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PUBLIC RIGHTS IN INDIANA WATERS*

G. GRAHAM WAITE†

Lawyers use the term "public rights in water" to refer to those water uses the law protects in persons regardless of whether they own shoreline property fronting that portion of the watercourse proposed to be used. The term "public" is a bit misleading. The persons exercising the rights are for the most part private persons, just as are the persons owning shoreline tracts; and the uses within the rights, though important to society, are not more important than some shoreline uses. In some states the rights have been court-created; are said to be held by the state in trust for the public; and may be enforced by the state or private persons.1 Modern Indiana law pertaining to public uses of water, however, is largely statutory. In the nineteenth century relevant decisions of the state's courts invariably dealt with only commercial navigation. Not until the 1940's did demands to make recreational uses of Indiana watercourses become sufficiently insistent to win governmental protection. By that time it was toward the legislature that recreation pressures were principally directed, rather than toward the courts through a test case. This article summarizes the early case law of public rights in Indiana water and then proceeds with the principal task of discussing the possible meaning of recent statutory developments, none of which have been construed by the Indiana Supreme Court.

CASE LAW

By 1900 several attitudes of Indiana's highest court toward public rights in water had become clear. One such attitude is that the basis of these rights is the common law.2 The Indiana courts customarily have

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2. Porter v. Allen, 8 Ind. 1 (1856); Depew v. Wabash & Erie Canal, 5 Ind. 8 (1854); Cox v. State, Blackf. (Ind.) 193, 198 (1833) (alternative ground of decision).
Early in the state's history there was some thought that public rights in water sprang from article 4 of the Northwest Ordinance of 1787 as reenacted by Congress, 1 Stat. 50 (1789). This article provides that "the navigable waters leading into the Mississippi and the Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any States that may be admitted into the confederacy, without any tax, impost, or duty therefor." In the Cox case, supra, this provision was considered to limit the state's jurisdiction over streams so as to prohibit obstructing them physically or levying any tax, impost or duty on navigation
not used the trust doctrine\textsuperscript{8} in developing the case law of public rights in water. The public right is expressed as an easement of passage, superior to the riparians' title to the bed.\textsuperscript{4} The "public" to which the rights extend is limited to the citizens of Indiana.\textsuperscript{6}

Public rights in water are not paramount to every conflicting private or public activity. The Indiana courts have tried to balance the interests of the conflicting users in determining which use to protect and in what degree.\textsuperscript{8} Conflicting uses of land and water authorized by the state are

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3. What is now known as the trust doctrine of public rights in navigable waters stems from the following history as traced by Professor Richard S. Harnsberger of the University of Nebraska Law School. In very early times the King of England was said to own all tidal waters and the soils under them just as a private individual might. There were no public rights. But the king was both a private person and a sovereign. Eventually the law distinguished the king's water rights according to whether they pertained to him as a private person or as a sovereign. Rights held by him as a private individual were called the \textit{jus privatum}; those held as sovereign, the \textit{jus publicum}. The king could do as he pleased with the \textit{jus privatum}. The \textit{jus publicum}, however, was held in trust for the people and could not be transferred to private ownership. At first navigation and its incidents were the only uses within the \textit{jus publicum}, and hence were the only public rights, but at least since the Magna Charta fishing in tidal waters has been included as well. All other rights to use the waters and the submerged beds, such as to extract minerals, were in the \textit{jus privatum}. Although these rights, including legal title to the beds, could be sold or given away by the king or—after 1702—by Parliament, the grants were subject to the \textit{jus publicum}. The public rights could no more be destroyed by the grantee of the private rights than they could by the king himself. The public right of navigation, but not of fishing, eventually extended to nontidal waters. See Harnsberger, The Present and Future Status of Public and Private Rights in Wisconsin's Waters, (unpublished thesis in University of Wisconsin Law School Library 1959) at 524-34.

In the leading United States Supreme Court case on the subject, Martin v. Waddell, 42 U.S. (16 Pet.) 367 (1842), the \textit{jus privatum} and \textit{jus publicum} were lumped together and the government's disability to dispose was extended to the \textit{jus privatum}. The Court assumed that for waters in which public rights existed, every possible use of the soil of the bed was included in the \textit{jus publicum}.

4. Cox v. State, 3 Blackf. (Ind.) 193,198 (1833). The public easement does not apply to Indiana riparians bordering on the Ohio River since the state boundary line is the low water mark along the Indiana shore. Martin v. City of Evansville, 32 Ind. 85 (1869); Gentile v. State, 29 Ind. 409 (1868); Cowden v. Kerr, 6 Blackf. (Ind.) 280 (1842); Stinson v. Butler, 4 Blackf. (Ind.) 285 (1837).


6. Williams v. Beardsley, 2 Ind. 591 (1851) (Bridge partially obstructing navigation not a nuisance if the public benefit from the bridge was greater than the inconvenience
likely to be allowed at the expense of the public rights. Generally the public rights in water do not limit riparian uses of the banks that do not physically obstruct navigation, nor may the public acquire rights to use the shore by custom or prescription. An exception to this is the sailors' right to use the shore in emergencies arising in operation of vessels. Also, shoreline businesses have been denied compensation for profits lost through the mooring of commercial vessels nearby.

Indiana common law public rights to use navigable water include the right of commercial navigation free of artificial obstructions placed by

it caused navigation). Compare Porter v. Allen, 8 Ind. 1 (1856), where the public right of navigation is protected against obstructions placed by private persons in any part of the river in which boats may in fact run, with Commissioners of St. Joseph County v. Pidge, 5 Ind. 13 (1854), where the public right of navigation is protected against obstructions placed by the state only to the extent they are placed in the navigable channel. Nor need the state refrain from obstructing interstate navigable streams upstream from the point where it ceases to be used in commercial navigation. Neaderhouser v. The State, 28 Ind. 257 (1867).

The same theme of balancing various social interests appears in the Indiana definition of obstruction. The mere fact that some physical object is so placed that a certain area of water surface may not be occupied by a vessel is not enough to cause the object to be an obstruction in the legal sense. Rather the object must be such "an impediment to the navigation that boats in passing along the stream could not, by the use of skill and care, avoid being injured. . . ." Terre Haute Drawbridge Co. v. Halliday, 4 Ind. 36, 41 (1852). In this case it was declared to be a jury question as to whether a tree, saw log and flat-boat lodged against a bridge pier and against which another flat-boat foundered were obstructions. A description of water use rights Indiana recognizes by virtue of owning the bank of a watercourse—so-called private rights in water—appears in 32 IND. L. 3. The note cites many Indiana cases and statutes on the subject.

7. See Commissioners of St. Joseph County v. Pidge, 5 Ind. 13 (1854). The county owned a bridge over a new channel created pursuant to state authorization. The county was held not liable for obstructing navigation with the bridge when the river returned to its old channel. See also Depew v. Wabash & Erie Canal, 5 Ind. 8 (1954) where the state authorized a canal and laid out its route so as to cross a stream on which commercial navigation took place (although not by boats making interstate voyages). The crossing was effected by an aqueduct that blocked navigation, but the canal company was held not liable in damages. The result of the Depew case indicates that the public right of navigation does not exist as against the state or its licensees in streams on which no interstate commercial voyages occur, even though the stream is usable for commercial navigation. The reason for this development appears to be the Indiana court's concern for state control of state affairs and a desire to foster development of the state's economy.

8. Martin v. City of Evansville, 32 Ind. 85 (1869). This case denied the right of cities to prohibit construction of buildings on any wharf or shoreline of the Ohio River above the high water mark, saying to do so would be a taking of property requiring compensation, although the city need not pay compensation if it prohibited construction of buildings below low water mark which tended to obstruct navigation. The latent inference in the holding is that the public easement of navigation does not limit the possible uses of riparian land, such as the providing of public access, so long as a physical obstruction to navigation is not created.


11. Sherlock v. Bainbridge, 41 Ind. 35 (1872).
private persons anywhere in the stream where boats may in fact run, and free of permanent artificial obstructions placed by the state in the navigable channel. They also include the right to remove sand from Lake Michigan's bed and probably from stream beds as well. The only recreational use the courts have considered is fishing. The activity occurred on a non-navigable lake and therefore was not a public right, but the inference is that it would have been had it occurred on a navigable watercourse. No public right to fish exists on a lake artificially created from a non-navigable stream.

The public right of navigation has figured in Indiana's efforts to control water pollution. In a criminal prosecution for polluting a stream the defense was that the act was not committed in a public place. The court found the stream was navigable and thus open to the public and the defense was declared unsound.

In another case the public right of navigation was used by an upper riparian dam owner to obtain the removal of a dam maintained by a lower riparian. The down stream dam raised the water level at the foot of the upstream dam and thereby decreased the capability of the upstream dam to generate power. The upper riparian successfully argued that the

14. Lake Sand Co. v. State, 68 Ind. App. 439, 120 N.E. 714 (1918). The court uses the trust doctrine, discussed note 3 supra, in this case, saying the state owns the bed of Lake Michigan in trust for all state citizens and that all such citizens have correlative rights to use the land.
15. State ex rel. Indiana Dept. of Conservation v. Kivett, 288 Ind. 623, 95 N.E.2d 145 (1950). The case does not clearly establish that removing sand from the bed of a navigable stream is part of the public right. A state agency caused a riparian on the White River to be enjoined from removing sand from the river without first obtaining a permit from the state. The court rested its decision on a finding that the White River was navigable for commercial purposes when Indiana became a state, and that the riparian had no right to remove sand from it without a license. The opinion did not cite the Lake Michigan case, Lake Sand Co., note 14 supra, nor did it cite Ind. Ann. Stat. §§ 27-620-26 (Burns 1960), which declares the natural resources, including minerals under public lakes, to be a public right. Nor was anything said of a public right to remove sand. The court did quote from a case saying the state owns the bed in its "sovereign" capacity, State ex rel. Indiana Dept. of Conservation v. Kivett, 228 Ind. 623, 637, 95 N.E.2d 145, 152 (1950). While this language suggests public rights, there is no indication that the court meant that title is part of the jus publicum. See note 3 supra. Rather, the court seems to consider the state to own the beds just as a private individual owns something and hence can do with them as it likes. This makes it seem that the state's requirement of a license is justified simply because the state may do what it pleases with its own property rather than because licensing may insure that one person does not monopolize the public right and that the individual's use confers some benefit in revenue on the nonusing public. Since case and statutory law make the extraction of sand from beds of navigable lakes a public right, it seems desirable that extraction of sand from beds of navigable streams be a public right also.
loss in power generating capacity amounted to special damages allowing him to sue to remove the downstream dam as a public nuisance because it obstructed navigation.\textsuperscript{19}

Although no discussion of the test of navigability appears in the Indiana cases until the \textit{State ex rel. Indiana Dept. of Conservation v. Kivett}\textsuperscript{20} decision in 1950, it is evident from earlier cases that the test applied is the susceptibility of the watercourse to commercial navigation by substantial vessels in 1816 when Indiana became a state.\textsuperscript{21}

\textbf{Statutory Developments}

Indiana statutes before 1920 reveal little statewide policy toward water resources. These early statutes were usually either prohibitions apparently intended to protect waterways as a means of transport,\textsuperscript{22} permissions to local units of government to improve waterways for purposes of transport,\textsuperscript{23} or authorizations permitting drainage, flood protection and fixing of lake levels.\textsuperscript{24} Although these statutes gave incidental protection to public rights through their tendency to maintain the navigability and purity of the water, they did not affect the definition of the waters on which public rights may be exercised, nor did they delineate the activities which are included as being within the public rights.

\textsuperscript{20} 228 Ind. 623, 95 N.E.2d 145 (1950).
\textsuperscript{21} See Neaderhouser v. State, 28 Ind. 257 (1867); John Hilt Lake Ice Co. v. Zahrt, 29 Ind. App. 476, 62 N.E. 509 (1902) (Lake 1 and 1/2 miles long and 1 mile wide, held navigable); Sanders v. De Rose, 207 Ind. 90, 191 N.E. 331 (1934) (Lake non-navigable although boat livery maintained thereon).
\textsuperscript{22} E.g., obstruction or diversion of navigable waters was made a public nuisance, \textit{IND. ANN. STAT.} § 10-2502 (Burns 1956); criminal offenses were established for conduct such as creating stagnant water, \textit{IND. ANN. STAT.} § 10-2504 (Burns 1956); putting dead animals into a watercourse, \textit{IND. ANN. STAT.} § 10-2505 (Burns 1956); obstructing a public canal or injuring it, \textit{IND. ANN. STAT.} § 10-2601 (Burns 1956); and dumping rubbish in any lake or stream, \textit{IND. ANN. STAT.} § 10-2605a (Burns 1956). Other examples are found in \textit{IND. ANN. STAT.} §§ 10-2606-18 (Burns 1956); and \textit{IND. ANN. STAT.} § 10-2620 (Burns 1956).
\textsuperscript{23} E.g., county Boards of Commissioners were empowered to use county money to maintain any canal used for navigation, \textit{IND. ANN. STAT.} §§ 26-1413-14 (Burns 1960); the county commissioners were authorized to change or straighten watercourses and to pay the costs by special assessments, \textit{IND. ANN. STAT.} §§ 26-1401-06 (Burns 1960); a 1905 Act "concerning highways," \textit{IND. ANN. STAT.} §§ 68-101-03 (Burns 1961), authorized the county commissioners to declare a stream navigable and to keep it clear of obstruction by calling out "for two days inhabitants . . . liable to work on the public highways. . . . ."
\textsuperscript{24} \textit{IND. ANN. STAT.} §§ 27-601-06 (Burns 1960) (lake levels); \textit{IND. ANN. STAT.} §§ 27-801-15 (Burns 1960) (drainage) repealing an earlier drainage law (Ind. Acts 1905, ch. 157) but preserving the 1905 lake level law. Under these acts persons desiring improvements in drainage and flood protection instituted \textit{ex parte} proceedings in court leading to the making of the improvements by private initiative. This approach and method was continued in a 1933 act, \textit{IND. ANN. STAT.} §§ 27-101-321 (Burns 1960).
Efforts to decide some issues of water use on a statewide basis have been made\(^2\) since the creation in 1919 of a state Department of Conservation.\(^2\) In 1947 the legislature made its first important declarations of activities which may be included as being within the public rights to use water,\(^2\) and eight years later the legislature seemingly expanded the waters in which public rights obtain.\(^2\) The possible meaning of the latter statute will be discussed first.

A. *Useful Natural Watercourses Declared Public*

In 1955 water in any natural lake or other natural body of water which could be applied to "any useful and beneficial purpose" was declared to be a natural resource and public water of the state.\(^2\) As such it is subject to legislative control and regulation for the public welfare.\(^3\) Is recreational use of water a useful and beneficial purpose? The statute's preamble lists recreational use in a list of increased water uses making the legislation necessary.\(^3\) Factually, the social value of water recreation makes it likely that this recreational use would be deemed beneficial especially because many of the waters affected by the statute are actually devoted to recreational uses.

Specific controls over public water are left to future legislation and administrative action. The effectiveness of the pressure for protection of recreation existing at the time specific controls are promulgated will largely determine the amount of protection that recreational uses ultimately receive. In the meantime, Chapter 301 of the 1947 Acts\(^2\) (discussed *infra*) lends support to treating many, if not all, recreational uses of public fresh water lakes as "beneficial" uses.

\(25\) IND. ANN. STAT. § 68-201 (Burns 1961) (created Indiana Deep Waterways Commission to connect the Great Lakes with the Atlantic Ocean); IND. ANN. STAT. §§ 68-301-05, 401-05 (Burns 1961) (Indiana participated with Illinois in interstate activities relating to water); IND. ANN. STAT. §§ 11-1301-1813 (Burns 1956) (revises fish and game laws); IND. ANN. STAT. § 60-736 (Burns 1961) and IND. ANN. STAT. §§ 27-819, 822-23, 828 (Burns 1960) (authorization of state and local cooperation with federal government on flood control problems).

\(26\) IND. ANN. STAT. §§ 60-704, 729 (Burns 1961).

\(27\) IND. ANN. STAT. §§ 27-620-25, 654-58 (Burns 1960). Of lesser importance are IND. ANN. STAT §§ 27-614-19, 627-28 (Burns 1960). With regard to §§ 27-614-19, see text related to notes 42, 43, 45 and 46 *infra*. As to §§ 27-627-28, see text related to note 49 *infra*.

\(28\) IND. ANN. STAT. §§ 27-1401-08 (Burns 1960).

\(29\) IND. ANN. STAT. § 27-1402 (Burns 1960).

\(30\) *Ibid*. Furthermore, new or increased artificial uses of water are subject to future regulation by the legislature. IND. ANN. STAT. § 27-1405 (Burns 1960).

\(31\) Notes to IND. ANN. STAT. § 27-1401 (Burns 1960) quote the preamble of the statute. In pertinent part it reads, "Whereas, Due to the vastly increased use of water for domestic, industrial, recreational and related purposes. . . ."

The statute under discussion does affect public substantive rights in water in one respect. The section declaring the state's power to control public waters is followed by one subordinating "all" water uses, including, presumably, the public ones, to the riparians' use "for domestic purposes, which shall include, but not be limited to water for household purposes, drinking water for livestock, poultry and domestic animals." This provision is distinctive in its preference of a private use over public uses of water.

The public right of navigation appears to be further subordinated to private development through statutory authorization to riparians to impound water by building dams in the natural stream bed or by diverting the water to a reservoir. However, the impoundment may occur only when the stream flow or lake level exceeds "existing reasonable uses," and any obstruction placed across the stream must include an outlet for releasing water the owner is not entitled to use. Also, the riparian's actions must first be approved by the state's Flood Control and Water Resources Commission. It thus appears that the only respects in which public rights take a back seat are in the supplying of riparians' domestic needs and in the building of impounding structures. Such structures necessarily impede navigation to some extent, but if the structure is a dam, the net effect may be beneficial to navigation via a deepening of the water upstream from the dam.

In some respects the statute seems to contemplate a balancing of the proposed riparian uses against the public and other "existing reasonable uses." If it is decided that a proposed riparian use is more desirable than a public use, the proposed use may be authorized even though it obliterates the public use by declaring the public use to be unreasonable. An interesting provision of the statute gives the right to use additional stream volumes created by release from impoundments to the riparians who built and financed the impoundments, and the provision explicitly states that other riparians have no rights in flowage beyond normal stream flow. Thus, the impounding riparian need not fear that by increasing the volume temporarily he will have incurred an obligation to other riparians or the public to continue the increased volume permanently.

A 1959 amendment to the statute furthers the impression that conflicts in water use rights, public or private, are to be resolved by balancing

33. IND. ANN. STAT. § 27-1403(1) (Burns 1960).
34. IND. ANN. STAT. § 27-1403(2) (Burns 1960). IND. ANN. STAT. § 27-620 (Burns 1960) says that the public holds "vested rights" in fresh water lakes. This has been qualified by the domestic use priority mentioned in the text.
35. IND. ANN. STAT. § 27-1403(2) (Burns 1960).
36. Ibid.
37. IND. ANN. STAT. § 27-1403(3) (Burns 1960).
the utility and social cost of the various uses against one another. The amendment provides that disputes between users of surface water in any watershed may be mediated by the Flood Control and Water Resources Commission at the request of any party to the dispute. The Commission is directed to conduct a public hearing to consider the facts involved, after it has first notified all interested parties of the time and place at which the hearing is to be held. The Commission may survey the water supply in the watershed and try to add to the sources of water for users in the watershed. However, the Commission’s recommendations are not binding on the parties and do not preclude resort to the courts. It is probable that a court desiring to fulfill the spirit of the legislation would resolve disputes between users of surface waters by use of the same balancing technique mentioned above.

B. Protection of Lakes

Public rights to use water have indirectly been enhanced by the legislature through statutes protecting Indiana watercourses from various physical hazards. Drainage ditches may not be dug through a lake, or within 160 rods of it so as to lower its legally established level, if the lake is at least ten acres large. Where the water level of a lake with surface area greater than twenty acres is controlled by a dam or other device, it is unlawful to lower the water level by more than twelve inches below the high water mark established by the dam or other device creating the lake. The statute does not apply, however, to artificial lakes created or used in connection with providing a municipal water supply, or with generating electricity, or with storing water for such purposes nor to Lake Michigan or lakes owned or controlled by the State Conservation Department.

The Conservation Department decides whether a proposed ditch will lower a lake’s level. Upon an affirmative finding, the Department then

38. IND. ANN. STAT. § 27-1406(1), (2), (3) (Burns 1960). Subsection (3) requires persons using ground or surface water to report the amount used when asked to do so by the state flood control commission. Subsection (1) authorizes nonriparians as well as riparians to divert floodwaters for any useful purpose if the diversion will not harm other users of the water or landowners, and if the state flood control and water resources commission approves of the diversion. IND. ANN. STAT. § 27-1407 (Burns 1960) defines floodwaters as water flowing or standing above or outside the banks of the watercourse. The above subsections have little direct affect on public rights in water.

39. IND. ANN. STAT. § 27-601 (Burns 1960), as construed by Holle v. Drudge, 190 Ind. 520, 129 N.E. 229 (1920). IND. ANN. STAT. §§ 27-614-19 (Burns 1960) provide procedures whereby the State Conservation Department is to make sure that devices are installed to protect lake levels from being lowered by drainage ditches.

40. IND. ANN. STAT. § 27-610 (Burns 1960).

41. IND. ANN. STAT. § 27-611 (Burns 1960).
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determines the safeguard to be constructed to prevent the level from dropping. The problem of who has standing to challenge the Department's decision on these questions is not decisively answered. The statute states that "any person . . . who may be adversely affected by" the Department's decision may appeal to the courts. The statute requires the complaint to state the interest of the appealing party "whether he be a person proposing to construct . . . a ditch or drain on his own land or whether he be a petitioner or other party or public officer in a pending drainage proceedings. . . ." This might be construed to mean that only persons in these categories have standing to appeal to the courts. However, another act passed the same year declared the natural resources and natural scenic beauty of Indiana to be a public right and that the public of Indiana has "a vested right in the preservation, protection and enjoyment of all the public fresh water lakes, of Indiana in their present state, and the use of such waters for recreational purposes." The fact that "any person" who is adversely affected thereby is enabled to appeal the Conservation Department's decision, plus the fact that an act of the same year gives the Indiana public a vested right in the preservation of the lakes "in their present state," indicates the reasonable interpretation of the appeal statute to be that an individual sportsman may take such an appeal. However, there has been no judicial construction of either statute to date.

A person does not have to be planning his own ditch or to be a party to a drainage proceeding in order to intervene in a court proceeding that someone else has brought. Thus, it seems that any member of the public may intervene.

Written approval from the Conservation Department is necessary to encroach on the lake level or shoreline of any public lake by excavating or filling or otherwise changing the size or affecting the natural resources or scenic beauty of the lake or by changing the contour of the lake below the shoreline. The Department has authority to sue in the state courts to preserve the lakes and streams. Whether this is authority

43. Ibid.
46. Ind. Ann. Stat. § 27-615 (Burns 1960) requires an intervenor to be "interested in or affected by" the proposed ditch. It would seem this requirement is satisfied since Ind. Ann. Stat. § 27-620 (Burns 1960) gives all the public of Indiana a "vested right" in the preservation and enjoyment of the lakes. Any member of the public is affected by the Conservation Department's decision, whether the individual member is a sportsman or sightseer or not.
to protect aesthetics generally or just the water level is difficult to determine. There have been no actions brought under the statute.

The Conservation Department has authority to have established by legal action the average normal water level of all the state's lakes, including artificial ones, and to build dams or other works necessary to maintain such level. Another statute allows petition by 20 per cent of the owners of land abutting or lying within 440 yards of a lake of at least 10 acres, or by the Department of Conservation or County Board of Commissioners to a Circuit or Superior Court, to fix, change or maintain the lake level. The petitioners are to state the type of work they desire, such as the construction or repair of a dam, and the lake level desired.

The statute does not restrict the type of improvement that may be constructed, except that any improvement must be beneficial to the public good. The provision for apportionment of costs of such projects indicates that projects beneficial to the state as a whole as well as projects of value predominantly to landowners near the lake are within the contemplation of the legislature. If only the landowners petition for the improvement, they alone pay for it, in proportion to the benefit each tract receives from the improvement. If the county or the Indiana Conservation Department joins in the landowners' petition, or if the petition is solely that of the Conservation Department or the county, only one-quarter of the cost is to be borne by the landowners whose tracts are within a quarter mile of the lake. Another quarter is to be borne by the county and one-half by the Conservation Department. At the same time, local owners can defeat the plans of their own clan as well as the plans of outsiders. If 51 per cent of the landowners object to an improvement within ten days of its hearing, the petition will be dismissed. Thus, the statute strives to counter the interest of the nonresident sportsman who desires additional sites for water recreation and improvement of existing ones with the realization that the sites will in part be paid for with public money. Assurance that the local residents will not be cavalierly treated is provided by the veto power of 51 per cent of the local landowners.

C. Public Rights in Lakes


The statute declaring natural resources and scenic beauty to be a public

49. IND. ANN. STAT. § 27-627 (Burns 1960).
50. IND. ANN. STAT. § 27-629 (Burns 1960).
52. IND. ANN. STAT. § 27-636 (Burns 1960).
53. IND. ANN. STAT. § 27-634 (Burns 1960).
right, Chapter 301, 1947 Acts, indicates that recreational activities on lakes and the extraction of minerals from lakes are part of the public right. The public is said to have a "vested" right in preservation and enjoyment of the lakes and in the use of the water for recreation. This sounds like a property right, and the remedies stated in the statute accord with this view. It is probably not, however, a property right as against the state. "Natural resources" are defined to mean "the water, fish, plant life and minerals," and the natural inference would seem to be that the public's right in these resources is to use them. "Natural scenic beauty" is defined to mean "the natural condition as left by nature without man-made additions or alterations."

Does this statute provide a means whereby a member of the public could obtain an injunction abating an eyesore such as a garish billboard or a run-down house? The answer is not clear. Another section of the statute may be interpreted as saying that it does so provide and that damages may be awarded as well. However, the only positive sanction of the statute is directed against encroachment on the water level or shore-line. Hence it may be argued that conduct not affecting these two matters is not within the operation of the statute. The sweeping language in which the public right is declared suggests that the legislature intended a more liberal construction of the statute. In any event, issuance of an injunction would be discretionary with the court, in the equity tradition.

If damages are to be awarded, how are they to be measured? And if it is a public right being vindicated, how are those members of the public to be compensated who do not join in the suit? Perhaps the most effective and theoretically just remedy is to award only special damages to a private litigant, in the amount of those costs he can prove to have incurred himself as a result of the destruction of scenic beauty, and reserve for an action brought by the state the awarding of general damages for the destruction of beauty. At the present, one can only speculate as to such remedies, there having been no cases brought to vindicate the right. Apart from civil remedies, there is a criminal penalty of a fine of $100 to $500 imposed on any violator of the statute for each offense.

a. Public Rights Not Made to Depend on Navigability. Navigability is not the test of the lakes to which the public rights declared by

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56. See discussion in text following note 76 infra.
58. Ibid.
the statute attach. Rather the test is that the lakes "have been used by the public with the acquiescence of all riparian owners," except that the statutory rights do not exist in Lake Michigan or in lakes lying wholly or partially within the corporate limits of cities of the second class in counties of between 400,000 and 650,000 population. In those lakes that are navigable but which do not meet the public use-riparian acquiescence test, it seems only the common law rights obtain. Certainly this is true of streams, since the statute purports only to affect lakes.

Will a court, should the case arise, expand the common law rights to include those conferred by statute? One factor tending to decrease the chances of judicial expansion as to lakes should probably be given little weight. Prior to 1961 the statute defined public lakes more broadly than now. Instead of acquiescence by "all" riparians in a public use, acquiescence by "any" was sufficient. The result, if the amendment be taken literally, is to greatly reduce the number of lakes to which the expansion of public rights afforded by the statute applies. It might be argued from this that the legislature had decided its expansion of public rights had originally applied to too many lakes. Implicit in such a decision is a further decision that the expanded public rights should not exist on lakes falling within the original definition but outside the amended one. From this it would follow that the courts, in order to carry out the legislative policy, should not expand the common law public rights existing on those lakes.

Before accepting this line of argument, however, the courts should consider the impact of the amendment on the substantive rights the statute gives the public on those lakes to which the statute applies. By requiring all riparians to acquiesce in public use to make a lake public the amendment narrows the expansion of public rights affected by the statute down to this: acquiescence by all riparians to one type of public use—fishing, for example—authorizes for an indefinite time other types of public use—swimming and waterskiing, for instance—and the number of non-riparians that may rightfully be using the lake at one time is unlimited. In other respects the statute comes close to allowing the public to use the lakes that all the riparians are willing to allow them to use. In addition, of course, they still have the judge made rights in navigable waters. Such a construction of the definition of public fresh water lakes is at odds with the spirit of the language declaring the natural resources and natural scenic beauty of Indiana a public right and declaring a vested

right in the public to use public lakes for recreation. It is unlikely that the legislature intended to reduce the bold promise of this language to a mockery by cute definition of public lakes, especially in light of the rising demand for public use of water.

It is difficult to determine just what the legislature did intend the amendment to accomplish. This writer's guess is that the legislature realized that the original wording of the statute could be construed to cause a lake to be public if one riparian allowed a non-riparian to use the lake one time, and that the amendment was passed simply to avoid such an extreme result. Perhaps the legislature will clarify the situation by further amendment. In the meantime, the inconsistencies of the statute seem so great that the Indiana courts should be slow in drawing any conclusions from it bearing on the wisdom of judicial expansion of public rights on streams or on lakes outside the statute. Of greater significance for a court deciding whether to expand public rights in water is the finding in 1956 of the Indiana Water Resources Study Committee that "recreational uses of streams and lakes, or reservoirs—whether natural or man-made—should be broadened greatly where practicable."

2. Chapter 181: Another 1947 Statute Declaring Broad Public Rights. Perhaps the strongest statutory language bearing on public enjoyment of Indiana lakes appears in Chapter 181, 1947 Acts:

The state of Indiana is hereby vested with full power and control of all of the public fresh water lakes in the state of Indiana both meandered and unmeandered and the state of Indiana shall hold and control all of said lakes in trust for the use of all of its citizens for fishing, boating, swimming, the storage of water to maintain water levels, and for any purposes for which said lakes are ordinarily used and adapted, and no person owning lands bordering any such lakes shall have the exclusive right to the use of waters of any such lake or any part thereof.

The act makes it unlawful to extend the shoreline of public fresh water lakes by filling, except as permitted by the Conservation Department, and prevents title from vesting in the riparian owner by accretion if the water is artificially caused to recede by drainage or by extending

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64. IND. ANN. STAT. § 27-620 (Burns 1960). Perhaps "all" should be construed to mean "any." See discussion in text infra of meaning of comparable language in statutes cited note 72 infra.


the shore line out into the waters by filling with soil or any other sub-
stance. The act defines "water line or shore line" to be the line formed
on the bank or shore by the water surface at the legally established average
normal level. If no such level has been established, then the average
level determined by existing water level records is used. If no records are
available, then the waterline is the line formed by the action of the water
marking the soil of the bed with a character and vegetation distinct from
that of the banks. "Public fresh water lake" is defined as any lake
which has been used by any or all riparian owners, except Lake Michigan
and lakes lying wholly or partially within the corporate limits of cities
of the second class in counties of between 400,000 and 650,000 popula-
tion. The statute does not apply to streams.

a. Interpretational and Constitutional Problems. Several features
of the above statute deserve comment. First, as in Chapter 301, the
natural resource-scenic beauty statute, the navigability concept does not
figure in determining the lakes in which the public rights attach. But the
test for identifying public lakes is not the same as that created in the
natural resource-scenic beauty statute. In the statute here considered
acquiescence of "any or all" riparians to public use makes the lake public,
whereas in the other statute "all" riparians must acquiesce to the public
use. Originally the definitions were the same in this respect and both
spoke of acquiescence by "any" riparian in public use. Why introduce
divergence between them later? Both definitions were changed in the
same session of the legislature and the portion of the new definitions
excepting Lake Michigan and lakes within certain cities is identical in
each statute. These circumstances suggest a legislative intent that the
new definitions be identical. This suggestion is strengthened by the fact
that the original definition of public lakes in chapter 181 differed from
that in chapter 301 in that the chapter 181 definition excepted no lakes
from its purview whereas the chapter 301 definition did make such an
exception. These factors seem to indicate an attempt to make the two
statutes identical in their definition of public fresh water lakes. There-
fore, the difference of one statute requiring acquiescence by "all"
riparians while the other requires acquiescence by "any or all" must be
inadvertent. But which requirement is the one the legislature intended
to apply?

70. Ibid.
73. Compare the two acts cited note 72 supra.
Before suggesting an answer to the question just posed, a second question should be raised. How much use by the public, if such use is appropriately acquiesced in, is enough to make a lake public? Apparently any use by the public is sufficient. Does this mean that one swim, sail, fishing trip or the like by one member of the public is enough? No court decision has construed the statute. The use would have to be known of by the person or persons whose acquiescence was critical, since acquiescence is a conscious decision not to protest rather than a lack of knowledge of anything about which to protest.  

Although it seems extreme to shift the status of a lake from private to public on the basis of one use by one member of the public acquiesced in by one riparian, it is not clear how much more use the legislature intended to require. Use for a period equal to that necessary to acquire a prescriptive right probably is excessive. The statute does not appear to create property rights in the public but speaks in terms of police power. Its title reads: "An act declaring and determining the right and authority of the state of Indiana to control . . . the water in all public fresh water lakes. . . ."

The key to these two problems in statutory interpretation may lie in a constitutional problem the statutes pose. Assuming that the statutes are police regulations, they are unconstitutional if they arbitrarily classify the lakes as public or private and thereby deny lake shore owners the equal protection of the laws required by the United States Constitution. The basis of classification is the acquiescence of a given lake’s riparians—or perhaps the acquiescence of only one of their number—in public use of the lake. This test seems to bear only a remote relationship to the social need for more watercourses for public recreation, which must be the ultimate justification for the Indiana statutes creating more public waters. Of course the fact that a nonriparian used a lake is in itself some evidence of existing demand for public use of the lake. This suggests the statutes could be sustained on constitutional grounds if the public use in which a riparian must acquiesce is construed to be “substantial” public use. This would promote rational classification of the lakes, since for each lake made public there would be a demonstrated demand for its public use. But what reasonable purpose is served by requiring riparian acquiescence before making a lake public? It might be argued that if all

74. See WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2d ed., at 23.
75. Some indication of this is found in the statute's language which vests “full power and control” of the affected lakes, and not their “title,” in the state. The state is to “hold and control” all of the lakes “in trust for the use of all its citizens . . . for any purposes for which said lakes are ordinarily used and adapted.” IND. ANN. STAT. § 27-654 (Burns 1960).
77. U.S. CONST. amend XIV, § 1.
lakes for which there is significant demand for public use are not made public the statute still is unconstitutional. This argument ignores that a lake's capacity to support use beyond that of its riparians and their guests also is pertinent to deciding that it should be thrown open to public use. Such matters as a lake's size, shape and depth bear on its suitability for waterskiing; the characteristic of its bottom being mud or sand affects its suitability for fishing and swimming; the purity of its water is relevant to its suitability for all recreational uses. Requiring riparian acquiescence in public use gives some rough protection against over-use of a lake on the theory that if there already are too many fishermen or other sportsmen using a lake, no riparian will acquiesce in public use. If a riparian does acquiesce then it must not be generally agreed that the lake is overused, and in such case the legislature may reasonably deem it a public lake.

The constitutional requirement that the statutes set up a reasonable classification of lakes strongly suggests that the question of how much public use of a lake will make the lake public should be answered "substantial use." But this requirement would be met equally well by requiring acquiescence of "all" riparians rather than of "any or all." Examination of the statutes themselves shows the acquiescence required is that of "any" riparian. "Any or all," being in the alternative, appears to create no change from the earlier "any" and therefore should be construed simply to mean "any." "All," since it drastically restricts the application of the statute, is inconsistent with the strong language in Chapter 181. "Any" avoids frustrating the apparent legislative intent to enlarge public rights and also is consistent with a constitutional interpretation of the statute.78

Public use sufficient to make the lake public results in the public having a right to use the lake for any purpose for which it is ordinarily used and adopted, rather than just a right to use it in the fashion of the initial use (as would be the case if only strict prescriptive property rights could be acquired). Since the right of public use stems from the police power, the public has no vested right as against the state. Hence a member of the public cannot object if the right is withdrawn or altered unless unusual circumstances of reliance are present. This situation is similar to the right to rely on the continuation of existing zoning regulations. But is not this position inconsistent with the statute previously discussed which is suggested as giving the public a vested right? It would seem not. The latter statute can either be narrowly construed as applying only to encroachments on the shoreline or, and this seems the better view, the statute can be construed as giving the public a vested right against

78. The classification rationale described in the text seemingly meets the situation
private encroachments on public rights, but not against public encroachments. The rights are to be enforced by the Conservation Department through suits for injunction.\footnote{Ind. Ann. Stat. § 27-657 (Burns 1960).}

The fact that the theory of police power statutes is regulation reduces the chance that the courts would find in the designation of a lake as public a taking of riparians' property requiring compensation. The basic task of the lawyer attempting to get a court to uphold statutes like those under discussion, which impinge on private rights without compensating the owners thereof, is to convince the court that the facts giving rise to the regulation make compensation inappropriate. Lawyers often, because of the police power language of a statute, adopt a "no compensation" frame of mind when approaching such a task.

The courts may be more likely to require compensation of riparians situated on nonnavigable lakes than of those located on navigable ones, since this involves creation of public rights where none previously existed rather than mere expansion of present rights. The feeling might be that the substantial harm to the riparian is in allowing the public to use the lake at all, not in expanding the permitted public uses. Resting the statutory right on the police power promotes flexible administration of public rights since the state has no public trust responsibility. Police power theory offers another advantage in that it avoids questions of the state's power to create a property interest in the public in lakes not navigable by the federal test and hence never within state ownership.\footnote{See Waite, Pleasure Boating in a Federal Union, 10 Buff. L. Rev. 427, 430-38 (1961).}

At the same time it gives the public the same rights of use that ownership gives. A major drawback of creating rights by legislative act rather than judicial decision, whether the statute is a police regulation or confers a property right, is the relative ease with which the statute may be changed and the rights withdrawn, perhaps inadvertently. This is illustrated by the amendments to chapters 181 and 301 already discussed.

b. Zoning Lakes for Public Use. The preamble of this statute deserves attention also. It states there are privately owned fractional tracts of land bordering on, and parts of which are submerged by, certain lakes and rivers; that certain owners of such lakeshore land claim the fee under the water to the line of the government survey; that throughout the history of the state its people have used the water above such submerged lands for boating, fishing, swimming, and for all of the usual and ordinary purposes "and in the same manner and as fully as other parts of such bodies of water have been used" without objection

where all riparians to a lake except one emphatically do not acquiesce in the public use.
from persons "who have owned lands contiguous to such submerged portions of land, subject to the prior rights of public user of the lake waters thereon. . . ." 81

This language is puzzling. Until one gets to the part about prior rights of public user, it seems that the legislature is acknowledging that certain lakes were never susceptible to commercial navigation in the traditional sense of that term and therefore title to the beds passed to the shoreline patentees from the United States 82 and, since susceptibility to commercial navigation is also the test Indiana uses to determine whether common-law public rights attach to a watercourse, 83 the title of these shoreline owners has thus never been subject to any public rights of use. At the same time, the legislature seems to be saying, the public has always used the water in various ways just as though public rights did attach. The reference to using the waters as fully "as other parts" of the lakes in question inconsistently suggests that portions of the lakes are commercially navigable and that common-law public rights, other than commercial navigation, attach only to those portions of the watercourses. 84 In view of the history of public use with riparian acquiescence of non-navigable lakes and of nonnavigable portions of navigable lakes, the act is passed to give the public a right to make such use, and this is done without disturbing the riparian's title to the bed. The act is in the nature of a zoning of the lakes to public use.

But what of the statement that the ownership of the lakeshore is "subject to the prior rights of public user of the lake waters thereon"? There can be prior rights of public user only if the lakes are navigable in the "public rights" sense, which in Indiana means "navigability in the bed-title" sense. Hence the beds, if the lakes are navigable, would be owned by the state, not by riparians. 85 It may be that the state acquired the shoreland at some time in the past and resold it with the intention of conveying title to the bed. There is no reason why this couldn't be done, although there is no evidence it ever happened. Even in a state following the trust concept of public rights in water, state sale of a bed would be possible if ownership of the bed were not confused with the sovereign power to control the use of the bed and of the water as well. 86

83. See note 21 supra.
84. There is no Indiana case to the contrary, although where commercial navigation was involved the Indiana Supreme Court decided that a private individual riparian must refrain from obstructing all parts of the river where boats could run in periods of high water, not just the part where they usually sailed. Porter v. Allen, 8 Ind. 1 (1856).
85. See note 80 supra. Also see note 21 supra and related text.
86. See note 3 supra.
If the common-law public rights are taken to include only commercial navigation, the language of the preamble is explained. It prefaces an act that will expand the public right to include additional uses without disturbing private ownership of the bed. The preamble refers to the conditions it describes as existing on “certain” lakes, thus implying that on others they do not. This is consistent with the possibility that they exist only where the state once owned the shore and sold it intending to convey the fee to the lake bed as well.

D. Miscellaneous Protections

Since 1905 the commissioners of any county have been empowered to declare any watercourse in their county navigable on petition of twenty-four freeholders. Declaring a stream navigable under this statute does not protect it from obstruction by the state itself, but it does protect the stream from blocking by private individuals and also places the watercourse under the care of the supervisor of the road district through which it passes. This may result in some rudimentary maintenance work on the stream, such as the removal of obstructions to navigation, as the supervisor is empowered to call out the district’s inhabitants for two days’ work on the stream each year. It is not known how often this statute is invoked, but the frequency is presumably slight. It may, however, afford a more practicable remedy than injunction for channel obstruction in cases where navigation by pleasure boat is restricted to a narrow, tortuous channel.

The Board of Town Trustees is empowered to “survey, determine, regulate and care for” the shores and wharves of any stream within the corporate limits. Would an ordinance requiring shoreland owners to allow the public access to the water be a regulation of the shore within the meaning of the act? There is no decision on this point. If the individuals exercising the right of access so created were liable to pay for the actual damage they might cause to riparian land, the due process risk of such an ordinance would seemingly be greatly lessened.

Regardless of whether Indiana communities have the means to provide public access to a watercourse without paying for it, they can always

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87. This would be consistent with the English view as to nontidal waters. See note 6 supra.
89. Depew v. Wabash & Erie Canal, 5 Ind. 8 (1854). See textual discussion following note 11 supra.
90. IND. ANN. STAT. § 68-104 (Burns 1961) renders a private obstructor liable to the same penalties incurred by obstructors of public highways. One such penalty is a $10-$100 fine. IND. ANN. STAT. § 36-2903 (Burns 1949).
91. IND. ANN. STAT. § 68-103 (Burns 1961).
92. IND. ANN. STAT. § 48-301(17) (Burns 1950).
purchase such access under their authority to buy land for a public park.  

**May Administration of the Public Trust in Public Waters Be Delegated to Local Government?**

In Wisconsin decisions about use of public waters that are matters of statewide concern must be made by the state government itself, and a delegation of such decisions to local government is an abdication of the public trust and is void. The Indiana court has not decided this question. Some of the language found in Chapter 181 may lead the Indiana courts to the Wisconsin conclusion. The statute vests the trust of control of the lakes in the "state" and it gives the "state" the "full power and control" of the public lakes. The courts might decide this use of the word "state" indicates that all policy decisions affecting public lakes must be made at the state level. However, the approach the Indiana legislature has taken to flood plain regulation casts doubt on such an interpretation of Chapter 181. Construction on flood plains and construction of flood control works, activities closely related to public rights in water since they affect the quality and beauty of the watercourses on which the right may be exercised, are controlled at the state level but enjoy significant participation by local government. Construction of flood control projects is expected to be done largely by local government using local money subject only to general supervision by the state Flood Control and Water Resources Commission. If the legislature

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93. Ibid.
95. IND. ANN. STAT. § 27-654 (Burns 1960).
96. The Flood Control Acts, IND. ANN. STAT. §§ 27-1101-34 (Burns 1960), as amended, IND. ANN. STAT. §§ 27-1115, 17, 19, 20, 23a (Burns Supp. 1961) contemplate solution of a problem of state-wide concern [flood damage and the diminishing of the state’s water resources—IND. ANN. STAT. § 27-1102 (Burns 1960)] through cooperative effort by federal, state and local government. The state contribution is the administration, by the Flood Control and Water Resources Commission, of a permit system applicable to all new construction activity in the floodways and to the maintenance of existing artificial conditions as well. IND. ANN. STAT. § 27-1117 (Burns Supp. 1961). “Floodway” includes both the stream channel and the adjoining flood plain reasonably required to carry the flood flow efficiently. IND. ANN. STAT. § 27-1103(2) (Burns 1960). The Flood Control Commission in reviewing permit applications can impose such restrictions on the permit as it deems necessary to carry out the purpose of the statute and in this way can control both the design and the location of the structure or excavation. IND. ANN. STAT. § 27-1117 (Burns Supp. 1961). This power seems to allow zoning of the floodways at the state level. Since it applies to the maintenance of structures as well as their creation, it affords a means of eliminating beauty-destroying structures on the upland which also adversely affect or unduly restrict the capacity of the floodway.

The state also (through an additional permit system) coordinates the design, construction and operation of flood control works so as to affect the best possible flood control throughout the state. IND. ANN. STAT. § 27-1119 (Burns Supp. 1961). Although the state has the power to build flood control structures, IND. ANN. STAT. § 27-1115
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considers local participation in a program of statewide concern essential, it is hard to believe that it intended absolutely to bar local participation in a related matter affecting the entire state. An additional statute or judicial decision is needed to determine clearly the extent to which local government may participate in shaping the substantive rights of public use of lakes.

SUMMARY AND CRITICISM

Public rights to use water in Indiana are of statutory origin, except for the rights of navigation and fishing. The statutory rights apply only to lakes and do not apply to streams at all. Thus, even though streams that are useful have been declared to be public water, only the narrow rights of public use created by the Indiana Supreme Court exist on streams.

The meaning of the Indiana statutes is clouded by their obscure language. In addition, the statutes are of doubtful constitutionality. Since no compensation to riparians situated on formerly private lakes is provided for, the use rights given to nonriparians by making the lakes public must be construed to flow from a police regulation. The regulation in effect zones the lakes to public use rather than creating a property right in nonriparians. The statutory language which vests only "power and control" of the lakes rather than giving full title to the state supports this conclusion. However, granting this interpretation, a difficult question remains under the equal protection clause of the federal Constitution.

Even if it is assumed that the statutes which appear to enlarge public rights to use Indiana lakes are constitutional, the remaining situation is not a particularly happy one for nonriparians desiring to use Indiana waters. The writer knows of no administrative implementation of the public rights declared in the statutes. A more serious fact to sportsmen is simply that the enlarged rights are statutory in origin. As such they are susceptible to relatively easy amendment—amendments which may inadvertently introduce changes in the law beyond that contemplated by the legislature. Court made law, on the other hand, with the doctrine of stare decisis behind it tends to resist changes, particularly changes urged by pressure groups whose legitimacy is not derived from some

(Burns Supp. 1961), it does not do so. Instead it loans money to local governments through the Flood Control Revolving Fund, IND. ANN. STAT. §§ 27-1124-34 (Burns 1960), so that they may build the structures. Under this technique local government assumes a key role in flood protection for the state. Although state agencies control the projects in the sense of determining what projects to support, IND. ANN. STAT. §27-1128 (Burns 1960), the local people determine what projects are proposed in the first place, IND. ANN. STAT. § 27-1127 (Burns 1960), and ultimately pay for them with local money, IND. ANN. STAT. § 27-1132 (Burns 1960).
basic social force demanding legal recognition and protection. The ancient origin and continuous existence of public rights to use water for navigation and fishing, and the modern increase in leisure and in inclination toward water recreation, suggest that in contemporary society the orderly use, by riparian and nonriparian alike, of all water courses suitable for recreation is itself a goal toward which important social forces drive. Persons interested in achieving broad rights of public use of water in Indiana may yet find it desirable or necessary to present a test case to its courts.

In thinking of such a case attorneys should remember that the Indiana Supreme Court has fashioned the court law of water rights along lines it deemed best for the state's development as a whole and has remained relatively uninfluenced by the English heritage of seemingly paramount public over private rights in water. In Indiana, perhaps more than elsewhere, the protagonists in a test case of public rights in water may be forced to rely on pragmatic proof of the utility to society of their respective positions. The result could be a more detailed exposition than has yet been made of the costs and benefits, and of their distribution through a community, of broad public rights to use water.

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97. See note 3 supra.