

DARRELL F. SMITH, THE ATTORNEY GENERAL  
STATE CAPITOL  
PHOENIX, ARIZONA

**LAW LIBRARY**  
**ARIZONA ATTORNEY GENERAL**

July 20, 1965

DEPARTMENT OF LAW LETTER OPINION NO. 65-28-L (R-112)

---

REQUESTED BY: Irval L. Mortensen  
Graham County Attorney

QUESTIONS: 1. Do the provisions of A.R.S. §§ 5-301 through 5-313 give to the peace officers of the state, counties and cities jurisdiction over a body of water upon which watercraft is able to be navigated, but which is a private body of water and for which users must pay a fee before using the lake for boating and water skiing?

2. Do the peace officers of the state, counties and cities have authority to enforce the provisions of §§ 5-301 through 5-313 A.R.S. when said acts are committed upon a private body of water?

ANSWERS: 1. Yes.  
2. Yes.

A.R.S. §§ 5-301 through 5-313 were enacted in 1958, and provide general regulations of boating and water sports.

A.R.S. § 5-301 (3) provides:

" 'Waterway' means any body of water upon which a watercraft is able to be navigated."

A.R.S. § 5-302 provides:

"The provisions of this article apply to all watercraft operating on all of

the waterways of this state, including that part of waters common to interstate boundaries, which is within the boundaries of this state, and shall be enforced on waterways under federal jurisdiction insofar as they do not conflict with rules and regulations of the United States coast guard or other federal regulations."

The questions asked present questions of statutory construction and legislative intent. The regulations contained in the provisions of A.R.S. §§ 5-301 to 5-313 include boat licensing regulations, as well as various provisions prohibiting the negligent operation of watercraft, operation of watercraft while intoxicated, required reporting of accidents, and various other water safety regulations covering boating and water skiing. There is no specific reference in any of the sections to "private" waters, lakes or ponds.

A.R.S. § 1-211 B provides that:

"Statutes shall be liberally construed to effect their objects and to promote justice."

A.R.S. § 1-211 C provides that:

"The rule of the common law that penal statutes shall be strictly construed has no application to these revised statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice."

Opinion No. 65-28-L  
(R-112)  
July 20, 1965  
Page Three

The courts in Arizona have in fact construed penal statutes with a view to effect its object and to promote justice. (Bush v. State, 19 Ariz. 195, 168 Pac. 508; Williams v. Territory, 13 Ariz. 27, 108 Pac. 243.)

In general it may be said that the statutes enacted under general police powers of the state must bear a substantial and reasonable relation to the preservation of the public health, safety, morals or general welfare. (62 C.J.S. p. 306; 16 Am. Jur. 2d pp. 537-544; Annot. in 92 A.L.R. 2d 1283.)

In an annotation in 15 A.L.R. 2d 754 it is said that:

"Generally speaking, private lakes or ponds are not subject to the regulatory power of the state wherein they are situated....The term 'private' is not self explanatory; and the question of what are 'private waters' for the purpose of application of the statutes presents the main problem to be considered."

At page 755 of the same annotation it is said that:

"The view has generally been taken that statutes regulating the manner and time of fishing in waters within the state do not apply to lakes or ponds privately owned...and this is so even though the particular statute involved does not specifically exempt private lakes or ponds."  
(See Washburn v. Oklahoma, Okla. Crim., 213 P.2d 870, 15 A.L.R. 2d 751; Arkansas Game & Fish Commission v. Storthz, 181 Ark. 1089, 29 S.W. 2d 294).

Similarly, it has generally been held that private grounds and ways are not public highways or places within the meaning of measures prohibiting the negligent operation of automobiles. (7 McQuillen, "Municipal Corporations," 3d Ed., pp. 667, 668). On the other hand, reasonable regulations designed to protect the public water supply have been held applicable on occasion to boating, bathing, fishing, etc., on private lakes. (See cases in Annot 56 A.L.R. 2d 790)

The courts in many jurisdictions have taken the view that navigable waters are public waters, or that they are subject to rights of the public to use them. (Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128; State v. Korrer, 127 Minn. 60, 148 N.W. 617; Flisrand v. Madson, 35 S.D. 457, 152 N.W. 796; also annot. in 57 A.L.R. 2d 569, and cases cited therein.) Some jurisdictions take the view that it is the physical capacity of the particular lake for one or more public uses, including boating for pleasure, which determines whether the particular lake is "public" (or "navigable") and, therefore, subject to public rights. (See Annot. in 57 A.L.R. 2d 569).

Such an interpretation used in answering the question raised herein would clearly lead to the conclusion that the provisions of A.R.S. § 5-301 et seq. would be applicable to a waterway such as is described in the question. However, there being no case authority in Arizona defining navigable or public waters, the same conclusion may be reached on other grounds. Thus, we have a legislative definition of "waterway" which could literally include navigable private, as well as public, waters. In addition the regulations enacted by the Legislature are for the most part of the type which might reasonably apply to protect the public safety on private waters used by the public as well as public waters, eg., careless operation of watercraft, operation of watercraft by incapacitated persons, reporting of accidents, the use of life preservers, overloading of watercraft, etc. Therefore, we are of the opinion that the provisions of A.R.S. §§ 5-301 through 5-313 are applicable to all navigable waterways, whether privately or publicly owned, which are open and available for the use of the public, either by the payment of a fee, or otherwise.

Opinion No. 65-28-L  
(R-112)  
July 20, 1965  
Page Five

A.R.S. § 5-312 A gives all peace officers of the state, counties and cities concurrent jurisdiction to enforce the provisions of the article in question, subject of course, to all the usual safeguards involved in the enforcement of any other public law or regulation upon private property.

No opinion is expressed herein as to the character of the ownership of any particular body of water, nor as to whether any particular body of water is in fact "navigable" within the meaning of the referenced statutes.

Respectfully submitted,

  
DARRELL F. SMITH  
The Attorney General

DFS/cah