

Lake Access: Arkansas Court of Appeals Addresses Challenge to Fees/Restrictions



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The Arkansas Court of Appeals (Division 1) (“ACA”) addressed in a February 1st Opinion a challenge to restrictions by a private entity on the use of a lake. See *The AGREED Foundation v. Friends of Lake Erling Association*, No. CV-20-509.

The issues involved lake-use policies imposed by the owner of the lakebed.

Lake Erling is described as a 7,100-acre lake that was constructed in 1956 by the International Paper Company (“IP”) in Lafayette County, Arkansas. Some of the land beneath the lake was owned by the federal government.

The United States and IP entered into an act of exchange (“Act”) in 1952.

The United States was granted a flowage easement over the IP-owned land within the greater Bayou Bodeau Reservoir Project. In turn, IP was granted the right to flood United States land under the lake that was eventually constructed.

The United States’ conveyance to IP included a perpetual easement:

. . . for its construction of a dam and reservoir to supply fresh water for industrial purposes.

The Act required IP to:

1. place no restrictions on the public use of Lake Erling; and
2. allow public access to Lake Erling via its land.

IP is stated to have never charged for, or objected to, the public’s use of the lake or restricted adjoining landowners from constructing structures to access the lake.

IP conveyed its interest in the land under Lake Erling to the AGREED Foundation (“AGRED”). AGRED agreed to assume all of IP’s obligations and duties imposed by the Act.

AGRED subsequently began charging various fees to access the lake.

Friends of Lake Erling Association (“FOLEA”) filed suit in the Lafayette County Circuit Court (“Court”) challenging AGRED requirements:

1. to purchase a boat decal from AGRED in order to launch motorized boats on Lake Erling; and
2. to purchase an annual permit for boat docks and other structures on the lake.

FOLEA is described as a nonprofit organization dedicated to preserving the public's right to access Lake Erling. The membership is stated to consist of individuals that own or rent real property adjacent to the lake who had enjoyed the unrestricted right to:

- Boat
- Hunt
- Fish
- Engage in recreational activities

The Court held a hearing on a preliminary injunction requested by FOLEA and AGRED's motion to dismiss.

The Court found that FOLEA had standing to bring the lawsuit. It further granted FOLEA's summary judgment motion holding that the Act prohibited AGRED from placing restrictions on the public's use of the lake for purposes stated in the agreement which include:

- Recreation
- Wildlife
- Fishing and hunting

An injunction was also entered on behalf of FOLEA.

The ACA first held in addressing the appeal that FOLEA's members had standing to bring the legal action.

In addressing the merits, AGRED argued that the Act does not prohibit its fee-generating programs. This was based on an assertion that the Act granted it:

"complete control and management of Lake Erling"

FOLEA responded that the Act "clearly grants" the public unrestricted use of the water area of Lake Erling. This was stated to include:

. . . right to operate a motorized boat and construct boat docks and other means of assistance to exercise their right to access the lake.

FOLEA cited the contractual provision granting the public unrestricted access noting its consistency with the provision granting AGRED the right to control/manage the lake "to insure a reasonable and sufficient fresh water supply." Also cited was a near 60-year peaceful coexistence of the public and IP on the lake.

AGRED also cited the Act's requirement that there shall be "no restrictions on the public use of the water area" as synonymous with the requirement under the Flood Control Act that waters shall be open to public use generally. It then cited federal case law involving the United States in which the fees or other reasonable restrictions did not result in an area no longer being "open to public use."

FOLEA distinguished the federal cases because the relevant lakes were constructed and owned by the U.S. Army Corps of Engineers. They argued that Lake Erling was not and that neither case was governed by an act of exchange.

The ACA agreed that the cases were distinguishable and therefore did not provide guidance.

The ACA noted that when construing a contract, the following must be considered:

- Sense and meaning of the words used by the parties as they are taken and understood in their plain and ordinary meaning.
- Intention of the parties is also to be gathered from the whole context of the agreement

The ACA concluded that IP was to have use of the valuable public resource in exchange for maintaining the lake for the unrestricted use and benefit of the public. Also considered was the fact that IP did not restrict the public (including adjoining landowners) from constructing boat docks, etc., from the 1950s to November 2013. Further, no fee was charged nor was a permit required.

Concern was expressed that a contrary ruling would result in many of the existing lake structures being at risk of being removed. As a result, it held that IP's conduct was convincing evidence of the parties' understanding of the Act. No error was found in the Court's ruling that permits and fees for structures on the lake are restrictions under the Act.

Finally, ACA also addressed AGRED's fee program for granting easements to adjacent owners seeking private access to the lake (as opposed to using the designated route of public access contemplated by the Act). An argument was put forth that the easement program and land-use permits were properly characterized as granting easements to adjacent landowners. As a result, the argument was that it is not required to allow anyone access to the lake other than by the public route designed by AGRED and the United States (i.e., it was a question of property law that must be determined on a case-by-case basis between AGRED and the property owners).

FOLEA responded that the case did not involve an issue about an access route over AGRED's property to access Lake Erling. Instead, the concern was AGRED's permit and fee for both docks and similar structures.

The ACA held that the Court did not address the easement issue and the appeal focuses only on the public's right to unrestricted access under the Act (as opposed to the separate obligation of AGRED to grant permit access routes across its land to access Lake Erling).

A copy of the Opinion can be downloaded [here](#).