kentucky was admitted to the Union in 1792 and its northern boundary designated as the low water mark of the north bank of the Ohio River. Chief Justice John Marshall confirmed this interpretation of Kentucky's boundary in an 1820 Supreme Court decision.

The question which has continued to rise in Indiana is the precise location of the low water mark of the Ohio River. In the 1880's, Wallace says, Indiana brought a suit against Kentucky in which it claimed that what is now known as Green River Island was a part of Indiana.

"Indiana was dead wrong on that," Wallace explains. "In the 1700's the main channel of the river was south of the island but there was a narrow channel north of the island that ran year around. There is evidence that the people who lived on the island built footbridges across to the north bank. Over the years sand accumulated around the bridge supports until the channel finally was filled up.

"The people who lived on the island voted across the river in Henderson, Ky. They paid taxes in Kentucky. They sent their children to school in Indiana, but they paid tuition as non-residents."

In an 1890 decision, Indiana lost the case. In an attempt to settle the matter once and for all, C. C. Genung, county surveyor for Vanderburgh County, in Indiana, was commissioned to plat that 3.6 miles of disputed boundary, which was north of Green River Island. The survey was completed in January, 1896.

1896 Survey Ambiguous

Genung's survey was fine as far as it went, according to Wallace, but neither of his terminal points touched the low water mark. This eventually resulted in another squabble in the 1940's when there was a dispute over the location of the Evansville waterworks.

Indiana and Kentucky each appointed two commissioners to do something about the new dispute. They had surveys made which extended the lines surveyed nearly 50 years earlier by Genung. Each state passed a bill containing the identical description of the newly surveyed boundary. This should have ended the matter but, according to Wallace, the description was ambiguous. It did not give a termination point at either end of the boundary line.

The bills passed by the Indiana and Kentucky General Assemblies were approved by Congress and the effect was a state compact, but Wallace is not sure just what the compact is worth considering the ambiguity of the language.

Wallace reiterates that there is no quarrel with the statement that Kentucky's northern boundary is the low water mark of the Ohio River's north bank. He points out that the compact, even if accepted with its unclear wording, sets the boundary as being the low water mark of 1792 rather than 1792. This was after construction of a series of low dams which raised the low water mark.

"Mutual Mistake of Fact"

Wallace believes the validity of the 1943 compact can be questioned on the basis of a "mutual mistake of fact" because in 1943 the low water mark of 1792 was not known. Wallace believes the maps and documents he has uncovered in his research do show the 1792 low water mark.

Even if the 1943 survey is accepted, construction of large dams on the Ohio River since then has pushed the river further into Indiana. How much further Wallace is not sure, but he believes it would be up to 600 feet in some areas.

Interest in the boundary has been awakened again in Indiana in connection with proposed construction of a river port at Mount Vernon. Indiana wants to be sure that such a facility could not be claimed for taxation purposes by Kentucky.

Wallace emphasizes that he has not taken the role of adversary in his research. His interest, he says, is that of the scholar who searches for truth.