

WATERS:  
STATE:  
STATE PARK  
BOARD:

Authority to construct fences across artificial lake covering state-owned land.



January 17, 1957

Honorable Richard J. DeCoster  
Representative, 69th General Assembly  
Capitol Building  
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion, which request reads:

"The Missouri State Park Board has under consideration the acceptance of a tract of land located in Lewis County and now owned by the State Highway Department for development into a State Park. This tract contains some eighty to one hundred acres water area. These lakes were formed as a result of the excavation of gravel and sand deposits in this area. A portion of one of the lakes, about four or five acres belongs to a private individual. Negotiations for acquiring this private property have been unsuccessful so far.

"In the event that they are not able, or do not deem it feasible, to take title to this private water area, the Park Board has under consideration the possibility of building a fence along the 'property line' between the portion of water now owned by the state and the portion privately owned.

"This lake is filled primarily by table water, there being very little run-off into it. It is located in what was perfectly level farm land. The particular lake in question is horseshoe-shaped, some two miles in length and has an average depth of around fifteen to twenty feet.

Honorable Richard J. DeCoster

"Your opinion is respectfully requested as to whether or not the State Park Board, if it undertook the development of a State Park here, could, after accepting title from the Highway Department, legally build a fence separating the privately owned water area from the part owned by the State."

This body of water or so-called lake is in the nature of an artificial lake, it is not caused from overflow water of any stream or river and neither does it have any direct outlet to any such body of water. It was caused by the removal of gravel and sand deposits from an almost level tract of farm land, thereby leaving large openings in said land which were primarily filled by so-called table water.

It is our understanding that the State Highway Commission presently holds title to most of the land covered by this body of water. However, one individual does own possibly some four or five acres of a portion of said water. Furthermore, no easement or agreement of any kind has been heretofore executed by the respective owners thereof, as to the use of said water. It is quite possible that the individual owner of a small portion of land underlying said water has in the past used said water for certain recreational purposes. The boundary of said land underlying said body of water owned by the state is described by metes and bounds and can definitely be located.

Under such facts and circumstances we can see no reason why the state, either the Missouri Highway Commission or the Missouri State Park Board, if it ultimately becomes the owner of said land, cannot construct a fence on its side of the property line or a division fence if the parties can agree thereto.

The state should at least have the same right to construct fences as an individual if for no other reason than the protection of its property. Chapter -272, MoRS 1949, authorizes the construction of fences.

This request does not involve navigable and nonnavigable rivers, commerce, etc., therefore, all of the many decisions referring to same are not pertinent here. Neither can said individual owner raise the question of adverse possession, prescription, etc., against the state, as under Section 516.090, MoRS 1949, such limitations do not apply against any land belonging to the State of Missouri. Said section reads:

"Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable

Honorable Richard J. DeCoster

use, or to any lands belonging to this state."

Volume 93, C.J.S., Section 163, page 893, in part, reads:

"No such right it has been held, can be acquired against a public right in a stream or other water, nor can it be acquired as against the United States or a state, \* \* \* \* \*"

See *Bowzer v. State Highway Commission*, 170 S.W. 2d. 399, l.c. 403, and *Hecker v. Bleish*, 3 S.W. 2d. 1008.

The construction of a fence will in no manner diminish or increase the water supply covering this individual's land. Furthermore, both the state and individual owner will still have the normal use of water over their respective lands. A fence will only prevent trespass on and over water flowing over their respective lands.

It was held in *Smoulter et al. v. Boyd*, 58 Atl. Rep. 145, l.c. 145, 146 and 147, that such a fence could be erected across the surface of a lake, in so holding the court said:

"\* \* \* \* \*In 1895, Mr. Boyd built a boom of heavy logs fastened together at the ends by iron links, and thereon erected a barbed wire fence across the surface of the lake. This boom begins at the shore near the eastern corner of Mrs. Wormser's land and follows the line between her land and Mr. Boyd's land in a northerly course to the opposite shore, thereby, whilst not practically interfering with the flow of water, effectually and permanently excluding plaintiffs and all others from crossing to or from the eastern part of the lake.' \* \* \* \* \*"

\* \* \* \* \*

"It is contended by the plaintiffs, however, that, even if Mrs. Wormser's title be limited by the metes and bounds set forth in her deed, the fact that she owns a small portion of the bed of the lake gives them the right to use the waters of the entire lake for boating purposes. But with this contention we do not agree. The ownership in fee of the soil covered by the waters of Lilly Lake out side of Mrs. Wormser's lines being in the defendant, we think he has the right to control that part of the waters of the lake above his land to the extent, at least, of prohibiting the use of the

Honorable Richard J. DeCoster

waters by Mrs. Wormser or her grantees for boating purposes. His grant of the land in the bed of the lake gave him title ad coelum et ad inferos, and hence the waters on his land were subject to his use and enjoyment. There were no rights of a riparian owner which made those waters subject to an easement in favor of the plaintiffs while they covered the defendant's land. The grant to the plaintiffs of a part of the bed of the lake, as observed above, is clearly and distinctly defined by their deed, and does not extend to the other part of the bed of the lake owned in fee by the defendant. When, therefore they entered on the waters covering the defendant's land with their boats for pleasure and recreation, they became trespassers. This logically results from the character of the title of the parties to the bed of the lake vested in them by their respective conveyances. Each of the parties owns his land in fee, and included in that ownership is the right to the use of the water while it is on the land. Any use of it for boating purposes by another is an infringement of the rights of property vested in the owner of the land. It follows from what has been said that the defendant had the right to erect the boom on his premises for the purpose of preventing the plaintiffs from boating or sailing on the waters covering his land, and that the trial judge was in error in requiring it to be removed."

#### CONCLUSION

Therefore, it is the opinion of this department under the foregoing facts and circumstances, should the Missouri State Park Board acquire title to the land now held in the name of the Missouri State Highway Commission, it would be authorized to construct a fence across said body of water located along its property line.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. Aubrey R. Hammett, Jr.

Yours very truly,

John M. Dalton  
Attorney General

ARH:mw