

FISH AND GAME:

Commercial fishing in the Osage River at points formed by the Lake of the Ozarks.

June 30, 1938

7-1
FILED
57

Mr. G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

This is in reply to yours of June 23 requesting an official opinion from this department based upon the following letter:

"The Bagnell Dam has backed the water from the Osage River into the Big and Little Gravois Creeks, and the Big and Little Buffalo Creeks in Morgan County, Mo, large distances from the original mouth where these streams did empty into the Osage river.

I want an opinion as to whether these original non-navigable fresh water streams are part of the Osage River from their original mouths to the 660 contour line; that is the place where these creeks have been flooded with the back water, forming the Lake of the Ozarks. This 660 contour varies, and there has been a drop to as high as 22 feet below the 660 foot contour line; so that the back water fluctuates in these streams to a great extent.

By virtue of section 8273 of the 1929 statutes of Missouri, commercial fishermen with hoop nets and trammel nets of

a 2 inch mesh has invaded these streams from the mouths of these streams on up. They catch rough fish for the market. Their trammel nets often reach nearly across these fresh water creeks. These fishermen always in so far as we can learn, return to the water all game fish caught in these nets. Right now the Little Buffalo creek is infested with the nets and hoop nets. These commercial fishermen contend that these arms of the Lake of the Ozarks are part of the Osage river, and is the Osage river, and they can use these nets by virtue of section 8273. These parties contend that these creeks now are navigable, and are considered a part of the Osage river by the reason of the ruling of the War Department and the Bureau of Navigation of the Federal Government; that the Federal government has assumed jurisdiction of the creeks as being a part of the Osage river. I am not vouching for the truth of these statements.

I have quite a few complaints from residents around Stover, Mo., against the commercial fishermen. These complaints state that this illegal fishing with these nets has ruined the fishing for game fish in the Little Buffalo Creek. If these creeks are not parts of the Osage river, then it would seem that the use of these nets for commercial fishing would be illegal. These fish are not caught for their own consumption or table use."

Your request particularly goes to the question of the rights of the public to fish upon that part of the Osage River which backed up into the various creeks entering said river when the Lake of the Ozarks was formed. Under Section 41 at page 28 of Title 33 of the United States Code Annotated entitled "Navigation and Navigable Waters", we

find that the navigable part of the Osage River is set out as follows:

"The Osage River in the State of Missouri above the point where the south line of sections 15 and 16 in township 40 north, of range 22 west, of the fifth principal meridian, and in the county of Benton, State of Missouri, crosses said river, is declared not to be a navigable stream, and shall be so treated by the Secretary of War and by all other authorities."

Section 8273, R.S. Mo. 1929 provides as follows:

"The use of seines, hoop nets and trammel nets, is hereby permitted, in the Mississippi, Missouri and Osage rivers, during the months of January, February, March, June, July, August, September, October, November and December of each year, with seines and nets, the mesh of which shall not be less than two inches square; * * *"

From this section the above named fishing articles may be used in the Osage River during the months stated therein.

In our research upon this matter we find that the fishing privileges, whatever they may be, extend to the general public and do not distinguish commercial fishermen from any other parties who desire to fish and, therefore, this opinion will apply to the public in general who desire to fish.

The rights of the general public to fish in navigable waters are set out in 26 Corpus Juris, page 602, Sections 17 and 18 which are as follows:

"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. The right of fishing on the high seas, without the territorial limits of any state, is a right common to all mankind, and cannot be granted or restricted by any particular nation.

It is generally held that, in the absence of a special legislative grant, the right of fishing in large fresh water lakes and ponds is a public right; and under some statutes and colonial ordinances the right to take fish from a great pond of more than a specified area is a public right which every inhabitant who can obtain access to the pond without trespass may exercise so long as he does not interfere with the reasonable exercise by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority. But the right of fishing in such ponds may be appropriated by the legislature or by local governments, such as towns, acting under its authority; and under some statutes such a pond may be leased to private individuals for the purpose of fish culture, the lessees having the exclusive right of fishing there-

in. An owner of land abutting on one of such lakes or ponds has no greater rights than others to fish in front of his land, except to the extent that he is given greater rights by statute, or acquires them by grant or prescription.

The right of fishing in the 'Great Lakes' and in their contiguous bays is a public right just as much as if those waters were subject to the ebb and flow of the tide; and the public rights of fishing are not limited to the particular portions thereof which are navigable."

As stated in your letter the 660 contour line is the place to which the various creeks have been flooded on account of the back water forming the Lake of the Ozarks and on the question of whether or not that portion of the lake formed by such back water is navigable, we find no Missouri authority on this point but in the case of Mendota Club v. Anderson et al., 78 N. W. 185, l.c. 190, the Supreme Court of Wisconsin in a case in which a similar question was involved, said:

"* * * That dam was a permanent structure, designed to be such, and has so remained for nearly half a century. There is no claim that it was an unlawful structure. Although an artificial structure, which considerably increased the depth, the extent, and breadth of the waters on the premises in question, yet the public had the right to navigate such waters after they were so increased in volume, the same as though they had always remained in that condition. Whisler v. Wilkinson, 22 Wis. 546; Volk v. Eldred, 23 Wis. 410; Weatherby v. Meiklejohn, 56 Wis. 73, 13 N. W. 697; Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, and cases cited by Mr. Justice Pinney on page 110, 96 Wis., and page 147, 70 N. W. Certainly, persons

navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam. The question as to whether a riparian owner may rightfully fill in or build out to navigable water, suggested by counsel, is not here involved.* * * * *

In 45 Corpus Juris, page 445 on the question of to what water the public rights extend, we find the rule stated as follows:

"The right of navigation extends over the entire surface of the water, notwithstanding its extent has been increased through a raising of its level by artificial means. It is not confined to the main channel, but extends to the water between high and low water marks, subject to legitimate uses of the land thereunder by the owner thereof; and also extends to a new navigable channel formed by the stream, and to a stream as improved by straightening and deepening. So where the shore line is moved back, the water let in is as much public water as is any other part of the water of the river.* * * * *

From your request it appears that it is the general public who is complaining about this fishing and the rights of riparian owners are not in question, therefore, we will not touch that point in this opinion.

And in the case of Village of Pewaukee v. Savoy et al., 79 N. W. 436 Supreme Court of Wisconsin held:

"If a person artificially raise the level of the waters of a navigable

Mr. G. Logan Marr

-7-

June 30, 1938

lake so as to flood his own lands, the public rights in the lake will be correspondingly extended so long as such artificial condition exists."

CONCLUSION

From the foregoing authorities it is the opinion of this department that that part of the Osage River which, on account of the forming of the Lake of the Ozarks, has backed up into the streams which entered into said river to the 660 contour line is navigable and is considered a part of the Osage River so far as the general public is concerned and all of the fishing rights in connection therewith.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB DA