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June 28, 2013

Honorable N. Gunter Guy, Jr.
Commissioner, Department of
Conservation and Natural Resources
64 North Union Street
Suite 468
Montgomery, Alabama 36130-1450

Real Property – Water and Waterways –
Recreation – Conservation Department

Pursuant to section 9-11-80 of the Code of Alabama, if a dam, lock, or impoundment device is placed across a navigable waterway, the impounded waters are public waters that may be used by the public for hunting and fishing.

Dear Commissioner Guy:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Pursuant to section 9-11-80 of the Code of Alabama, are waters that are impounded by the construction of a lock or dam, or other impounding device placed across the channel of a navigable stream, public waters that can be utilized by the public for hunting and fishing?

FACTS AND ANALYSIS

According to your request, the Department of Conservation and Natural Resources (“Department”) has been given jurisdiction and control over all unused lands of the State of Alabama pursuant to section 9-15-2 of the Code of

Alabama, and further has the authority, through its Commissioner, to lease the oil, gas, and minerals under any navigable stream or navigable waterway and manage such lands as set forth in section 9-17-62 of the Code. Pursuant to these provisions, the Department is frequently called upon to make determinations as to whether particular stretches of Alabama waterways are navigable so as to determine whether the State will assert ownership in the beds of such streams.

Under the equal-footing doctrine, the State of Alabama was vested with title to the beds of all navigable waterways when the State was admitted to the Union on December 14, 1819. *See PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012). Thus, when reviewing a request for determination of ownership, the Department assesses whether the waterway was navigable as it existed on December 14, 1819.

The Department asserts, however, under the laws of the State of Alabama, the public has the right to use all public waters within the State for hunting and fishing, regardless of the ownership of the waterbed. Thus, even if the Department determines that certain waters are not navigable for title purposes under the federal test for navigability, the Department further asserts that this does not preclude the conclusion that those waters are public waters under State law or that the public has a right to use the waters.

The question of whether waters are public is a matter of state law as explained by the Alabama Supreme Court as follows:

“A federal determination of ‘navigability’ may serve many different purposes, the three most typical being: to confer admiralty jurisdiction, to define Congress’ reach under the commerce power, and to grant title under the equal footing doctrine. *See State of Alaska v. United States*, 563 F.Supp. 1223, 1225 n. 3 (D.Alaska 1983). ***In addition to the federal tests, states have also adopted a variety of navigability definitions to satisfy different policies regarding resource conservation, apportionment of waterways between private and public uses, and protection of public access to waterways.*** No aspect of the federal test of navigability used to determine title under the equal footing doctrine precludes the various states from adopting more liberal tests in order to advance other important interests or public uses. *See Hitchings v. Del Rio Woods Recreation and Park Dist.*, 55 Cal.App.3d 560, 127 Cal.Rptr. 830, 834 (1976) (‘for purposes of public use of waters, the state may adopt different and less stringent tests of navigability’).

City of Irondale v. City of Leeds, No. 1111347, 2013 WL 563410, at *5 (Ala. Feb. 15, 2013) (emphasis added).

Section 9-11-80 of the Code of Alabama defines “public and private waters” as follows:

(a) All waters of this state are hereby declared to be public waters if such waters are natural bodies of water such as rivers, creeks, brooks, lakes, bayous, bays, channels, canals or lagoons or are dug, dredged or blasted canals and if these waters traverse, bound, flow upon or through or touch lands title to which is held by more than one person, firm or corporation. ***Any water impounded by the construction of any lock or dam or other impounding device placed across the channel of a navigable stream is declared a public water.*** All waters caused to be impounded or owned or leased by any municipality, county or other governmental unit are also declared to be public waters; likewise, all impoundments owned or operated by public utilities when such impoundments touch or bound lands title to which is held by more than one person, firm or corporation are declared to be public waters; provided, that before any person may go or be upon the posted lands of another for the purpose of fishing he shall procure the consent of the landowner or his agent.

(b) Private waters are defined as any body of water wholly on lands held in fee or in trust or under lease by any one person, firm, corporation or club and include impoundments that are wholly on lands held in fee or in trust, or under lease by any one person, firm, corporation or club, and regardless of the extent of the impounded stream, provided such stream is nonnavigable.

ALA. CODE § 9-11-80 (2001) (emphasis added).

The Alabama Supreme Court has emphasized that the determining factor for determining whether impounded water is public water under section 9-11-80(a) of the Code is whether the lock or dam is placed across a waterway that is navigable. *Wehby v. Turpin*, 710 So. 2d 1243 (Ala. 1998). In *Wehby*, the Court held that individual property owners owning part of a lake bed only had the

right to use the surface waters covering their property rather than the entire man-made lake because the stream that was dammed to form the lake was nonnavigable. The Court stated as follows:

The Wehbys also contend that Yellowleaf Creek is navigable at the point where the dam is located. They rely on Ala. Code 1975, § 9-11-80, for the proposition that Yellowleaf Creek, being a natural waterway flowing through lands belonging to more than one person, is a public waterway. The Wehbys assert that the lake is public and, therefore, that the common law rule would have no field of operation because the lake's source is capable of being traversed by fishing boats and canoes during some parts of the year. The Wehbys do acknowledge, however, that *impounded waters are not within the definition of "public waters" in § 9-11-80 and, therefore, that the lake is not a public lake, within the meaning of the statute, unless Yellowleaf Creek was navigable where the dam was placed.*

Id. at 1249-1250 (emphasis added).

Based upon the above, the Department must make a factual determination as to whether the dam, lock, or impoundment device is placed across a navigable waterway. The Attorney General does not make factual determinations. Opinion to Honorable Casandra Horsley, Winston County Judge of Probate, dated April 19, 1996, A.G. No. 96-00189 at 1. If the dam, lock, or impoundment is placed across a navigable waterway, the impounded waters are public waters, at least to the extent of the flood/flowage easements. *See City of Irondale*, 1111347, 2013 WL 563410, at *4.

The plain language of section 9-11-80 of the Code leads to the conclusion that the impoundment of a navigable waterway creates a public servitude to the impounded waters. Further, the Alabama Supreme Court has held that the public's right in a right-of-way or easement across certain surface waters is superior to the rights of the owner of the waterbed. *See Walker v. Allen*, 72 Ala. 456, 459 (1882) (noting that a public right-of-way or easement upon certain waters is "superior to the right of the riparian proprietor, though he may own the soil of the bed"). Thus, the public may utilize the impounded waters for hunting and fishing, but the right to use the waters extends over and across the public waters only, and does not extend to the submerged lands or any upland areas.

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CONCLUSION

Pursuant to section 9-11-80 of the Code of Alabama, if a dam, lock, or impoundment device is placed across a navigable waterway, the impounded waters are public waters that may be used by the public for hunting and fishing.

I hope this opinion answers your question. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

LUTHER STRANGE
Attorney General
By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

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