

**IF YOU ARE FACING  
A DRAINAGE LAW  
ISSUE CONTACT AN  
ATTORNEY  
IMMEDIATELY -  
deadlines under the  
Drainage Code are  
often short, failure  
to act timely may  
waive your rights.**

#### KRLog links

[KRLog homepage](#)  
[Search BigEastern](#)  
[History and Prehistory](#)  
[Historic Maps](#)  
[Vegetation/Land Maps](#)  
[Recreation](#)  
[Background](#)  
[Photos](#)  
[Op-Ed and Archive](#)  
[Older Press Links](#)

#### also on bigEastern.com

[EDGE OF THE PRAIRIE](#)  
[BALLAD OF NED LUDD](#)  
[TAD ROBINSON](#)  
[BIGDUMBHOOSIER](#)  
[MP3s](#)  
[CONTACT](#)  
[MORE](#)

An independent web  
site edited by [Marty](#)  
[Lucas](#).

#### further reading

[download the full  
text of the Indiana  
Drainage Code](#) -  
hosted by Access

## Abundance breeds contempt - perspectives on Indiana drainage law and policy

Based on a presentation to the [Save the Dunes](#)  
symposium 'Everything you ever wanted to know about  
drainage, but were afraid to ask', Nappanee, Indiana  
November 16, 2002.

The presentation was accompanied by a series of slides -  
the contents of the slides are reproduced in the gray  
boxes; with commentary following.

Caution! This presentation is intended to provide a brief  
introduction to the legal background of Indiana drainage  
issues to help foster an intelligent debate regarding the  
need for reform of statutes and practice. Many of the the  
statutory sections cited are excerpts. The drainage law is  
complex and includes many traps for the unwary. This  
information is *not legal advice*.

#### slide 1

### ABUNDANCE BREEDS CONTEMPT

**Our legal system is a framework for resolving  
conflicts -**

**In arid regions, like the western U.S., water  
resources are highly valued and therefore the  
legal framework is primarily concerned with  
allocation of these scarce resources.**

**However, Indiana is blessed with an abundance  
of water resources; that abundance has fostered  
development of a legal system with an emphasis**

Water is a critical resource, and one that is in short supply in many regions of the world. In areas where water is scarce, it is highly valued and therefore most water conflicts relate to people competing for access to water.

Indiana has an abundance of water, from the shores of Lake Michigan to the Ohio River. With myriads of natural lakes and wetlands, Northern Indiana has so much water that, historically at least, most water management efforts were aimed at getting rid of water.

The law is a dispute resolution system, and most disputes are rooted in economics. In the case of the drainage movement in Indiana, one can view the Swampland Act of 1850 as the big starting point. Congress looked to the west and saw a lot of land that was wet, swampy, or often flooded. In 1850 economic development meant farming. Swampy or frequently flooded lands weren't amenable to agriculture, and often posed a barrier to transportation and law enforcement. Congress gave these lands to the state with the condition that they be drained and plowed.

So drainage law started to help foster economic development - there were people (hunters, backwoodsmen, early conservationists and no doubt a few bandits too) - that didn't want drainage. It's not an accident that the drainage law put these people at the disadvantage. Like the American Indians before them, they were in the way of *progress*.

Drainage is achieved by speeding the flow of water downstream; the basic ways to do this are by (a) shortening the distance that the water must travel by straightening its course, by (b) removing any objects that might interfere with its flow and by (c) cutting a steeper gradient.

## **RIPARIAN RIGHTS**

**At common law, freeholders whose property included perennial surface waters-- a stream, or the shore of a lake or river-- acquired thereby certain rights to use the natural resources associated with the body of water. These rights are collectively known as riparian rights. Yates v. Milwaukee, 77 U.S. 497; 19 L. Ed. 984; 10 Wall. 497 (1870).**

### **Examples of riparian rights-**

**To construct piers and wharves - Yates v. Milwaukee, 77 U.S. 497; 19 L. Ed. 984; 10 Wall. 497 (1870)**

**To withdraw reasonable quantities of water - Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233, 46 N.E. 591 (1897)**

**To employ the energy of flowing water for a mill or hydroelectric facility - Elkhart v. Christiana Hydraulics, Inc., 223 Ind. 242; 59 N.E.2d 353; (1945)**

**To take action against an upstream polluter - Penn American Plate Glass Co. v. Schwinn, 177 Ind. 645, 98 N.E. 715 (1912)**

Before the drainage movement, property owners with river-front or lake-front property had certain property rights in those waters. These rights are ancient in origin, coming from the English common law. Riparian rights are associated with the riparian property. These riparian rights are what make lakefront property worth more than other, similar property. It's not surprising that riparian rights are ancient in origin. Water is obviously useful for drinking and washing, and in an earlier era water bodies were the primary routes for travel and commerce, and moving waters powered mills, the main engines of industrial activity before the fossil fuel era.

Before there was any pollution regulation a riparian owner

downstream could take legal action against a polluter upstream - in recent times we've come to think of these kinds of rights as being largely possessed by government regulators.

But the advent of more governmental regulatory activity doesn't mean that riparian property owners have lost their rights to use, enjoy and protect, the unique advantages of owning land on a lake, river or creek.

### slide 3

## COMPOSITION OF COUNTY DRAINAGE BOARD

### IC § 6-9-27-5 (generally relevant portions)

**Sec. 5. (a) Except in a county having a consolidated city, the drainage board consists of either:**

**(1) the county executive; or**

**(2) three (3) or five (5) persons, at least one (1) of whom must be a member of the executive, appointed by the executive; at the option of the executive. Appointees under subdivision (2) must be resident freeholders of the county who are knowledgeable in drainage matters. Freeholders appointed to the board serve for terms of three (3) years, with their initial appointments made so as to provide for staggering of terms on an annual basis. In addition, the county surveyor serves on the board as an ex officio, nonvoting member.**

Most of the ditch construction and river channelization projects in Northern Indiana were undertaken in the late 19th and early 20th century. At that time the projects were overseen by the judiciary branch of government through petitions filed in county circuit courts. Even today, it's common parlance to refer to a regulated drain as a 'court ditch'.

However, primary authority for drainage issues was turned over to the administrative branch with the passage of the Drainage Code in the 1960s. It's an important change because circuit court judges are generalists - they hear criminal cases, divorces, contract cases, really the whole panoply of legal issues. The Drainage Board, by contrast, was composed of a group of politicians or political appointees with a focus entirely on drainage issues. Judges may have been happy to rid their dockets of ditch cases, but the resulting boards often lacked any formal qualifications and were dominated by agricultural interests.

#### slide 4

### **DRAINAGE BOARD JURISDICTION**

#### **IC § 36-9-27-15, 16**

**Sec. 15. Each regulated drain in a county is under the jurisdiction of the board and subject to this chapter, except as otherwise provided by this chapter.**

**(b)(1) If land in two (2) counties may be affected, the chairman of the board of each county shall appoint two (2) of the members of his board, other than the county surveyor, to serve on the joint board. In addition, a fifth member shall be appointed by the four (4) members of the joint board. The fifth member must reside in a county that is not affected by the drainage problem.**

**(b)(2) If land in more than two (2) counties may be affected, the chairman of the board of each county shall appoint one (1) of the members of his board, other than the county surveyor, to serve on the joint board. If, as a result of the appointments, the board has an even number of members, the members of the joint board shall appoint an additional member to the joint board. The additional member must reside in a county that is not affected by the**

## drainage problem.

Drainage boards are basically county-based, but often watersheds affect multiple counties. This section of the code explains how multiple county drainage boards are set up - it's interesting to note that, in the cases of watersheds in two counties, a member from a third county not in the watershed is added. The apparent purpose is to serve as a tie-breaker in disputes between the counties; it can be viewed as legislative recognition that a county would likely favor its own residents with better treatment (e.g. a lower ditch tax) as compared with the other county.

### slide 5

## COUNTY SURVEYOR: POWERS AND DUTIES

### IC § 36-9-27-29

**The county surveyor is the technical authority on the construction, reconstruction, and maintenance of all regulated drains or proposed regulated drains in the county, and he shall:**

- (1) investigate, evaluate, and survey all regulated drains or proposed regulated drains, and prepare all reports, plans, profiles, and specifications necessary or incident to any proposed construction, reconstruction, or maintenance of regulated drains;**
- (2) prepare and make public standards of design, construction, and maintenance that will apply to all regulated drains and their appurtenances, taking into consideration in preparing these standards the published recommendations made by Purdue University, the American Society of Agricultural Engineers, the American Society of Civil Engineers, the United States Department of Agriculture, the department of natural resources, the United States Army Corps of Engineers, and other**

**reliable sources of information;**

**(3) supervise all construction, reconstruction, and maintenance work performed under this chapter;**

**(4) catalog and maintain a record of all surveying notes, plans, profiles, and specifications of all regulated drains in the county, and of all mutual and private drains when available; and**

**(5) perform the functions set forth in sections 67 through 69 of this chapter concerning all urban drains under his jurisdiction. In preparing plans under subdivision (1), the surveyor shall, when feasible, include the seeding of the banks of all open drains. The surveyor shall, when feasible, use United States Geological Survey data on plans and profiles prepared under subdivision (1).**

The County Surveyor is an elected official, and is therefore independent from the Drainage Board, even though he acts as an *ex officio* (non-voting) member of the DB. While some boards may be heard to refer to the CS as a technical *advisor*, this is incorrect. The CS has specific, independent authority and cannot be removed, replaced or ordered to make any particular finding by the Drainage Board. Said simply, the County Surveyor doesn't work *for* the Drainage Board, he works *with* the Drainage Board.

Review of the Drainage Code will reveal instances where a CS can effectively veto Drainage Board decisions. Therefore, it's important to understand the CS as a potential check and balance built into the Drainage Code system.

Despite the fact that the CS is, by statute, the technical authority the office is purely political. No technical, academic or professional credentials are required. The Drainage Code authorizes a non-tech CS to hire the

technical support he needs, and therefore non-tech CS's often argue that their job is essentially an administrative and policy position. Whether this state of the law is desirable or not depends a lot on the person in the office. Therefore, given the current Indiana Drainage Code the most effective single thing that can be done at the local level to help find a better balance in drainage and riparian management is this: **Elect a good County Surveyor!**

slide 6

## THE DITCH EASEMENT: RIGHT-OF-ENTRY

(a) The county surveyor, the board, or an authorized representative has the right of entry over and upon land lying within seventy-five (75) feet of any regulated drain. The seventy-five (75) foot limit shall be measured at right angles to:

- (1) the center line of any tiled drain; and
  - (2) the top edge of each bank of an open drain;
- as determined by the surveyor.

(b) Spoil bank spreading resulting from the construction, reconstruction, or maintenance of an open drain may extend beyond the seventy-five (75) foot right-of-way if:

- (1) the county surveyor finds that the extension is necessary; and
- (2) the extension has been provided for in the engineer's report on the construction, reconstruction, or maintenance.

(c) All persons exercising the right given by this section shall, to the extent possible, use due care to avoid damage to crops, fences, buildings, and other structures outside of the right-of-way, and to crops and approved structures inside the right-of-way. The county surveyor shall give oral or written notice of the

entry on the land to the property owner of record, and in the case of a municipality, to the executive of that municipality. The notice must state the purpose for the entry.

(d) The owners of land over which the right-of-way runs may use the land in any manner consistent with this chapter and the proper operation of the drain. Permanent structures may not be placed on any right-of-way without the written consent of the board. Temporary structures may be placed upon or over the right-of-way without the written consent of the board, but shall be removed immediately by the owner when so ordered by the board or by the county surveyor. Crops grown on a right-of-way are at the risk of the owner, and, if necessary in the reconstruction or maintenance of the drain, may be damaged without liability on the part of the surveyor, the board, or their representatives. Trees, shrubs, and woody vegetation may not be planted in the right-of-way without the written consent of the board, and trees and shrubs may be removed by the surveyor if necessary to the proper operation or maintenance of the drain.

[remaining portions omitted]

This statute, creating a ditch easement in favor of county ditch regulatory authorities, is a core provision of the Indiana Drainage Code. Basically, this is an easement a lot like familiar easements of public way, used for roads, or a bit like a utility easement. There are a few aspects of it that are worthy of note.

First of all, it's not a public easement, *per se*. In other words, the general public can't enter a ditch easement and stroll about, let alone conduct any drainage activities. It's called a 'right-of-entry', and it's possessed only by the CS, the DB and their agents, and even then only after notice.

Secondly, and perhaps most remarkably, there's no compensation given to the owner of the property on which the easement is located (the *servient tenement*, to use easement terminology). Indiana drainage law developed through use of a 'police action' theory, which stated that swamplands were bad places from which emanated 'miasmatic vapors', which harbored criminals, and generally brought despair and ruin upon the public. These propositions appear quaint today, but Indiana case law continues to support the "policy inherent in the Indiana Drainage Code, that of favoring drainage of wet lands when the public welfare, health or convenience is served thereby." *Johnson v. Kosciusko Co. Drainage Bd.*, 594 N.E.2d 798 (Ind. Ct. App. 1992), citing *Zigler v. Menges*, 121 Ind. 99, 22 N.E. 782 (1889).

In any event, the finding of public benefit in wetlands drainage, while debatable, is a well-recognized basis for a governmental activity, similar to building an Interstate through a forest. We might not agree with the decision, but there's little doubt that condemnation based purchases from unwilling sellers are legal. What's remarkable (but remains the law in Indiana today) is how an easement for the public benefit can be taken *without compensation* to the owner, without violating the 5th Amendment 'takings clause'. See, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 73 L.Ed2d 868, 102 S.Ct. 3164 (1982).

Environmentalists and regulators alike often focus on destruction or damage to wetlands as the primary harm caused by drainage activities. Ask a homeowner with a creek listed as a 'regulated drain' for their biggest complaint and you'll probably hear a horror story about bulldozers, chainsaws and (former) trees. No aspect of drainage construction is more controversial than the total clearing of the 75' drainage easement, and no passage of the drainage code more clearly sets out its pervasively anti-land ethic than the one prohibiting trees and woody vegetation in the easement. How the 'police action' theory supports clearing of riparian corridors is an unsolved mystery.

Today, most progressive farmers and more than a few drainage boards support installation of '**filter strips**' along regulated drains. Typically, these are permanent grassy strips on the ditch bank that help keep a field from eroding into the ditch. Where a ditch is flanked by tilled fields, filter strips are a big improvement over plowing right up the ditch bank. In prairie country a strip of native prairie grasses and forbs can be an excellent addition to the landscape. However, where a regulated drain bisects a wooded area, a filter strip is little more than a lawn - it's neither aesthetically pleasing nor ecologically correct. In a prairie landscape, a native grass filter strip could be maintained by burning, but in the forest chemical spraying will almost certainly be adopted.

slide 7

## **ACTIONS: RECONSTRUCTION AND MAINTENANCE**

### **IC § 36-9-27-34**

**Most Drainage Board sponsored actions on established regulated drains fall into two categories:**

- Reconstruction**
- Maintenance**

**Reconstruction projects are extensive projects that can substantially alter the original specifications of a particular regulated drain - the drain may be deepened, widened, lengthened, dams and control structures may be added.**

**Maintenance projects are less extensive and may be periodic in nature - the statute mentions 'cleaning', 'spraying', 'removing obstructions' and 'making minor repairs' - maintenance actions should not alter the drain's specifications.**

slide 8

## FUNDING: THE DITCH TAX

IC §§ 36-9-27-39, 112

Funding for Drainage Board actions comes from a tax imposed on landowners found by the board to be 'benefited'. Ditch taxes are billed like property taxes.

For reconstruction projects, the tax is a lump sum cost based on the project expenses. For maintenance the tax is an annual assessment.

Determination of the drainage 'benefits' accruing to a particular parcel of land are often subjective and speculative -

The practices in many counties appear primarily designed to make tax collection easier for the drainage board.

But are these practices legal?

slide 9

## THE 'PENNIES FROM HEAVEN' THEORY

Case - Eel River watershed taxed a \$3/ac. flat rate for a reconstruction project. Result - held improper -

"proper considerations include: indirect benefits received by all owners of land within the watershed; increased value of land affected; the right of owners of high ground to natural drainage; and, the burden caused by artificial drainage of high ground." *Whitley, Noble and Allen Joint Drainage Bd. v. Tschantz*, (Ind. App. 1984) 461 N.E.2d 1146.

What constitutes a minimally acceptable system for determining benefits, and hence, the ditch

## tax rate?

### slide 10

#### A USER'S TAX?

IC §§ 36-9-27-112, 51 (relevant portions)

Under the Drainage Code the Ditch Tax is a user's tax:

(a) In determining benefits to land under sections 39, 50, and 62 [IC 36-9-27-39, IC 36-9-27-50, and IC 36-9-27-62] of this chapter, the board may consider:

- (1) The watershed affected by the drain to be constructed, reconstructed, or maintained;
- (2) The number of acres in each tract;
- (3) The total volume of water draining into or through the drain to be constructed, reconstructed, or maintained, and the amount of water contributed by each land owner;
- (4) The land use;
- (5) The increased value accruing to each tract of land from the construction, reconstruction, or maintenance;
- (6) Whether the various tracts are adjacent, upland, upstream, or downstream in relation to the main trunk of the drain;
- (7) Elimination or reduction of damage from floods;
- (8) The soil type; and
- (9) Any other factors affecting the construction, reconstruction, or maintenance.

See also: IC § 36-9-27-51, where drainage need increased due to 'changes in land use' - party causing additional burdens should be required to pay more.

For a discussion of the issues raised in slides 7 through 10 read [Are You Benefitted?](#), a previous KRLog OpEd by

Marty Lucas.

slide 11

## TOP TEN REASONS FOR CHANGE

10. Ditch taxes are essentially 'off budget' and are seldom reported to the public.
9. Non-farm property owners have inadequate access to the process, especially in early stages.
8. Inadequate analysis of environmental consequences of drainage board actions, lack of statutory support for environmental values in the Drainage Code.
7. Lack of professionalism, analytical skills, by some Drainage Board members; also sometimes by County Surveyors; hostility to environmental considerations, state and federal regulators.
6. Lax regulation, particularly by DNR-Div/ Water (unless project impacts state property).
5. 'Benefits' to many landowners are illusory, can't be quantified.
4. Systemic advantages to project proponents - inconsistent with a 'fiscally conservative' approach to government and environmentally destructive.
3. Practice of pro forma finding of 'no damages'.
2. Inadequate cost/benefit analysis leads to pork-barrel projects, potentially to graft as well.
1. Policy of pushing water downstream as fast as possible is a product of 19th century push for economic development - an irresponsible policy in 21st century.

The problems of Indiana's drainage code are a lot like the

problems of Indiana in general - anachronistic, obsolete institutional structures - lack of imagination - lack of skills and professionalism both in government and in the press - 'good-ole-boyism'. The tendency of Hoosiers to keep 'doin' what we always done' has led the state into a downward spiral of brain drain, eroding quality of life, and lost opportunities.

## slide 12

### **A BETTER WAY**

**A better system would incorporate these changes:**

- (1) a framework for meaningful participation in stream management decisions by all stakeholders**
- (2) ensure adoption of 'best practices' for projects to lessen deleterious environmental impacts**
- (3) full disclosure of the costs of drainage projects and infrastructure on an annual basis, for counties and watersheds, including identification of payment recipients**
- (4) apply ditch tax to properties where an actual benefit accrues, especially where development or land management practices create need for artificial drainage**
- (5) grant ditch tax credits to properties where practices (e.g. forestry, wetland preservation, upland storage) reduce the need for artificial drainage**
- (6) requires minimal competency in knowledge of hydrology, soils, agricultural drainage, environmental issues, etc. associated with stream management as prerequisite to voting membership in management board.**

The drainage movement of the late 19th and early 20th century was fueled by a drive for economic development, and to a large extent it achieved its goals. Drainage brought hundreds of thousands of acres of land into agricultural production and removed impediments to transportation. But that was a long time ago.

We're now at the beginning of the 21st century and Northern Indiana needs a new push to economic development. With the globalization of the economy, overproduction of row crops, low commodity prices, and an ever decreasing percentage of the population employed in agriculture it's no longer realistic to expect agriculture to provide fuel for progress in Indiana. The state's dismal economic conditions ought to be sufficient to convince even the most conservative mind that 'doin' what we always done' just isn't working.

Ironically, what Indiana needs to do to get economic development happening in the 21st century is quite the opposite of what it needed in 1890. Today, we need to restore our landscape, our communities, and our human resources so that Indiana can again be a place that people *want to live* and where employers *want to locate*, and not just to get the cheapest, most unskilled workers.

Indiana's abundant water resources offer a major opportunity to help make Indiana once again an attractive place to live, work and invest. In Northern Indiana, especially, the lakes and rivers are by far the most beguiling places for recreational activities - saving *and restoring* them will not only make Northern Indiana a better place to live for those of us already here, it will help attract quality people to come here to live too.

---