

WATER COURSE:  
IRRIGATION:

A riparian owner of land abutting on a natural or artificial water course may take water therefrom for purposes of irrigation, and in such quantity as will not unnaturally, sensibly or materially affect the flow of the stream.



April 30, 1954

Honorable Wesley McMurry  
Representative  
Scotland County,  
Rutledge, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"I am directing this letter to you in regard to water rights in the Middle Fabius River, in Scotland County.

"This is a dug canal running through Scotland and adjoining Knox Counties, and I request this information regarding irrigation projects. A constituent has requested information regarding the right to procure water throughout the season from this stream.

"I should like to have your ruling on this, as several persons are contemplating putting in irrigation systems, and will appreciate it if you will advise me on the matter."

While you do not so state, we assume that the persons who contemplate taking water from the Middle Fabius River for irrigation purposes are riparian owners, which is to say, persons who own land abutting upon one, or perhaps upon both, sides of this river.

Certainly a person not a riparian owner would not have any right to usage for this purpose in those jurisdictions where the riparian doctrine prevails.

We shall not here enter into any course of reasoning in an attempt to show that the riparian doctrine does prevail in Missouri. Our courts have always held that the riparian doctrine did prevail in Missouri, and we likewise so hold. We will further note that the riparian doctrine is applicable to both navigable and non-navigable streams. This doctrine is pronounced in the case of Greisinger v. Klinhardt, 9 S.W.(2d) 978, l.c.980. This citation will

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be adduced subsequently in another connection.

We also note that riparian rights attach to artificial as well as to natural water courses. In the case of Greisinger v. Klinhardt, supra, at l.c. 981, the court stated:

"In Brill v. Railroad, 161 Mo. App. 472, 144 S.W. 174, Judge Ellison of the Kansas City Court of Appeals said (loc. cit. 475 of 161 Mo. App. (144 S.W. 175)), quoting from Farnham:

'If the artificial channel is substituted for a natural one, or is created under such circumstances as indicated that it is to be permanent and to be a water course the same as though it was created by nature, riparian rights may attach to it.'

"In Ranney v. Railroad, 137 Mo. App. 537, loc. cit. 548, 549, 119 S.W. 484, 488, the St. Louis Court of Appeals, opinion by Judge Goode, held that prescriptive rights might be acquired in an artificial water course, as well as in a natural one, provided the artificial water course was intended to be permanent."

Our question now is whether persons owning land which abuts upon one or both sides of a navigable or non-navigable natural or artificial water course can take water from such water course for irrigation purposes, and if so how much.

A general statement of the law on this matter is found in C. J. Vol. 67, p. 1287, Section 850 et seq., which reads:

"A. Right to Use of Water for Irrigation Generally.- 1. Riparian Owner. - a. In General. In jurisdictions wherein the doctrine of riparian rights obtains every riparian owner on a stream has a limited right to use the water to irrigate his riparian lands. The rights of different riparian owners are coequal in this respect and there is no superiority growing out of prior riparian ownership by one.

"c. Quantity. A riparian owner is not entitled to use the entire volume of the stream to irrigate his lands. Also, he is not entitled to use for irrigation such quantities of water as will deprive lower owners of a sufficient supply for their natural wants or domestic needs or such quantities

as will destroy or materially impair the rights of lower proprietors to use their due proportion of water for the irrigation of their riparian lands. His use of water for irrigation must be reasonable and what is reasonable is ordinarily a question of fact depending on the circumstances of the particular case, although there are some things which are clearly and obviously unreasonable, such as a needless waste of water to the injury of other owners. Reasonableness of use is not affected by the mode of diversion. The quantity of water to which a riparian owner is entitled to use for irrigation is necessarily indefinite, uncertain, and subject to fluctuations; it depends on, and varies with, the volume of water in the stream, seasons and climatic conditions, and the needs of other riparian proprietors, as well as his own needs; and in determining such needs it is necessary to consider the area of irrigable land, and the character of the soil, owned by each riparian proprietor. Where a riparian owner or his grantor acquired title to the land from the government subsequent to the adoption by congress of the Desert Land Act and the statute is applicable to the land, he is entitled, as against a subsequent appropriator, to water for irrigation only to the extent to which he is a prior appropriator."

We are unable to find a single Missouri case which deals with the taking of water from a stream for the purpose of irrigation. There are numerous Missouri cases which hold that one owning land adjacent to a stream, which is to say a riparian owner, may not arrest the flow of the stream, may not divert or obstruct it. We believe that the general principle of Missouri law in regard to the taking of water from a stream is stated in the case of Greisinger v. Klinhardt, 9 S.W. (2d) 978. At l.c. 980, the court stated:

"Considerable argument is offered by the defendants to show that Stout's creek was not a navigable stream, with the apparent inference that therefore no riparian rights inure to owners of the land adjacent the artificial lake made by damming that stream. Riparian rights are not confined to navigable waters. 1 Farnham, 278; 2 Farnham, p. 1565. The right to the flow of a natural nonnavigable stream, in its natural way, applies to upper and lower owners of land across which the stream flows. That may apply with equal force to a stream diverted to an artificial channel. Where the owner of a farm dug a ditch diverting a spring from its natural course so as to cause it to flow over another part of his farm and make a pond, and divided the dif-

ferent portions in severalty, he created dominant and servient tenements as to this water flow, as fully as it existed at his death, and the devisee acquiring the spring had a right to keep open the ditch so as to maintain the status quo. Schuler v. Weise, 9 Mo. App. 585."

It will be noted that a riparian owner is entitled on the basis of the above opinion, to the flow of a stream, "in its natural way", which would seem to mean that no other riparian owner could take from a stream sufficient water to "unnaturally" affect its flow. The above case was cited with approval in the more recent case of Mueller v. Klinhart, 167 S.W.(2d) 670.

Also in the case of McIntosh v. Rankin, 134 Mo. 340, at l.c. 345, the court stated:

"It appears from the petition that the plaintiffs are the owners of a grist mill on a running stream. As such they are entitled to the uninterrupted flow of its waters in their natural channel and the use of its power for their mill, if available for that purpose without injury to others, without express statutory power, and if deprived of that use by the unlawful acts of the defendant set out in the petition a right of action accrued to them for damages for such wrong."

On this point we direct attention to C. J. Vol 67, p. 686, Section 12, through Section 17, which reads:

"Right to Natural Flow a. Lower Riparian Owner. In the absence of any modification of relative rights by contract, grant, license, appropriation, or prescription, and subject to the paramount sovereign authority of the government, at common law every riparian proprietor is entitled to the natural flow of the water of a running stream through or along his land, in its accustomed channel, undiminished in quantity and unimpaired in quality, except as the accustomed flow may be changed by the act of God, and except as may be occasioned by the reasonable use of the stream by other like proprietors. The governing maxim is that water runs, and ought to run as it has been accustomed to run. This rule does not imply any ownership or property right to the flowing water itself, although it has been said that the waters of a stream are the private property of the owners of the land bordering on the stream, but is merely a right to have it continue in its accustomed channel and volume and to make a beneficial use of it while passing over the land,

to such reasonable extent as will not impair its usefulness to other riparian proprietors. This right to the natural flow is not an easement, nor an appurtenance, but is inseparably annexed to the soil and is part and parcel of the land itself, so that, even though severable from the land, when so severed, the right no longer is a riparian right. Such right is a valuable, vested right so that the owner cannot be deprived thereof except by due process of law and on compensation made. The right is not limited to a body of water which flows in the stream at the period of greater scarcity, but the riparian owner is entitled to the ordinary and usual flow of the stream, including accretions from snows. A riparian owner may not complain of artificial means of supplying the water so long as he secures the same quantity and quality which were furnished by the natural flow of the stream.

"b. Upper Riparian Owner. As against lower riparian owners, upper riparian owners are entitled to have the water flow from their lands to the extent it would naturally flow, subject to reasonable usage by them, unless such right has been curtailed by grant or adverse possession. Such right is an easement.

"6. Right to Use Water. - a. In General. Subject to any paramount right to the use of the water existing under the general law in some other person, a riparian owner has the right to make any use of the water, beneficial to himself, on the riparian land, which his situation makes possible, so long as he does not inflict any substantial or material injury on those below him, and he may facilitate his use of it by any appropriate means; but all the riparian proprietors have an equal or common right to use the water, and each must exercise his rights in a reasonable manner and to a reasonable extent, so as not to interfere unnecessarily with the corresponding rights of others, and water diverted but not consumed by a riparian owner must be returned to the stream before it passes his land. This right is one annexed and incident to the land, being a real or corporeal hereditament, in the nature of an easement. This right to the use of the water does not arise from the fact that the water is flowing, and that any part thereof used is immediately replaced by water from the current above, but arises out of the ownership of the bank, although it exists independently of any claim of ownership of the water,

and from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. It exists independently of use or appropriation. And exclusive rights to the flow of the stream cannot be acquired by mere priority of use. The relative amount of watershed owned by adjoining riparian proprietors does not affect their individual rights to a proper use of the stream. The use must be made only on the parcel to which the riparian rights attach. In the case of riparian owners on opposite sides of a stream forming the boundary, their respective rights to use the water do not result from the fact that the boundary is the center of the stream, but arise by mere operation of law as an incident to the ownership of the bank, and hence the formation of the bed of the stream, its varying depth, and the consequent course and direction of the current are wholly immaterial circumstances. It has been said that any injury to a lower riparian owner incidental to the reasonable use of the stream by a higher riparian owner gives no right of redress, and that a riparian owner who is not injured by the use cannot interfere with it.

"b. Reasonableness of Use. A riparian owner's rights are not measured by the necessities of his own business, but by the rule that his use of the water must be reasonable when considered with reference to the needs or rights of other riparian proprietors on the stream, and any malicious or wanton use or abuse of his water privileges by a riparian owner is unreasonable and actionable. There is no fixed rule of law for determining what will constitute a reasonable use, but each case depends on its own particular facts, and the reasonableness of a particular use is generally a question of fact for the jury, although the use of the water may be so plainly excessive as to be unreasonable as a matter of law. In determining the reasonableness of a particular use it is proper to consider the character and size of the stream, its location, the nature and condition of the improvements thereon, the uses to which it is subservient, the state of civilization, climatic conditions, the

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custom and usage of the people in the vicinity and elsewhere in regard to the management of business, the hours of labor, and the use of the water of such streams, the nature of the banks, the volume of water, its fall and velocity, the subject matter of the use, its object and extent, the necessity for it, and the previous usage.

"c. Use for Particular Purpose - (1) Natural Wants. Grounded on actual necessity, so long as his use of the water is reasonable in manner and extent, a riparian proprietor is entitled to take from the stream so much water as may be required for his natural wants, or for domestic purposes, such as washing, drinking, cooking, and other household uses, or for watering his animals, regardless of the effect on other riparian owners lower down the stream as diminishing their supply, and even though thereby all the water be consumed. This right is not dependent on whether the dwellers occupy homes or hospitals, or are sheltered by tents, or live in the open, and the same rule has been held applicable to a modified extent, to municipal and other waterworks having the rights of riparian proprietors.

"(2) Artificial Wants. Water may also be used for certain artificial wants, such as irrigation, mining, mechanical, or manufacturing purposes, the development of power for use or sale, the maintenance of a canal, the floating of logs or rafts, or fishing, provided it does not sensibly or materially diminish the quantity."

#### CONCLUSION

It is the opinion of this department that a riparian owner of land abutting on a natural or artificial water course may take water therefrom for purposes of irrigation, in such quantity as will not unnaturally, sensibly, or materially affect the flow of the stream.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

HPW/ld

JOHN M. DALTON  
Attorney General