

STATE OF MICHIGAN



NATURAL RESOURCES COMMISSION

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DEPARTMENT OF NATURAL RESOURCES

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 HOWARD A. TANNER, Director

September 16, 1980

COPY

Mr. Charles Moll, Manager
 Boyne Mountain Lodge
 Boyne Falls, Michigan 49715

Dear Mr. Moll:

This office has completed a file review of the Boyne River issue which dates back to 1964. Of particular interest is a letter written by the late Ralph A. MacMullan, then Director of the Department of Natural Resources, dated June 1, 1964 to Frank J. Kelley, Attorney General (copy enclosed). This department never did receive a formal or informal opinion from the Department of Attorney General on this issue.

Another interesting document appears in the file in a letter to Ralph A. MacMullan from Nicholas V. Olds, dated May 13, 1964 (copy enclosed). At that time, Prosecutor Varnum said he "would not issue any warrants for trespass unless the person went up beyond the bank or on the dam". Apparently, there was some disagreement as to whether an act of trespass was committed when the uplands were entered by portaging around the dam.

Insofar as fish planting records are concerned, the last stocking of the pond behind the dam was completed in 1963. The fish stocking records contain the notation "delete stocking, private pond".

During the past several years, two important developments have occurred which impact on the status of the Boyne River impoundment. One, the Recreational Trespass Act (323 PA 1976) and Department of Natural Resources v. Halden, 51 Mich. App. 176 (1974).

The former prescribes certain standards regarding public entry in respect to hunting, fishing, snowmobiling and ORV use on private lands. The Halden decision is the latest expression of the Michigan Supreme Court on the issue of navigability.

The final determination of the character of any given water is presently a judicial function. Halden held that members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high-water mark on waters of this state which are capable of being navigated by oar or motor propelled small craft. Unquestionably, there are portions of the Boyne River above the dam, including the impoundments, which meet that criteria.

In absence of a request for a declaratory ruling as provided for in 306 PA 1969 (Administrative Procedures Act) on a specific question, this office will address the merits of the right of the public to enter the impoundment based

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on the provisions of the Recreational Trespass Act.

On April 26, 1977, George Dahl, then Chief of the Law Enforcement Division, in a letter to Tom Ellis, Manager of the Boyne Mountain Ski Lodge (copy enclosed) advised Mr. Ellis that: "If a stream or river encompasses 30 miles of stretch from origin to its confluence with another body of water, but only 6 miles thereof is navigable or public, the stream does not come within the purview of Section 2(3) of Act 323, 1976."

Subsection (3) reads:

"(3) On fenced or posted lands or farm lands, a fisherman wading or floating a navigable, public stream of a length greater than 15 miles may, without written or verbal consent, enter upon the upland within the clearly defined banks of the stream or walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, such as a dam, deep hole, a fence, or some other exercise of ownership by the riparian owner."

On August 8, 1980, conservation officers attempted to canoe the Boyne River starting at a point 8 miles upstream from the mouth (Metro and Greiger Roads). The river is 15 feet wide at this point. Due to fallen logs it was only canoeable for a short distance. Canoeing was attempted at several other locations and the stream was surveyed on foot at the impoundment and upstream for approximately 1/3 mile. It was the evaluation of the conservation officers that approximately 6-1/2 miles of the total stream length (approximately 15 miles) was navigable.

Therefore, based on Section 2(3) of 323 PA 1976 (Recreational Trespass Act), it is the opinion of this office that persons entering the uplands of the impoundment on the Boyne River for the purpose of fishing must have written permission from the landowners. Failure to do so is a violation of the Recreational Trespass Act.

Based on past state fish stocking records, and that the character of the Boyne River permits free migration of fish, fishermen must abide by state fishing regulations. The riparian owner may determine who shall fish but the fishing is regulated by law.

If I may be of further assistance, please contact this office.

Sincerely,



Frank Opolka, Chief
Law Enforcement Division

FO/gc

cc: Mr. Guenther
Mr. Milstein
Mr. Beatty, Charlevoix Co. Prosecutor
Mr. Curtis
Mr. Pyers
Mr. Gene

Enclosures