

June 22, 1971

Answered by Letter - Walt Nowotny
OPINION LETTER NO. 264



Honorable John W. Reid, II
Prosecuting Attorney
Madison County
Madison County Court House
148 East Main Street
Fredericktown, Missouri 63645

Dear Mr. Reid:

This is in reply to your request for an official opinion from this office concerning the question whether individuals are authorized to float or fish in the Little St. Francis River or from the bank of such stream, or camp on the bank of the river or on a sand or gravel bar of the river, and also asking whether a land owner of real estate adjacent to the river can stretch barbed wire across the river in order to keep his cattle from going onto adjoining land.

The questions you have asked depend upon whether or not the Little St. Francis River is either "navigable" for purposes of determining title to the bed of the river, or whether the river is subject to a public easement. Elder v. Delcour, 269 S.W.2d 17 (Mo. Banc. 1954).

If the river is "navigable", the state owns the bed of the river; but if it is "non-navigable" title is in the owner of record. Elder v. Delcour, *supra*. The court in Elder stated the test for determining "navigability" and held that the upper Meramec was not "navigable".

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The court then went on to state the tests for determining whether the public has a right of easement on a river in Missouri and held that the upper Meramec was subject to such an easement and that:

" . . . the waters of the Meramec River are public waters and the submerged area of its channel over and across appellant's farm is a public highway for travel and passage by floating and by wading, for business or for pleasure, and that in traveling the course of the stream by canoe or wading, respondent was not a trespasser on the property of appellant. . . ." Id. at 26.

The tests stated in Elder require factual determination as to whether a river is "navigable" or subject to a public easement. Each case involving a river must be decided with reference to its own facts. Elder v. Delcour, supra, l.c. 21-22.

Although you have stated certain facts in your opinion request, all facts and historical information upon which the cases depend are not included. Furthermore, in these cases the courts have taken judicial notice of certain facts based upon observation. Because of dependence upon facts and information concerning each river this office is not in a position to make a determination as to whether the Little St. Francis River falls within the guidelines of Elder v. Delcour, supra.

We suggest that the prosecuting attorney is in the first instance in the best position to make such determination. To assist you in making such a judgment it would be helpful for you to compare the portion of the Little St. Francis in question with other rivers on which court decisions have been made.

The courts in Missouri have ruled on the following rivers as to "navigability" for determination of title to the bed:

Meramec River - Crawford County - non-navigable,
Slovensky v. O'Reilly, Mo., 233 S.W. 478 (1921);

Current River - near Doniphan - non-navigable, T. L.
Wright Lumber Co. v. Ripley County, Mo., 192 S.W. 966 (1917);

Black River - Butler County - Poplar Bluff - non-navigable north of Cat bridge, Grobe v. Energy Coal & Supply Co., Mo.App. 275 S.W. 67;

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Stout's Creek - Iron County - non-navigable, Greisinger v. Klinhart, Mo.App., 282 S.W. 473, judgment and record quashed State ex rel. Greisinger v. Cox, Mo., 292 S.W. 75;

Mississippi River - navigable - Hickey v. Hazard, 3 Mo. App. 480;

Missouri River - navigable - Benson v. Morrow, 61 Mo. 345; Cooley v. Golden, Mo. 23 S.W. 100 (1893); Peterson v. City of St. Joseph, 156 S.W.2d 691 (1942);

Platte River - non-navigable - Cambest v. McComas Hydroelectric Co., Mo.App. 245 S.W. 598 (1922) (used federal test).

Gasconade River - Pulaski County - non-navigable - Hobart-Lee Tie Co. v. Grabner, Mo.App., 219 S.W. 975 (1920);

Meramec River - St. Louis County - court held not non-navigable - Tonkins v. Monarch Bldg. Materials Corp., Mo. 347 S.W.2d 152;

Chariton River - non-navigable - State ex rel. Applegate v. Taylor, Mo. 123 S.W. 892.

The courts in Missouri have ruled on the following rivers and held they are subject to a public easement:

Meramec River - Dent County - Elder v. Delcour, supra;

Indian Creek - McKinney v. Northcutt, Mo.App. 89 S.W. 351;

Current River - State v. Wright, Mo.App., 208 S.W. 149;

Blue River - Bollinger v. American Asphalt Corp., Mo.App., 19 S.W.2d 544;

Gasconade River - Pulaski County - Hobart-Lee Tie Co. v. Grabner, Mo.App., 219 S.W. 975;

James River - City of Springfield v. Mecum, Mo.App., 320 S.W.2d 742.

Very truly yours,

JOHN C. DANFORTH
Attorney General