

June 13, 2005

Mr. Dennis Riecke  
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RE: Public/private status of oxbow lakes

Dear Mr. Riecke:

Recently you contacted Stephanie Showalter with a question about the legal status of oxbow lakes that were formerly part of navigable waters or public waterways. Specifically, your question was whether these lakes are public or private waters. This letter contains the results of my research into the applicable law. Please be aware that the Mississippi-Alabama Sea Grant Legal Program does not offer formal legal advice, and that this letter is intended for informational purposes only.

Before starting the discussion I would like to compliment you on the article “Public Water or Private Water” that you wrote for *Mississippi Woods & Water*. The article shows that you already have an excellent grasp on the issues. I think that your belief that oxbow lakes are public waters is correct, for the reasons given below.

### **Oxbow Lakes**

An oxbow lake is formed when a meander in a river or stream is cut off from the main channel by an avulsion. Oxbow lakes, formed by avulsions in a meandering river, are common in Mississippi on rivers including the Mississippi and the Pearl, and are often excellent sites for fishing and boating. Typically they are hydrologically connected to, and seasonally rise and fall with, the river that created them.

### **The Law Pertaining to Public Waters**

The public has the right to use public waters for boating, fishing, and other uses. The Mississippi statutes define “public waterways” in such a way that it appears that only streams can be public.<sup>1</sup> However, the Mississippi Supreme Court in *Dycus v. Sillers* observes that the statutory definition does not necessarily exclude other types of waters, such as lakes, from the legal status of “public waters.”<sup>2</sup> While discussing the oxbow Lake Beulah in Bolivar County in that case, 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.”<sup>3</sup> 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.”<sup>4</sup>

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<sup>1</sup> Miss. Code § 51-1-4.

<sup>2</sup> *Dycus v. Sillers*, 557 So.2d 486, 499, n. 65 (Miss. 1990).

<sup>3</sup> *Id.* at 501. This statement is not binding law because the public/private status of oxbow lakes was not the issue before the court in that case. However, the statement does signal how the court might rule if that *were* the issue.

<sup>4</sup> *Id.* at 503.

Other cases, as well as opinions of the Mississippi Attorney General, support the *Dycus* view that oxbow lakes are public waters. In *State Game and Fish Commission v. Louis Fritz Co.* the Mississippi Supreme Court 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.<sup>5</sup> 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.<sup>6</sup> The state owns the water and fish for the common benefit of all its citizens.

In 1991 the Mississippi Supreme Court decided in *Ryals v. Pigott* that the Bogue Chitto River is a public waterway.<sup>7</sup> The portion of the river in question did not meet the statutory mean annual flow requirement; nonetheless, the court found it to be a public waterway because it is “navigable in fact.”<sup>8</sup> The court rejected as too restrictive the obsolete “steamboat carrying two hundred bales of cotton” definition of navigability found in Miss. Code § 51-1-1. Instead, a water body is “navigable in fact” if it can be navigated by “loggers, fishermen and pleasure boaters.”<sup>9</sup> The court indicates that lakes, as well as streams, can be navigable waters under the law.<sup>10</sup> Waters that are navigable in fact are subject to public use under the Equal Footing and Public Trust doctrines.

Under the Equal Footing Doctrine (erroneously referred to in *Ryals* as the “Equal Footings Doctrine”), the title to the beds and banks of navigable streams passed to newly-formed states at statehood.<sup>11</sup> States may, with some restrictions, pass title to these lands to private landowners, but the public retains the right to use the navigable waters for commerce, fishing, and boating under the Public Trust Doctrine.<sup>12</sup> The *Ryals* court observed that this public right cannot be withdrawn “by legislative enactment or judicial decree.”<sup>13</sup> In other words, the legislature can sell or give away the land under navigable waters but it cannot sell or give away the public’s right to use those waters.

None of these cases explicitly decided the public/private status of an oxbow lake. However, when these cases are read together the reasoning suggests very strongly that the Mississippi Supreme Court would consider oxbow lakes to be public waters. This view seems to be shared by the Mississippi Attorney General’s office, which has issued several opinion letters on the

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<sup>5</sup> *State Game and Fish Commn. v. Louis Fritz Co.*, 187 Miss. 539 (1940).

<sup>6</sup> This rule does not apply to man-made lakes, such as catfish farms.

<sup>7</sup> *Ryals v. Pigott*, 580 So.2d 1140 (Miss. 1991).

<sup>8</sup> *Id.* at 1152.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1151 (“At the time the constitution was adopted commerce by navigable waters, such as rivers, lakes, bayous and canals was much more common than now...”) (emphasis added).

<sup>11</sup> *Pollard v. Hagan*, 44 U.S. 212 (U.S. 1845).

<sup>12</sup> *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (U.S. 1892).

<sup>13</sup> *Ryals* at 1149.

subject. In a 1993 letter to Dr. Sam Polles of your agency the Attorney General quoted with approval the language in *Dycus* that indicates that all oxbow lakes are public.<sup>14</sup> In separate opinions to the Mississippi Gaming Commission, the Attorney General declared that oxbow lakes are navigable.<sup>15</sup> These letters provide additional strong support for the position that oxbow lakes are public waterways.

### **Prescription**

The *Dycus* court declared that, even if they are not otherwise “navigable” or “public,” oxbow lakes may become public waters by the doctrine of prescription.<sup>16</sup> Under the doctrine of prescription, private property may become public if it is used “under a claim of right, openly, notoriously, peacefully, continuously and uninterruptedly for in excess of ten years.”<sup>17</sup>

### **Conclusion**

The relevant law strongly indicates that oxbow lakes that were formed by navigable waters or public waterways are public waters. Therefore, a member of the public has a right to use them for, at the very least, boating and fishing, provided he or she does not have to trespass across private land to get there. (If a public lake is entirely surrounded by private land there may be some question whether the public has a right to cross the private land to access it; I have not addressed that issue here, but would be happy to look into it for you in the future.)

I hope this letter is helpful to you. Please let me know if you have any further questions on this, or any other, topic. Thank you for bringing your question to the Mississippi-Alabama Sea Grant Legal Program.

Sincerely,  
Josh Clemons  
Research Counsel  
Mississippi-Alabama Sea Grant Legal Program

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<sup>14</sup> Miss. Atty. Gen. Op. 1993-0836 (Dec. 6, 1993).

<sup>15</sup> Miss. Atty. Gen. Ops. 1992-0036 (May 18, 1992), 1993-0539 (July 14, 1993).

<sup>16</sup> *Dycus* at 501.

<sup>17</sup> *Id.*