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PUBLIC RIGHTS ON MISSISSIPPI PUBLIC WATERS

A White Paper Prepared by

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The Mississippi Code declares, in sweeping language, that the policy of the State of Mississippi is to allow its citizens to enjoy the bounty of her woods and waters:

Hunting, trapping and fishing are vital parts of the heritage of the State of Mississippi. It shall be the public policy of the State of Mississippi to protect and preserve these activities. The Mississippi Commission on Wildlife, Fisheries and Parks, acting by and through the Mississippi Department of Wildlife, Fisheries and Parks, may regulate hunting, trapping and fishing activities in the State of Mississippi, consistent with its powers and duties under the law. No court of this state may enjoin, suspend, curtail or abrogate any hunting, trapping or fishing activity which is otherwise lawful under the laws of this state or the regulations of the commission, except upon a showing, by clear and convincing evidence, of an immediate threat to the public health, safety and welfare, or other imminent peril. It is, and shall be, the public policy of this state to promote hunting, trapping and fishing and other outdoor recreational opportunities and to preserve these activities for all generations to come.¹

Nonetheless, there are private landowners who attempt to restrict public access to hunting and fishing on the state's waters. As a result of their efforts, questions have arisen concerning the state's legal authority to enforce the public's right to hunt and fish on certain of these waters - in particular, oxbow lakes. This paper will address those questions and provide the clearest possible answers based on the current state of the law.

Part I will begin with a discussion of the definition of "public waters." Following that will be a detailed description of the public's rights on those waters and the various processes by which a waterway may be designated "public." Finally, we will examine the authority of the Mississippi Department of Wildlife, Fisheries and Parks to enforce those rights.

Part II will examine the legal challenges that can arise when public waters are surrounded by private land. In Mississippi, the public has no right to cross private land to access public waters. In such situations, the public has three options: (1) obtain permission from a private landowner to cross the land to access the oxbow lake; (2) establish an easement by prescription over private land; or (3) obtain access through the state's purchase of land.

Finally, Part III will examine the consequences for state natural resource management and enforcement if a water is deemed private. Some of those consequences include restrictions on expenditures of federal funds to stock fish or construct boat ramps and piers; lack of authority to set length and creel limits for fishing or regulate water withdrawals; and potential trespassing citations for members of the public utilizing the water without permission.

I. What are Public Waters?

A. Definition

The question of "what are public waters?" takes us back to the early days of our nation, when the issues of who has rights to what property were being thrashed out in Congress and the courts.

¹ MISS. CODE ANN. § 49-7-1.1 (1972).

Before Mississippi was granted statehood, the beds and banks of her navigable streams were held by the United States. Title to these lands passed to the state at statehood under the Equal Footing Doctrine, as described by the U.S. Supreme Court in *Pollard v. Hagan*.² The State of Mississippi could, with some restrictions, then pass title to these lands to private landowners; however, the public retained the right to use the navigable waters atop those lands for commerce, fishing, and boating under the Public Trust Doctrine (subject to Congress' power to regulate navigable waters as necessary for commerce between the states and among the nations).³ This public right is near-absolute. As the Mississippi Supreme Court has observed, it cannot be taken away "by legislative enactment or judicial decree."⁴

Since those early days, navigability has generally been necessary for a waterway to be deemed "public." Accordingly, the question of what constitutes "navigability" has been debated for years in legislatures and courtrooms across the country, including the U.S. Supreme Court.

States have been left to their own devices to determine which waters are navigable and/or public for state law purposes. The Mississippi Legislature has defined "navigable waters" as "all rivers, creeks and bayous in this state, twenty-five (25) miles in length, that have sufficient depth and width of water for thirty (30) consecutive days in the year for floating a steamboat with carrying capacity of two hundred (200) bales of cotton..."⁵

That definition, evocative of the state's colorful past, was simultaneously overly restrictive and difficult to apply. It was rendered obsolete in 1991 by the Mississippi Supreme Court's decision in *Ryals v. Piggott*, in which the court declared that a portion of the Bogue Chitto River was a public waterway despite not meeting the statutory definition.⁶ The court found that a public waterway is navigable if it is "navigable in fact" – that is, navigable by "loggers, fishermen and pleasure boaters."⁷ This definition renders a great many more waters navigable than the statutory definition.

The Mississippi Attorney General's Office has been asked on several occasions to clarify which of the state's waters are navigable and/or public. In 1996, the Attorney General was asked to provide an opinion on which waters are "navigable" for purposes of the Mississippi Gaming Control Act, which utilized a more restrictive definition of navigability than found elsewhere in state law.⁸ The Attorney General's opinion, while primarily concerned with the specific issue of navigability for gaming vessels, distinguished oxbow lakes from other types of lakes in a way that should be generally applicable. Whereas landlocked, currentless bodies of water were not navigable for the purposes of floating gaming vessels, "[o]xbow lakes, which are characterized

² 44 U.S. 212 (U.S. 1845).

³ *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (U.S. 1892).

⁴ *Ryals v. Piggott*, 580 So.2d 1140 (Miss. 1991).

⁵ MISS. CODE ANN. § 51-1-1 (1972).

⁶ 580 So.2d 1140 (Miss. 1991).

⁷ *Id.* at 1151-52.

⁸ Miss. Atty. Gen. Op. 1992-0036 (May 18, 1992). For a waterway to be navigable under the Act, it had to be, among other things, "used or susceptible of being used as an artery of commerce." Miss. Code Ann. § 27-109-1(2)(c)(i) (1972).

by currents which reverse seasonally, running one direction when the Mississippi River rises, and in the opposite direction when the River falls, are ‘navigable waters.’”⁹

The Attorney General’s Office reinforced this opinion the following year, asserting that “[o]nce part of the Mississippi River as it existed on or after 1817, [oxbow] lakes remain part of the Mississippi River as long as such lakes are subject to the rise and fall of the waters of the Mississippi River.”¹⁰ That is, from a legal standpoint, the rights of the public on oxbow lakes are the same as on the Mississippi River itself.

It must be kept in mind that Attorney General opinions do not have the force of law. Nonetheless, they represent the opinion of the state’s top law enforcement official and therefore have strong persuasive power.

B. Public Rights on Public Waters

The Public Trust Doctrine provides the framework for any discussion of public rights on public waters in the United States. The core principles of the doctrine go back to the Romans (and perhaps earlier), have found expression in the laws of England, and from there spread to America.

The basic idea is this: the interest of the public at large in the use of public waters is so great that the government cannot allow such use to be limited by private interests. This interest, as the name of the doctrine implies, is considered a form of trust, in which the government holds the waters in trust for the use and benefit of the public. The doctrine functions both as a right inherent to citizens and a limitation on governmental authority.

In the U.S. the Public Trust Doctrine is primarily a creature of the courts. The seminal case is the U.S. Supreme Court’s 1892 decision in *Illinois Central Railroad Company v. Illinois*.¹¹ The conflict arose when the Illinois legislature granted a large portion of the land underlying Lake Michigan to the Illinois Central Railroad in 1869. The land included virtually the entire Chicago waterfront, which then fell under the control of a single private corporation. A later legislature realized the profound mistake and sued to have the grant declared invalid. The Supreme Court sided with the state, declaring in sweeping language that the public interest in the use of the waters of Lake Michigan was so important that the state could not abdicate control:

[Title to navigable waters] is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein free from the obstruction or interference of private parties.¹²

In keeping with the Public Trust Doctrine, Mississippi recognizes and reinforces the public’s right to use the state’s navigable waters in its constitution and statutes. The state constitution declares:

⁹ Miss. Atty. Gen. Op. 1992-0036 (May 18, 1992).

¹⁰ Miss. Atty. Gen. Op. 1993-0539 (July 14, 1993) (citing *Dycus*, 557 So. 2d at 508 (concurring opinion)).

¹¹ 146 U.S. 387 (1892).

¹² Miss. Const. art. IV, § 81.

The Legislature shall never authorize the permanent obstruction of any of the navigable waters of the State, but may provide for the removal of such obstructions as now exist, whenever the public welfare demands. This section shall not prevent the construction, under proper authority, of drawbridges for railroads, or other roads, nor the construction of booms and chutes for logs, nor the construction, operation and maintenance of facilities incident to the exploration, production or transportation of oil, gas or other minerals, nor the construction, operation and maintenance of bridges and causeways in such manner as not to prevent the safe passage of vessels or logs under regulations to be provided by law.

This section clearly reinforces the paramount right of the public to use the navigable waters of the state without obstruction, even going so far as to empower the legislature to remove obstructions “whenever the public welfare demands.”

The state legislature has refined this principle and codified it in the Mississippi Code. Section 51-1-4 provides:

Those portions of all natural flowing streams in this state having a mean annual flow of not less than one hundred (100) cubic feet per second, as determined and designated on appropriate maps by the Mississippi Department of Environmental Quality, shall be public waterways of the state on which the citizens of this state and other states shall have the right of free transport in the stream and the right to fish and engage in water sports.¹³

After declaring the public’s right to use the state’s public waterways, the legislature immediately goes on to clarify the corresponding rights of riparian landowners. First is the right, fundamental to property ownership, to exclude others from one’s land:

Nothing contained in this section shall authorize anyone utilizing public waterways, under the authority granted by this section, to trespass upon adjacent lands or to launch or land any commercial or pleasure craft along or from the shore of such waterways except at places established by public or private entities for such purposes.¹⁴

The following sub-section continues in the same vein, and adds important language:

Nothing contained in this section shall authorize any person utilizing those public waterways, under the authority granted by this section, to disturb the banks or beds of such waterways or the discharge of any object or substance into such waters or upon or across any lands adjacent thereto or to hunt or fish or go on or across any adjacent lands under floodwaters beyond the natural banks of the bed of the public waterway.

¹³ MISS. CODE ANN. § 51-1-4(1) (1972).

¹⁴ *Id.* § 51-1-4(2).

Floodwater which has overflowed the banks of a public waterway is not a part of the public waterway.¹⁵

This sub-section recognizes that the bed and banks of public waterways are subject to private ownership, and that their integrity must be respected by those using the waters flowing over them. It also unambiguously declares that floodwaters over private lands are *not* public waters, even if those floodwaters connect to a public waterway. Thus, one could not legally use floodwater to float from one public waterway to another if the lands underlying the floodwaters are privately owned.

Likewise, the public does not have the right to use motorized vehicles (such as all-terrain vehicles, or “four-wheelers”) in the bed of a public waterway if the bed is privately owned.¹⁶ It is illegal to operate a wheeled or tracked conveyance on the streambed in such a way that the streambed is damaged.¹⁷ However, people using public waterways for legitimate purposes, such as fishing or recreation, are still entitled to “the normal, usual and ordinary fording of streams.”¹⁸

Finally, the legislature addresses the right of riparian landowners to construct dams and reservoirs:

Nothing contained in this section shall be construed to prohibit the construction of dams and reservoirs by the State of Mississippi or any of its agencies or political subdivisions, or riparian owners, in the manner now or hereafter authorized by law, or in any way to affect the rights of riparian landowners along such waterways except as specifically provided hereinabove...¹⁹

Inevitably, conflicts have arisen between the public and private rights described above. Mississippi state courts have issued two key rulings in this area.

In 1940, the Mississippi Supreme Court in *State Game and Fish Commission v. Louis Fritz Co.* held that the private riparian owner of over ninety percent of the lands beneath a lake could not exclude a state contractor, who gained lawful access to the lake from another riparian landowner, from clearing the lake of predatory fish.²⁰ While the case appears to involve an oxbow lake (South Horn Lake in DeSoto County), the court did not explicitly address the public/private status of the lake; rather, it held anyone who gains lawful access to a lake (that is, who does not trespass to get there) may make use of the surface of the lake for boating and fishing so long as they do not interfere with similar use by others who are entitled to use the lake. A riparian landowner may own the bed and banks of a natural lake, but he does not own the water or the fish in it.²¹ The state owns the water and fish for the common benefit of all its citizens.

¹⁵ *Id.* § 51-1-4(3).

¹⁶ *Id.* § 51-1-4(4).

¹⁷ *Id.* § 51-1-4(4)(a).

¹⁸ *Id.* § 51-1-4(4)(d).

¹⁹ *Id.* § 51-1-4(5).

²⁰ 187 Miss. 539 (1940).

²¹ This rule does not apply to man-made lakes, such as catfish ponds.

In 1990 the Mississippi Supreme Court, echoing the Public Trust Doctrine, clarified the statutory definition of “public waterways” given in Mississippi Code § 51-1-4. In *Dycus v. Sillers* the court observes that the statutory definition does not necessarily exclude other types of waters, such as lakes, from the legal status of “public waters.”²² While discussing the oxbow Lake Beulah in Bolivar County, the court suggests that *all* oxbow lakes are public waters, and that members of the public accordingly have the right to use them “to [their] heart’s content, subject only to a like use by others and reasonable regulation by the state.”²³ The court even goes so far as to declare that “the public right to waters formed by an avulsion is as great as any other public waters.”²⁴ Oxbow lakes, of course, are formed by avulsions – a sudden physical change which cuts a meandering river off from the main channel.

Taken together, *Louis Fritz* and *Dycus* strongly support the vitality of a public right to use the waters of oxbow lakes for boating, hunting, and fishing.

The Mississippi Attorney General’s Office has issued relevant opinions as well. In 1990, a constituent submitted a request to Attorney General Mike Moore for an opinion on whether the Board of Supervisors of Pike County had the statutory authority

to regulate the public use of Topisaw Creek and the Bogue Chitto River by requiring decals on canoes and tubes; requiring rental agencies to maintain logs identifying all their customers; regulating points of entry and exit of the river; requiring life jackets in canoes; and requiring that rental agencies maintain liability coverage.²⁵

The Attorney General opined that the Board had no such authority; the public had the right to use the waterways for transportation and recreation, and the Department of Wildlife, Fisheries and Parks had the authority to police boating safety.²⁶ Use of the public waterways did not, however, entitle the public to trespass on private lands.²⁷

In 1993 Dr. Sam Polles of the Mississippi Department of Wildlife, Fisheries and Parks sent the following question to the Attorney General’s Office:

Would someone utilizing the waterway who ties to a tree or drops anchor be disturbing the beds or banks of a waterway and therefore such activity would be prohibited by this law?²⁸

In response, the Attorney General made two relevant points that are in accordance with what has been discussed above. First, he quotes with approval the language in *Dycus* that indicates oxbow lakes are public. Second, he confirms that *Dycus* and the statutes enshrine a public right to boat,

²² 557 So.2d 486, 499, n. 65 (Miss. 1990).

²³ *Id.* at 501.

²⁴ *Id.* at 503.

²⁵ Miss. Atty. Gen. Op. 1990-0554 (August 16, 1990).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Miss. Atty. Gen. Op. 1993-0836 (December 6, 1993).

fish, hunt, and engage in water sports on public waters, and that it is permissible to drop anchor – and perhaps even wade – if necessary to engage in those activities, even if the waterbed is privately owned.

In 1996 the Attorney General’s Office received the following request from state senator Robert G. “Bunky” Huggins:

There are certain lakes in my district that have public boat landings, though portions of the lands adjacent to and underlying these lakes are privately owned. Because a question has arisen regarding the right of the public to hunt on these waters, I hereby request an opinion from your office based on the facts and questions set out below.

For the purposes of your opinion, please assume that the waters of these lakes are navigable. Private owners have record title to the adjacent upland and to submerged lands underlying the lakes. [...] There are points where the public can reach the waters of these lakes without trespassing. The private owners believe they have a right to exclude the public from hunting waterfowl on those portions of the lake overlying private lands. This would be consistent with the statute which provide[s] that “(i)t shall be unlawful to hunt, shoot, or trap or otherwise trespass on the lands or leases of another after having been warned not to do so, whether in person or by posting of suitable notice in conspicuous places on such lands.” Miss. Code Ann. § 49-7-79 (1972). Do the owners of private lands which are submerged under public waters have the exclusive right to hunt on these lands? Does Miss. Code Ann. § 49-7-79 (1972) apply to lands that are submerged under public waters?²⁹

Drawing on *Ryals*, *Dycus*, and other cases, the Attorney General concluded that “the public does have the right to hunt on navigable public waters covering private lands.”³⁰

Taken as a whole, the statutes, case law, and Attorney General’s opinions discussed above support a conclusion that oxbow lakes that are hydrologically connected to the Mississippi River are public waters, and as such the public has the right to hunt, fish, boat, and enjoy water sports on them.

C. Designation Process

There are two paths by which a waterway in Mississippi may be designated as public. First, the waterway may meet the statutory definition of “public waterway” in Miss. Code Ann. § 51-1-4 (“those portions of natural flowing streams with a mean annual flow of 100 cubic feet per second”). The Mississippi Department of Environmental Quality is the state agency authorized to determine whether waterways meet the 100 cfs standard and maintain the official list of public waterways.³¹

²⁹ Miss. Atty. Gen. Op. 1996-0537 (August 30, 1996).

³⁰ *Id.*

³¹ MISS. CODE ANN. § 51-1-4(1). A map of Mississippi’s public waterways is available at http://www.deq.state.ms.us/MDEQ.nsf/page/L&W_pub_waterways?OpenDocument .

However, as discussed above, § 51-1-4 is not the exclusive mechanism by which a waterway may become public under Mississippi law. While MDEQ only has the authority to designate natural flowing streams meeting the 100 cfs standard as “public waterways,” Mississippi state courts may designate streams and lakes as public waterways during litigation through determinations of navigability or granting of prescriptive easements (due to established public use for long periods of time, discussed in more detail below).

D. DWFP’s Authority on Public Waters

The Department of Wildlife, Fisheries and Parks (DWFP) has clear statutory authority to enforce the public’s rights on public waters. The agency’s authority is found in Title 49 of the Mississippi Code, Chapters 1, 4, and 7.

The powers of the DWFP are enumerated in secs. 49-4-8 and 49-4-9 of the Mississippi Code. They include the power and duty to “conserve, manage, develop and protect the wildlife of the State of Mississippi” and “to formulate the policy of the department regarding wildlife and fisheries within the jurisdiction of the department.”³²

The Director of DWFP has broad enforcement power under sec. 49-1-43, which provides that he or she

shall have general supervision and control of all conservation officers, and shall enforce all the laws and regulations of the state relating to wild animals, birds, and fish, and shall exercise all necessary powers incident thereto not specifically conferred on the department.³³

Section 49-1-9 directs the Director of DWFP to appoint a Chief Law Enforcement Officer, whose “primary duty” is “directing the enforcement of all game and fish laws and regulations.”³⁴ The Chief Law Enforcement Officer oversees the activities of the agency’s conservation officers, who are authorized to carry out enforcement actions.³⁵ The agency has authority to promulgate “rules and regulations... it deems necessary to carry out wildlife laws.”³⁶

Conservation officers are specifically authorized to enforce the laws that forbid the obstruction of streams.³⁷ In the performance of their statutory duties, wildlife officers are authorized to enter privately owned lands or waters without being held liable for trespass.³⁸

The foregoing analysis reveals that the public has an enforceable right to use the public waterways of the state, which include oxbow lakes, for boating, fishing, hunting, and water sports. This conclusion rests on the following doctrines and authorities:

³² MISS. CODE ANN. §§ 49-4-8 and 44-4-9 (1972).

³³ *Id.* § 49-1-43(1) (1972).

³⁴ *Id.* § 49-1-9.

³⁵ *Id.* § 49-1-12, 49-1-43(3).

³⁶ *Id.* § 49-1-29.

³⁷ *Id.* § 49-1-44.

³⁸ *Id.* § 49-1-43.1.

- The Mississippi Constitution
- The Mississippi Code (1972)
- Decisions of the Mississippi Supreme Court
 - *Ryals v. Piggott*
 - *Dycus v. Sillers*
 - *State Game and Fish Commission v. Louis Fritz Co.*
- Mississippi Attorney General Opinions
- The Public Trust Doctrine
- The Equal Footing Doctrine

A right is meaningless if it cannot be enforced. Accordingly, the state legislature has granted the Department of Wildlife, Fisheries and Parks clear statutory authority, detailed above, to enforce this public right. By doing so, the Department can carry out Mississippi's avowed public policy "to promote hunting, trapping and fishing and other outdoor recreational opportunities and to preserve these activities for all generations to come."

II. Access to Public Waters Surrounded by Private Land³⁹

While the public clearly has a right to hunt, fish, and recreate on public waters, they may do so only if they can gain access to those waters without trespassing on private land. In some areas of the state, public waters can be easily accessed via public boat ramps at state parks or by paying a fee to use a private boat ramp. However, some public oxbow lakes in the state are entirely surrounded by private land. As the popularity of private hunting and fishing clubs has risen in the state, some private landowners have attempted to restrict access to these lakes for the benefit of their dues-paying members.

Members of the public seeking to gain access to such waters have limited options. The most straightforward and easiest option, of course, would be to receive permission from one of the surrounding private property owners to cross the property to access the lake. Once on the lake, the public could not be prevented by the other private owners from exercising their public trust rights.

Where a user of property is granted permission by the landowner to engage in such use, the individual has been granted a license to use the land for a specific purpose.⁴⁰ If the public has been granted permission (either express or implied) to cross private land to use a public lake, then the landowners have granted the public a license, which translates into an easement by permission.⁴¹ Members of the public who access the lake in accordance with that permissive easement have legally accessed the lake and would not be considered trespassers. Access to many public waters in the state is likely achieved, in part, via permissive easements.

³⁹ The authors would like to thank April Kilcreas, Mississippi-Alabama Sea Grant Legal Program Research Assistant, for her research and drafting assistance on this section.

⁴⁰ *Logan v. McGee*, 320 So.2d 792, 793 (Miss.1975) (noting that "[a] license is a permissive use of land by which the owner allows another to come onto his land for a specific purpose.")

⁴¹ See *Thornhill*, 594 So.2d at 1152-53.

A. Prescriptive Easements

Access problems often arise when property changes hands and the new owners choose to deny access. Up until then, the public had been using the property to access the lake. The question then becomes whether they can continue to do so. Whether the public continues to have access rights would depend on whether they have gained a prescriptive easement over the property. Under Mississippi law, the elements required to establish a prescriptive easement are the same as those required to establish a claim for adverse possession.⁴² To establish a claim for either adverse possession or prescriptive easement, the possession of the land must be under claim of ownership; actual or hostile; open, notorious, and visible; continuous and uninterrupted for period of at least ten years; exclusive; and peaceful.⁴³

The most commonly used and most successful defense against an easement by prescription is permissive use.⁴⁴ Mississippi courts have ruled that permissive use cannot give rise to a prescriptive easement because the element of hostility will not be established.⁴⁵ One of the required elements to establish a prescriptive easement is hostility, and permission to use the land for a particular purpose necessarily negates the hostility requirement.⁴⁶ Mississippi courts have also noted that permissive easements are terminable at will.⁴⁷ It is within the rights of the owners of the land to terminate their permission for the public to use the lake at any time.⁴⁸

Once the landowners revoke their consent for the public to cross their land to access the lake, further use of the lake by the general public, at that time, becomes hostile or adverse, for the purpose of establishing an easement by prescription.⁴⁹ When the property owners deny the public their continued permission to use the land, the statutory period for establishing a prescriptive easement begins, and from that point forward, the public would have to be able to demonstrate a continuous, uninterrupted, open and notorious, peaceful, and exclusive use of the lake access. Should the public be able to demonstrate those elements for a prescriptive easement during the statutorily mandated ten years *following* the revocation of permission, the public can be granted a prescriptive easement for use of the lake, because this would satisfy the requirement of hostility.

Additionally, for the public to establish a prescriptive easement over a piece of property, the claimants must demonstrate that the property in question is “habitually used by the public in general for a period of ten years; and such use must be accompanied by evidence ... of a claim

⁴² *Thornhill v. Caroline Hunt Trust Estate*, 594 So.2d 1150, 1152-53 (Miss.1992).

⁴³ *Paw Paw Island Land Co., Inc. v. Issaquena and Warren Counties Land Co., LLC*, 51 So.3d 916, 924 (Miss. 2010).

⁴⁴ *Thornhill*, 594 So.2d at 1152-53.

⁴⁵ *See, e.g. Paw Paw Island Land Co.*, 51 So.3d at 924.

⁴⁶ *Paw Paw Island Land Co.*, 51 So.3d at 924. *See also Moran v. Sims*, 873 So. 2d 1067 (Miss. Ct. App. 2004).

⁴⁷ *Thornhill*, 594 So.2d at 1153.

⁴⁸ *See Thornhill*, 594 So.2d at 1152-53.

⁴⁹ *Simcox v. Hunt*, 874 So. 2d 1010, 1015 (Miss. Ct. App. 2004) (finding that “[t]he time period for obtaining adverse possession or a prescriptive easement, when express or implied permission is previously given, does not begin to run until some form of objection to the use is made by the landowner.”).

by the public of the right so to do.”⁵⁰ In the case of lake access, the public would have to demonstrate more than continuous use of the lake access for the statutory period of ten years; to establish an easement by prescription, the public would have to provide evidence of their right to use that lake access point.⁵¹

Furthermore, for the public to be granted a prescriptive easement, they must be able to show that their use of the lake access is open, notorious, and visible. If the landowners are unaware of the public’s use of the lake, then they have not satisfied the open and notorious use requirement.⁵² However, if the new landowners are restricting the public from using the lake that indicates that the landowners are aware that members of the general public are crossing their land to access the lake. If the landowners have revoked their permission to use the lake and are now actively restricting access, that would indicate that the public is making open and notorious use of the lake, which would satisfy the requirements for an easement by prescription.⁵³ Finally, the public would also need to satisfy the requirements that their access to the lake has been continuous and uninterrupted, exclusive, and peaceful.

Seeking to gain public access to oxbow lakes through the establishment of prescriptive easements is unlikely to be a successful strategy. Even if all of the necessary elements are established, which are difficult and challenging to prove, it would take a minimum of ten years to gain access rights. And, in most situations, the cases probably have a fatal flaw in that the public once had permission to cross the land in question to access the lake.

B. Easement by Necessity

In the alternative to a prescriptive easement, it is possible that access to an oxbow lake could be gained via an easement by necessity. To establish an easement by necessity, the owner of a landlocked parcel must show that a commonly owned tract of land was severed in such a way that the landlocked portion of the property is inaccessible without passing over the land of another.⁵⁴ While it is unlikely that the general public could establish an easement by necessity, private owners whose access to the lake is cut off might be able to gain an easement over the adjacent land. The access rights obtained by necessity, however, might not extend to the public at large. Gaining public access through an easement by necessity, therefore, is probably not a viable option either.

C. Purchasing Access

The only fail-safe means of permanently securing public access to oxbow lakes surrounded by private land is for the state to purchase parcels of private land or easements across private land. Even when willing sellers can be found, funding constraints prevent state natural resources agencies from being able to secure adequate land for public access. In addition, state public

⁵⁰ *Myers v. Blair*, 611 So.2d 969, 971 (Miss. 1992) (quoting *Brooks v. Sanders*, 243 Miss. 46, 137 So.2d 174, 175 (Miss.1962)).

⁵¹ *See Ladner v. Harrison County Bd. of Sup'rs*, 793 So.2d 637, 641 (Miss. 2001).

⁵² *See, e.g., Fant v. Standard Oil Co.*, 247 So. 2d 132, 133 (Miss. 1971).

⁵³ *Id.*

⁵⁴ *Broadhead v. Terpening*, 611 So. 2d 949, 953 (Miss. 1992).

access points must be maintained and enforced, which imposes additional financial burdens on state agencies. As an alternative, land could be purchased for public access and held by non-profit organizations, such as the Mississippi Land Trust and Ducks Unlimited.

III. Why Clarity Regarding “Public Waterway” Status Matters

All citizens in Mississippi have a right to use the public waterways of the state, including the oxbow lakes, for boating, fishing, hunting, and water sports. Members of the general public, however, have no right to engage in these activities on private waters and can be charged with trespassing. As a result, uncertainty with respect to the classification of a particular waterway (i.e., whether it is public or private) can have serious consequences for users, the state agencies with primarily responsibility, and the natural resources themselves.

For the general public, uncertainty regarding a waterway’s status can result in users staying away from waters that are open to public use or mistakenly (and illegally) accessing private waters. Both of these situations raise enforcement challenges for MDWFP conservation officers. Even if the conservation officer knows the waterway’s status, they may not be able to convince private owners that the public has a right to be there (if it is public) or a user that they are trespassing (if it is private). To reduce these conflicts, more outreach and education is needed throughout the state about which waters are public and the scope of public rights in those waters.

For the natural resources agencies, uncertainty can have a chilling effect on management programs. For instance, while MDWFP may use federal funds to stock fish and build boat ramps and piers, those projects may only occur on public waters. If it turns out that those waters were actually private (for example, after a court ruling settles the issue), the state must reimburse the federal government for those expenditures. MDWFP may therefore be reluctant to fund much-needed public access projects on waters in which the status is in dispute. As for the waters and the fish and animals that depend on them, MDWFP and MDEQ have only limited authority to manage natural resources in private waters. Fishing harvests are unlimited in private lakes, as MDWFP’s authority to set creel and length limits for fish is limited to public waters.

Under the current law, MDEQ only has the authority to determine whether “natural flowing streams” meet the statutory definition of a public waterway. Waterways which are public due to navigability or prescriptive use can only be officially designated as such by a court of competent jurisdiction. Litigation is not the most efficient mechanism for resolving these public/private conflicts, as it is expensive, time-consuming, and adversarial. The Mississippi Legislature may wish to consider expanding the authority of the MDEQ to determine the public states of other waterways in the state or create an alternative mechanism for doing so. Establishing, once and for all, the status of Mississippi’s waterways would significantly improve the management of the state’s natural resources and enforcement of the state’s conservation and environmental laws.