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Iowa Department of Justice, Office of the Attorney General General Opinions

The Honorable Joseph M. Kremer

Office of the Attorney General

February 6, 1996

1996 WL 169627 (Iowa A.G.)

Office of the Attorney General

State of Iowa

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Opinion No. 96-2-3

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REAL PROPERTY; WATERS & WATER COURSES; RECREATIONAL NAVIGATION; FENCES: Scope of public right to navigate non-meandered streams. Iowa Code §§ 462A.2(16), 462A.69, 716.7(2)(a) (1995). Members of the public may float on any stream that is navigable as defined in Iowa Code section 462A.2(16) and engage in activities incident to navigation, including fishing, swimming, and wading. To the extent that waterfowl hunting in Iowa stream beds is customary, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. The owner of a navigable stream bed has a right to erect a fence across the stream as necessary to confine livestock on the owner's land while affording boaters safe passage. (Smith to Kremer, State Representative, 2-6-96)

1** The Honorable Joseph M. Kremer1** State Representative***1** 1265 9th St.***1** Jesup, IA 50648

Dear Representative Kremer:

***1** You have requested an opinion of the Attorney General concerning the scope of public rights to wade, fish and hunt in non-meandered streams, and the right of a landowner to erect a fence across a non-meandered stream that is navigable. We paraphrase your questions as follows:

***1** 1. Do members of the public have a right to wade and to fish or hunt while floating or wading in a non-meandered navigable stream whose bed is privately owned?

***1** 2. Can the owner of the bed of a non-meandered navigable stream erect a fence across the stream without creating a nuisance as defined in Iowa Code section 657.2(3)?

***1** In response to these questions, it is our opinion that members of the public may float on any navigable stream and engage in activities that are incident to navigation, including fishing, swimming, and wading. To the extent that hunting waterfowl in Iowa stream beds is customary, some particular

types of waterfowl hunting might be considered as incidental to public recreational navigation. The owner of the bed of a non-meandered navigable stream has a right to erect a fence across the stream as necessary to confine livestock on the owner's land in a manner that affords boaters safe passage.

***1** Our analysis begins with the observation that the phrase “navigable waters” has two distinctly different meanings depending on the context in which it is used. Its meaning in the context of streambed ownership is different from its meaning in the context of the public right to navigate streams flowing over private property.

I. “NAVIGABLE” AND “MEANDERED” IN RELATION TO OWNERSHIP OF IOWA STREAM BEDS

***1** When entering the Union, the original thirteen states retained title to the beds of navigable waters within their borders. Consequently, the federal government later held the beds of navigable territorial waters in trust for future states. *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894). On admission to the Union each state was given title to all navigable lakes and streams within its boundaries. The act for the admission of Iowa into the Union in 1845 put it on an equal footing with other states and gave it title to all navigable waters within its boundaries. See *State v. Jones*, 143 Iowa 398, 404-5, 122 N.W. 241, 243 (1909) *aff'd sub nom. Marshall Dental Mfg. Co. v. Iowa*, 226 U.S. 460, 462 (1913); 5 Stat. L. 742-3, § 3 (1845).

***2** The State of Iowa owns the beds of its navigable streams up to the ordinary high-water mark and holds them in trust for its citizens. *McManus v. Carmichael*, 3 Iowa (Clarke) 1 (1856). Thus, a riparian owner whose land abuts a navigable water body takes only to the high-water mark. *McCauley v. Salmon*, 234 Iowa 1020, 1022, 14 N.W.2d 715, 716 (1944).

***2** For the purpose of determining streambed ownership in Iowa, streams are only navigable to the extent that they were meandered in the original government survey. *Shortell v. Des Moines Elec. Co.*, 286 Iowa 469, 481-82, 172 N.W. 649, 653 (1919); *Board of Park Comm'rs v. Taylor*, 133 Iowa 453, 458, 108 N.W. 927, 928 (1906); Note: “Fishing and Recreational Rights in Iowa Lakes and Streams,” 53 Iowa L. Rev. 1322, 1328 (1968).

***2** A meandered river is one that was set apart from adjoining public lands by “meander lines” run in public land surveys made for the United States Department of the Interior. Meander lines were run for the purpose of ascertaining the quantity of land in a tract bordering a lake or river. *St. Paul & P. R. Co. v. Schurmeier*, 74 U.S. (7 Wall) 272, 286-7 (1868); *Berry v. Hoogendoorn*, 133 Iowa 437, 108 N.W. 923 (1906); *Kraut v. Crawford*, 18 Iowa 549, 553 (1865). Instructions for the original township surveys included a directive to meander all navigable rivers. However, the original township surveys were begun during the rush of settlement during the late 1830's while Iowa was still part of the Wisconsin Territory. Criteria for determining navigability were not specified in the instructions to surveyors, time was of the essence, land was cheap, and wages for surveyors were low. See, generally, *Dodds, Original Instructions Governing Public Land Surveys of Iowa*, Iowa Engineering Society (Powers Press, Ames, IA) (1943).

***2** Thus, despite the directive to meander all navigable rivers, some large rivers were not meandered in the original township surveys. The variability in applying the meandering directive is illustrated by comparing the Little Sioux River with the East Fork Des Moines River. The latter was meandered upstream to a point near Algona, Iowa, where it drains approximately 880 square miles. However, no segment of the Little Sioux River was meandered even though it drains approximately 4500 square miles at its mouth in Harrison County. *Drainage Areas of Iowa Streams*, Iowa Highway Research Board (1974).

***2** Iowa's border rivers and lengthy segments of the Iowa, Des Moines, and Cedar rivers were meandered in the public land surveys. Much shorter segments of the Racoon, Wapsipinicon, Maquoketa, Skunk, Turkey, Nishnabotna, Upper Iowa and Little Maquoketa rivers were meandered. The upstream ends of the meandered segments are listed in the administrative rules of the Environmental Protection Commission. 567 IAC 74.1.

***2** A riparian owner whose land abuts a nonnavigable stream takes to a line midway between the banks. *Holmes v. Haines*, 231 Iowa 634, 640, 1 N.W.2d 746, 749 (1942). Consequently, the beds and banks of many of Iowa's most popular canoeing and fishing streams are privately owned except to the extent that they have been included in public purchases of adjoining lands.

II. THE STATUTORY DEFINITION OF "NAVIGABLE" IN RELATION TO THE PUBLIC RIGHT TO USE STREAMS FLOWING OVER PRIVATE PROPERTY

***3** Although the term "navigable" may simply mean "meandered" for the purpose of determining streambed ownership in Iowa, the legislature has enacted a substantially different definition of "navigable" in relation to the right of the public to use streams flowing in privately owned beds. The following definition of the term "navigable waters" was included in a 1961 revision of Iowa water safety regulations:

***3** "Navigable waters" means all lakes, rivers and streams, which can support a vessel capable of carrying one or more persons during a total of six months period in one out of every ten years.

***3** 1961 Iowa Acts, 59th G. A., ch. 87, § 2 (codified at Iowa Code § 462A.2(16)(1995)). Shortly after its enactment, this office opined in 1965 that notwithstanding the statutory definition of "navigable waters," the public had a right to canoe rivers in Iowa only to the extent that they were meandered. 1966 Op. Att'y Gen. 57-8. The 1965 opinion further concluded that owners of the beds of non-meandered streams had the right to erect fences obstructing passage of boats. *Id.* The validity of those conclusions was doubtful in 1965. They clearly are not valid in light of subsequent legislative and judicial recognition of the importance of recreational navigation to the public.

***3** In 1982, the General Assembly enacted legislation entitled "An Act relating to revision of laws governing recreational boating in Iowa, including penalties and scheduled fines for violations of boating laws." 1982 Iowa Acts, 69th G. A., ch. 1028. Section 34 added a new section to the Iowa Code:

***3** Water occurring in any river, stream, or creek having definite banks and bed with visible evidence of the flow of water is flowing surface water and is declared to be public waters of the state of Iowa and subject to use by the public for navigation purposes in accordance with law. Land underlying flowing surface water is held subject to a trust for the public use of the water flowing over it. Such use is subject to the same rights, duties, limitations, and regulations as presently apply to meandered streams, or other streams deemed navigable for commercial purposes and to any reasonable use by the owner of the land lying under and next to the flowing surface water.

***3** This statute, codified at Iowa Code section 462A.69 (1995), has not been construed in any reported opinion of a court or any prior opinion of this office. Coupled with the statutory definition of "navigable waters", section 462A.69 clarifies the public right to navigate for recreational purposes on non-meandered streams that have enough flow to float a small recreational vessel.

***3** Iowa's statutory recognition of the public right to use streams navigable in fact for recreational purposes is in accord with the modern majority rule. Cases are collected in 6 A.L.R.4th 1030.

Colorado is an exception to the modern majority rule. Compare *People v. Emmert*, 597 P.2d 1025, 6 A.L.R.4th 1016 (Colo 1979) (affirming rafters' conviction on charge of criminal trespass for floating over privately-owned streambed) with *Adirondack League Club v. Sierra Club*, 201 App. Div. 2d 225 (N.Y. App. Div. 1994) (despite posting for a century by private club, stream bed navigable in fact by canoes and kayaks was subject to public right of navigation for recreational purposes).

III. WADING, FISHING AND HUNTING AS INCIDENTS OF PUBLIC RECREATIONAL NAVIGATION

***4** Section 462A.69 clarifies the right of the public to use streams flowing through private property for navigation purposes. But it is ambiguous concerning the scope of the term “public use for navigation purposes.” If a statute is ambiguous, principles of statutory construction should be applied. Iowa Code § 4.6 (1995). In interpreting statutes the ultimate goal is to ascertain and give effect to the intention of the legislature. *Farmers Co-op. Co. v. DeCoster*, 528 N.W.2d 536, 537 (Iowa 1995). In discovering such intent courts consider the language used, the purpose to be served and the evil sought to be remedied. *Id.* When statutes relate to the same subject matter or to closely allied subjects they are said to be in *pari materia* and must be construed, considered and examined in light of their common purpose and intent so as to produce a harmonious system or body of legislation. *Id.* at 538.

***4** The definition of “navigable waters” in Iowa Code section 462A.2(16) is relevant in determining whether the legislature intended to include wading within the scope of public use for navigation purposes. By including all streams capable of floating a vessel with one person aboard during six months in one out of ten years, the legislature defined as navigable the numerous streams which are floatable by small watercraft.

***4** Water levels in Iowa streams fluctuate considerably with changes in season and from wet weather to drought. As a practical matter, floating on streams in small boats necessitates some wading. Fallen trees and log jams temporarily obstruct channels that are otherwise floatable. Canoeists sometimes must wade around such obstructions and pull their vessels over shoals even on the larger meandered rivers when water levels are low.

***4** Neither the statutory definition of the term “navigable waters” nor section 462A.69 limits navigation to periods when water levels are high. If public use for navigation were not intended to include wading through shallows, legislative declaration of the public right to navigate streams flowing through private land would be futile. Courts seek a reasonable interpretation that will best effect the purpose of the statute and avoid an absurd result. *First Iowa State Bank v. Iowa Dept. of Natural Resources*, 502 N.W.2d 164, 168 (Iowa 1993). We conclude that the legislature intended the phrase “public use for navigation” to include wading because floating often necessitates some wading.

***4** Courts in several other jurisdictions have concluded that activities such as recreational boating and activities “incident to navigation” such as fishing, wading, swimming, and hunting waterfowl are within the scope of the public right of recreational navigation on streams flowing over privately owned stream beds. *State v. McIlroy*, 595 S.W.2d 659, 664-65 (Ark. 1980); *People v. Sweetser*, 72 Cal. App. 3d 278, 140 Cal.Rptr.82 (1977); *Southern Idaho Fish & Game Ass’n v. Picabo Livestock, Inc.*, 96 Idaho 360, 528 P.2d 1295 (1974); *Kelley ex rel. MacMullan v. Hallden*, 51 Mich. App. 176, 214 N.W.2d 856, 862-64 (1974) (citing cases from other jurisdictions employing recreational use test to determine navigability); *Elder v. Delcour*, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R. 2d 370 (1954); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 211 Mont. 29, 684 P.2d 1088, 1091 (1984); *Montana Coalition for Stream Access, Inc. v. Curran*, 210 Mont. 38, 682 P.2d 163, 170-1 (1984); *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961) (floating and fishing but wading only as necessary for floating).

***5** Courts have articulated several rationales for the public right to navigate and engage in activities “incident to navigation” on streams flowing in privately owned beds. An early and frequently cited case is *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816, 820 (1914) (public right to boat and hunt waterfowl for pleasure on stream navigable in fact by small boats based on implied trust reservation in conveyance of stream bed). Other courts have cited constitutional or statutory declarations of navigability or public ownership of the water flowing in privately-owned stream beds. *Muench v. Public Service Comm’n.*, 261 Wis. 492, 53 N.W.2d 514, 519 (1952); *Montana Coalition for Stream Access, Inc., v. Hildreth*, 684 P.2d at 1091; see Note: *supra*, 53 Iowa L. Rev. at 1332-42.

***5** The Iowa Supreme Court has noted the relationship between recreational fishing and navigation, taking judicial notice of the “expanding involvement of Iowans in recreational activities on or near navigable streams such as the Missouri River.” *State v. Sorensen*, 436 N.W.2d 348, 363 (Iowa 1989). Public recreational use of Iowa’s streams clearly is not limited to meandered stream segments. Prominent examples of non-meandered rivers popular for floating and fishing are the Boone and Little Sioux, all of the Upper Iowa except a straightened portion near its confluence with the Mississippi River, all of the Raccoon upstream from Polk County, the Maquoketa upstream from the City of Maquoketa, and the Iowa upstream from the City of Ladora. In the mid-1960’s the Iowa Conservation Commission began printing guides for canoeing and fishing Iowa rivers without distinguishing between meandered and non-meandered segments. See, e.g., Iowa Department of Natural Resources (DNR), “Canoeing the Middle and South Raccoon River”. The DNR’s fish stocking programs include periodic stocking of walleye in non-meandered floatable streams. See DNR, Fisheries Bureau, “1995 Stocking List”; see also “Interior River Walleyes! a Well-Kept Secret,” *Iowa Conservationist* 8, 10 (March/April 1995).

***5** Public recreational use of Iowa’s many non-meandered streams from public points of access and egress is of substantial importance. The spiritual value of experiencing such streams has been eloquently expressed:

***5** Most of all, these rivers invite awareness. Land forms, sky patterns, and the community of plant, animal, and bird life are on display in river corridors as nowhere else in the forest. Wild rivers are the museums of the natural world. And beneath, there is no wearisome tile floor but a cushion of running water, brown or clear, floating one in sensuous ease down river.

***5** Jamieson, *Adirondack Canoe Waters*, Preface (North Flow Press 1986), quoted in “Paddling Through: New York’s Canoeable Rivers Can No Longer Be Posted by Landowners,” (September 1995) *National Environmental Enforcement Journal* 3, 7 fn. 12.

IV. RELEVANCE OF IOWA’S CRIMINAL TRESPASS STATUTE

***5** In 1981 Iowa’s criminal trespass statute was amended to specify a prohibition against entering property to hunt, fish or trap without express permission from the landowner or agent. 1981 Iowa Acts, 69th G.A., ch. 205, § 1 (codified at Iowa Code § 716.7(2)(a) (1995)). We thus need to consider whether this statute conflicts with section 462A.69 and, if so, how the conflict should be resolved.

***6** If two statutes are irreconcilable, the statute latest enacted prevails. Iowa Code § 4.8; *Doe v. Ray*, 251 N.W.2d 496, 503 (Iowa 1977). Ambiguities in penal statutes are strictly construed against the State. *First Iowa State Bank v. Iowa Dept. of Natural Resources*, 502 N.W.2d 164, 166 (Iowa 1993). If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. Iowa Code § 4.7.

***6** Applying these rules of construction, we conclude that section 462A.69 would bar prosecution of a

person for criminal trespass arising from boating, fishing, or wading in the bed of a stream that is navigable as defined in Iowa Code section 462A.2(16). Section 462A.69 was enacted one year later than section 716.7(2)(a). Additionally, section 716.7 is a penal statute while section 462A.69 is not penal. Although section 716.7(2)(a) is more specific than section 462A.69 with respect to hunting, fishing, or trapping, it is less specific with respect to the property to which it applies.

***6** Courts in other jurisdictions have recognized a public right to hunt waterfowl from a boat on a stream flowing in a privately owned bed. *Diana Shooting Club v. Husting*, supra. However, generally, hunting is less likely than wading and fishing to be viewed as an incident of recreational navigation. To the extent that waterfowl hunting is customary in Iowa stream beds, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. It would not be appropriate for us to speculate on particular facts and circumstances which might make section 462A.69 relevant in a criminal trespass prosecution for hunting waterfowl in a privately-owned stream bed.

V. FENCING ACROSS A NAVIGABLE STREAM

***6** Owners have a duty of reasonable and ordinary care in confining their livestock. *Leaders v. Dreher*, 169 N.W.2d 570, 573 (Iowa 1969). In some circumstances an owner may be required to erect a fence across a stream to confine livestock. See *Myers v. Tallman*, 169 Iowa 104, 149 N.W. 259 (1914) (dispute arising from complications of attempting to maintain hog-tight fence across stream). It is unlikely that any landowner would attempt to maintain a hog-tight fence across a navigable stream due to the considerable practical difficulties and the modern practice of confining hogs in buildings or lots. However, it is still a common practice to pasture cattle along streams and to confine them by extending one or more electric or barbed wires across the stream.

***6** You have asked whether such a fence across a non-meandered navigable stream would violate Iowa Code section 657.2(3) which states that a nuisance includes: “[t]he obstructing or impeding without legal authority the passage of any navigable river, harbor, or collection of water.” The identical text has been codified since the early years of statehood. See Code of 1851, § 2759. Arguably, the meaning of the word “navigable” is ambiguous as used in this ancient statute enumerating nuisances. However, whether or not section 657.2(3) is applicable to a fence across a non-meandered stream, such a fence could constitute a common law nuisance by interfering with public navigation. Statutory provisions enumerating nuisances have not superseded the common law of nuisance. *Guzman v. Des Moines Hotel Partners*, 489 N.W.2d 7, 10 (Iowa 1992). Moreover, irrespective of liability in nuisance, one who negligently fences a stream in a manner that causes injury to the navigating public may be liable in tort. See *Guzman*, 489 N.W.2d at 11 (analyzing the relationship between nuisance and tort).¹

VI. CONCLUSION

***7** It is our opinion that members of the public may float on any stream that is navigable as defined in Iowa Code section 462A.2(16) and engage in activities incident to navigation, including fishing, swimming, and wading. To the extent that waterfowl hunting is customary in Iowa stream beds, some particular types of waterfowl hunting might be considered as incidental to public recreational navigation. The owner of a navigable stream bed has a right to erect a fence across the stream as necessary to confine livestock on the owner's land in a manner that affords boaters safe passage. Respectfully Submitted,

***7** Michael H. Smith

***7** Assistant Attorney General

Footnotes

- 1 Conflict between fence wires and canoeists is easily avoided. Cattle and canoeists tend to seek different areas of rivers and streams. Canoeists generally navigate in the “thalweg,” the deepest navigable area of the channel, while cattle instinctively prefer wading the shallows to swimming in current. Fence wires can be insulated to afford boaters safe passage. With simple modifications, livestock “watergap” fences can be maintained across navigable streams without obstructing navigation.

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