

GAME AND FISH COMMISSIONER:

Fences may be built in
navigable streams, When.

May 2, 1934

5-14

Honorable W. C. Euford
Game and Fish Commissioner
Jefferson City
Missouri



Dear Sir:

Receipt of your letter dated April 5, 1934 is acknowledged. The letter is as follows:

"Enclosed you will find letter which I have today received from Tom S. Warnack of Protem, Missouri, which is self-explanatory.

Will you please let me have an opinion in this matter at your convenience?"

The letter referred to in and attached to your letter, in part, states and inquires as follows:

"A number of my friends from throughout the State who have been down in the White River Country fishing have made complaints to me and seriously object to the fencing below Powersite dam on White river near Forsyth a distance of one fourth mile below the dam which prohibits fishing in one of the most popular sections of the White river region. The dam and power plant is owned and operated by the Empire District Electric Company a subsidiary of Cities Service and by the fencing of this section of the river immediately below the dam is greatly damaging the tourist business and I would like

May 2, 1934

to have a ruling from your department or the Attorney General's office if the Company can legally fence this section of the river and prohibit fishing therein.

I will appreciate very much a ruling in this matter and also please advise me if it will be necessary for me to get a ruling from the Federal Government as no doubt you are aware that White river is a navigable stream.

You realize Mr. Buford that sportsmen are not anxious to fish in the run way immediately at the base of the dam but they do desire to fish a hundred or two feet below the dam and there is no way in which they can get near this good fishing spot."

(a) Navigability of White River.

A navigable river is defined in 27 R. C. L. pg.1303, Section 213, as follows:

"The test of navigability of a river, as stated by the supreme court of the United States, is that those rivers are navigable in law when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

It is immaterial if a stream be not used for commercial purposes, the question is whether it can be so used. Nor does it matter that there may be natural obstructions in a river. The test is whether the natural state of the river is such that it may afford a channel for commerce. If so, the river is navigable in fact, although its navigation

may be accomplished with difficulty by reason of natural barriers such as rapids and sandbars.

We assume that White River is a navigable river within the meaning of the definition above set down but we are not expressing any opinion on the fact.

(b) Fishing Rights.

In reference to the rights of the public generally to fish in navigable streams it is stated in 26 C. J. pg.602, Section 17, that:

"Fishing implies a reasonable use of the waters and shore line of navigable streams, and as a general rule all the members of the public have a common and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters, except in so far as he has acquired such right by grant or prescription. This rule applies notwithstanding the title to the bed of such a stream is in the riparian owner, and notwithstanding his ownership of the abutting upland carries with it the right of access to deep water. It has been held that the right of fishing is incident to the right of navigation."

(c) Riparian Rights.

It is the law of Missouri that the owner of land abutting on a navigable river owns to the line fixed by the low water mark of the river.

Randolph v. Moberly Hunting and Fishing Club 15 S. W. (2nd) pg. 834.

Low water mark is the line, on either side of the river banks, to which the water in the river bed reaches at the usual and ordinary low stages of water in the river bed.

The letter of Mr. Warnack does not state who built the fences complained of. If the fences were built by an

May 2, 1934

abutting landowner, and by reason of his rights as such landowner, then such landowner would only have a right to build his fences to the line of the low water mark of the river, if the building of such fences would interfere with the rights of other adjoining landowner or with the rights of the public generally to use the waters of such navigable streams.

(d) Prescription, Grant or other vested right.

There is a rule of law that a right to interfere with the rights of the public generally in the use of a navigable river may be acquired by prescription or use or by grant from the Legislature or other competent authority or by a decree of a court having jurisdiction of the subject matter. We do not know whether Power Site dam was built or any property rights thereabouts acquired by reason of a court proceeding or not and express no opinion thereon.

CONCLUSION

In the absence of rights acquired by prescription, grant or decree of a court of competent jurisdiction and if the fences built are between the lines that mark the low water mark on either side of White River, then, in our opinion, such fences constitute, under the facts stated in your letter, an unlawful obstruction to the use of White River and such obstructions may be caused to be removed by a proper proceeding brought for that purpose.

Very truly yours,

GILBERT LAMB
Assistant Attorney General.

APPROVED:

ROY McKITTRICK
Attorney General.

GL:LC