

# The Question Remains— Public or Private?

by DENNIS RIECKE, MDWFP Fisheries Biologist

**O**ne area where public versus private gets real complicated involves natural oxbow lakes that were previously part of a river or stream. Are these public or private water bodies?

Many of you have fished them for many years and consider them public waters. Surely, the presence of a public boat ramp on these waters means they are public, right? Well, every so often I receive phone calls from people seeking definite answers. Unfortunately, I'm no help. Believe it or not, no one who works for MDWFP can give you a definite answer. Shocking, isn't it? Why you might say? The reason is because we don't have the authority to do so. I'll be happy to give you my opinion but it's only that.

First you should understand that I am not a lawyer so don't consider anything in this article as legal advice. However, I have read the laws, opinions issued by the Attorney General's office, and consulted with knowledgeable individuals. My intent

is to relate my experiences on this issue to help you make an informed decision on whether or not fishing and hunting on these water bodies is trespassing. Hopefully, this article will stimulate discussion that will help resolve this long-standing dilemma. Thus far in my 13 year career with the department the issue has surfaced several times — Goose Lake, Issaquena County; Mossy Lake and McIntyre Scatters, Leflore County; Bee Lake, Holmes County; Fosters Lake, Wilkinson County and yesterday, Lake Mary, Wilkinson County.

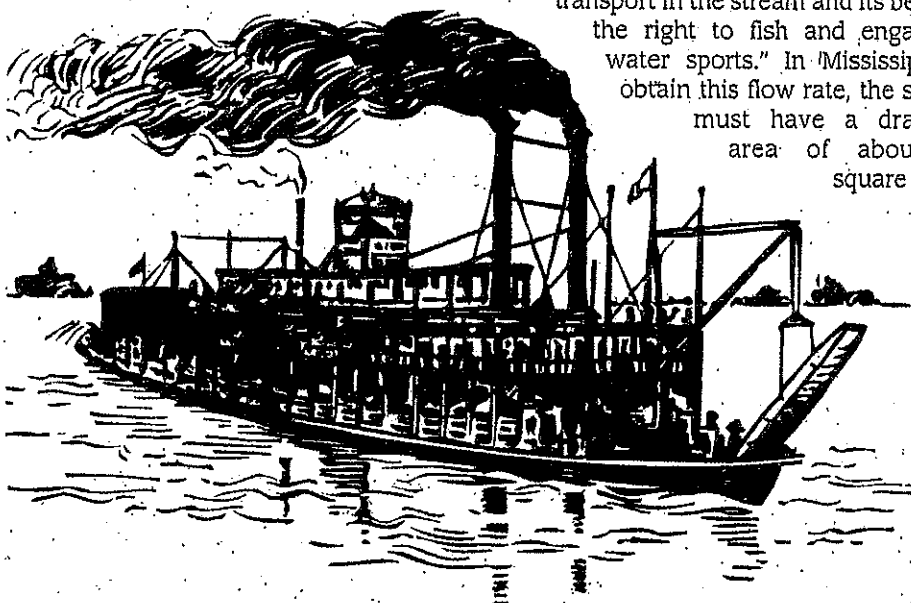
## Public Waterway Law

State law 51-1-4 states "Such 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 (MDEQ), 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 its bed and the right to fish and engage in water sports." In Mississippi to obtain this flow rate, the stream must have a drainage area of about 75 square miles.

So, most headwaters and small streams are "private streams". The last sentence of the law states "This section shall apply only to natural flowing streams." Since this is the only state law granting MDEQ this authority, they cannot rule on whether any nonflowing water body is public. At times in the past MDEQ has reasoned that if a public waterway flows through a lake they believe they have the authority to designate that lake as public. MDEQ has a publication listing all the starting and ending points for public waterways and has marked them on a large state map. Does this mean that if a waterway is not on the map that it is not public?...well.

## What's Legal and Illegal

So, what can you legally do on these public waterways? You can hunt, fish, swim, boat, and tube. You can also anchor, tie up to a tree, and wade because these are normal activities when engaged in hunting and fishing. You cannot erect a permanent duck blind or attach anything meant to be permanent to the streambed, stream banks, or trees along the banks. You cannot launch a boat or walk around on private lands adjacent to these streams. The law specifically forbids these activities by stating "Nothing herein contained shall authorize any person utilizing such public waterways, under the authority granted hereby, 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". In most cases, landowners own the riparian as well as the stream banks and streambed and thus pay property taxes on these lands. Given this, all public waterways have always been sur-



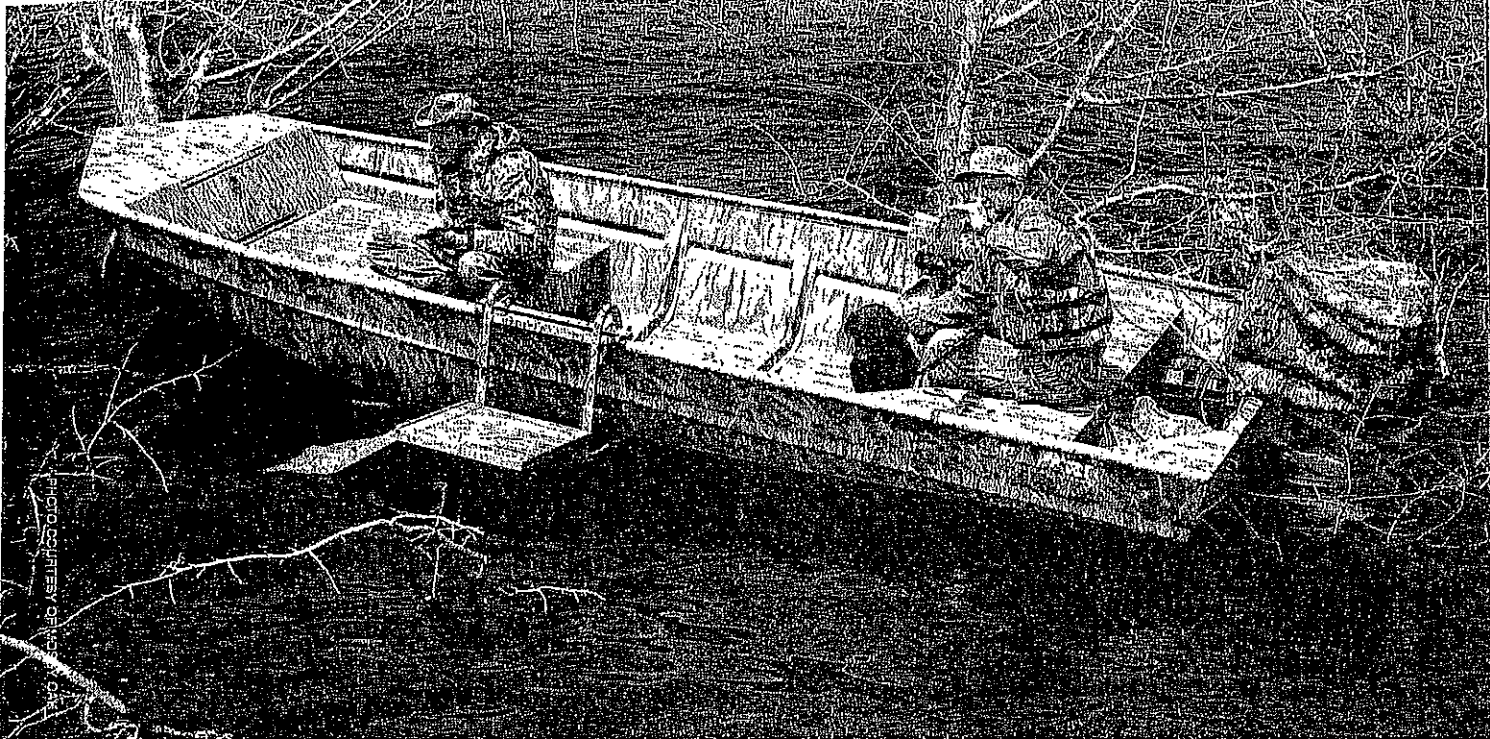


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rounded by private land and entering such land without permission is trespassing. Therefore, camping without landowner permission along the banks or on sandbars is also trespassing.

You can legally gain access to public waterways by using public ramps or by having landowner permission to cross their land to reach the water. Private fee ramps are an example of this. The state owns the water in public waterways and it owns the fish and wildlife statewide, except for fish in private ponds and artificially constructed water bodies.

### Flooding

Let's say your favorite stream is swollen with rainwater and flooding adjacent land. Are the flood waters on this adjacent land considered part of the public waterway? Previously they were, but the law now specifically prohibits their use by stating, "Flood water which has overflowed the banks of a public waterway is not a part of the public waterway." At times it can be difficult to determine the dividing line between floodwater and a public waterway. A practical rule-of-thumb is to confine your activity within the waters bounded by the tree line on each bank. If you do so, you will remain in the public waterway.

### ATV's

There have been debates and articles about the rights of ATV or 4-wheeler riders versus the rights of

property owners. The issue has become so contentious that last year a frustrated property owner shot an ATV rider who repeatedly trespassed on his property. The law clearly prohibits riding ATV's or other motorized vehicles on stream banks and streambeds. The same law states, "**Nothing herein contained shall authorize any person utilizing said public waterways under the authority granted hereby to disturb the banks or beds of such waterways.**" Streams are not roads or highways for land vehicles and riding motorized vehicles in streams is not considered a "water sport". Since these vehicles disturb the bed and banks of streams, the law prohibits such activity.

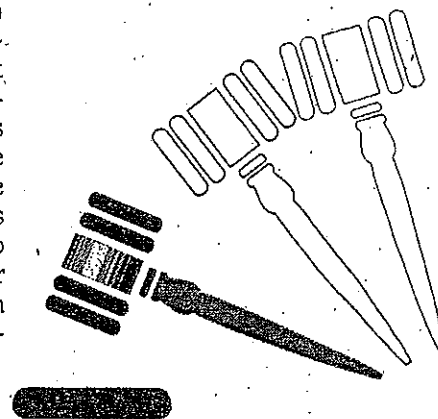
### The Rest of the Story

Providing you with that background, we now come to the issue of oxbow lakes. **If you want to settle the issue (or get a definite answer) on whether they are public or private, go to court.** While this is not simple or inexpensive route, it will provide a definitive answer. "This" is where Paul Harvey would say "is the rest of the story." Unfortunately, we cannot compile a list of oxbow lakes and go to the courts and ask them to rule on their status to settle the matter once and for all. Courts only deal with "ripe" matters—that is, a specific dispute or issue must be present before hearing a case. The MDWFP is clearly interested in resolving the status

of these water bodies for a variety of reasons. Most importantly, conservation officers need to know what oxbow and natural lakes are deemed "public" to effectively respond to trespassing complaints. Secondly, MDWFP uses federal funds to construct boat ramps and piers for public usage. It is a violation of federal law to construct these facilities on private lands without a lease agreement or exclude free public usage.

### Statehood Rights

Several laws and principles are applicable here that the courts can use to declare nonflowing waters "public waters". The first is called the Equal Footings Doctrine and it concerns the two great public trusts the United States created and conveyed to each new state—lands to be held by the state for the public purpose and tide-



lands and navigable waters. In each case the federal sovereign granted the state simple title in certain properties to be held by the state for the benefit of all its people. Other useful concepts are Common Law and the Public Trust Doctrine. These are powerful legal concepts that judges interpret. They exist in every state and have skillfully been used to protect resources for the public. What each state received under the Public Trust Doctrine it cannot ever give up or abandon.

### Navigable Waters

Our state legislature has provided an evolving definition of "navigability". It seems reasonable the courts could use this definition to declare lakes "public waters". Court cases have rendered that navigable waters are those waters which are navigable by loggers, fisherman, and pleasure boaters. Furthermore, owners of the beds and bottoms of navigable freshwaters have no right to exclude others from the water's surface. All public waterways are not navigable waters but all navigable waters are public waterways. Anyone reading our state law defining navigable waters quickly

realizes it is an old law due to its language which stipulates that such waters must "have sufficient width and depth for thirty consecutive days each year for floating a steamboat with carrying capacity of two hundred (200) bales of cotton."

### Prior Status

I contend that if a water body was ever considered a public waterway by any means, it should forever retain that status. Let's consider all those oxbow lakes that were once part of the main channel of such large rivers as the Mississippi, Yazoo, Coldwater, Yocona, Yalobusha, Tallahatchie, Pascagoula, Biloxi, Big Black, Wolf, etc. By meandering through time, bend ways are cut off forming these lakes. The process, called avulsion, means a cutting off of land by flood, currents, or change in course of a body of water. Courts have ruled that "the public right to waters formed by an avulsion is as great as any other public waters." Furthermore, the Act of Congress authorizing the formation of Mississippi statehood provided "that the River Mississippi, and the navigable rivers and waters leading into the same, ..., shall be

common highways, and forever free, ....."

### Prescription

The doctrine of prescription states "that where the public has enjoyed access to waters for in excess of ten consecutive years, those waters belong to the state by adverse possession, to be held in trust for the people." Courts have stated that "under this view, oxbow lakes formed before statehood, as well as other waters used by the public under a claim of right, openly, notoriously, peacefully, continuously, and uninterruptedly for in excess of ten years become public and once public, such waters may not be lost by prescription." This deals with the elements of adverse possession and because no one can "adversely possess" from the state, what the state receives via prescription, she cannot lose. Our law recognizes that roadways may become public by prescription and the court stated "by analogy, waters may similarly become public."

### What's Next

I really don't know, but I hope a solution can be found. In the 1990 court case from which I quoted heavily, a footnote offers these hopeful words "we know that many lakes are public but we have at present no statute declaring which lakes are.....certainly nothing in the 1988 enactment or any other statute declares our many lakes heretofore thought public to be no longer so, nor could it".

I do know that the "public vs private" water questions will continue and unless state laws are amended the courts will have to settle such questions at the expense of taxpayers. We have hundreds of oxbow lakes — it has the potential to be very expensive. This issue will continue to frustrate those seeking an immediate solution and those like myself that try to explain it. Mississippi is a poor state with plenty of more prudent ways to spend state revenues. Let's change the law and avoid all the expenses and court cases.

**MWW**

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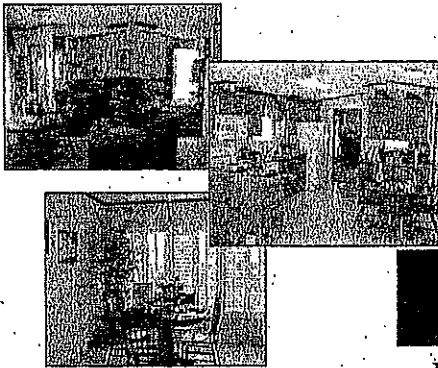
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