

LIVESTOCK:  
UNFENCED LAND:  
OPEN RANGE TERRITORY:

United States of America not required to fence wild life refuge located in open range territory to keep ranging cattle from ranging or grazing within the boundaries of the refuge.

October 31, 1951

11/1/51

Honorable Roy W. McGhee, Jr.  
Prosecuting Attorney  
Wayne County  
Greenville, Missouri



Dear Sir:

Your opinion request of June 5, 1951, upon reassignment, is before me for an opinion. Prior to its assignment to me, this office again, on July 21, 1951, received another request in which you restated your proposition, the pertinent part of the June 5th letter reads:

"The Federal government owns a large amount of land here in our county as a result of the Wappapello and Clearwater dams. Several farmers have leased portions of this land for farming purposes, and in certain of the "open range" townships other farmers are allowing their stock to run free on this land.

"The land is unfenced, and I am wondering if the Federal government stands in a different position in this respect than would an individual owner, i.e., can the government keep the stock out without fencing?"

We believe the following cases cited answer the question about the government fencing its land--Shannon vs. U. S., 165 Fed. Rep. 870; U.S. vs. Travis, 66 Fed. Sup. 413.

In the Travis case, supra, the court held that the Federal Government was under no obligation to fence its land included in the migratory bird refuge due to the fact that the state laws gave to the subjects of the state rights that extended only to the lands of the state and up to the border of those owned by the United States. Then too, the Secretary of the Interior had issued regulations for the administration of wild life refuges and in this case is set out Section 16.3, which reads as follows:

Hon. Roy W. McGhee

"Sec. 16.3. Grazing. No cattle, sheep, horses, or other livestock are permitted to graze on the public lands within the exterior boundaries of such game ranges, or refuges, except under permit of the Secretary of the Interior and in accordance with such conditions as he may prescribe therein and no grazing is permitted on lands within the exterior boundaries of such game ranges or refuges, which have been or which hereafter may be acquired by the United States for the use of the Department of Agriculture for the conservation of migratory birds and other wildlife, except under permit of the Secretary of Agriculture and in accordance with such conditions as he may prescribe therein."

The court further, at page 415 of its opinion, said:

"It could not give to the people of that state the right to pasture cattle upon the public domain, or in any way to use the same. Its own laws in regard to fencing and pasturing cattle at large must be held to apply only to land subject to its own dominion. No one within the state can claim any right in the public land by virtue of such a statute. The United States have the unlimited right to control the occupation of the public lands, and no obligation to fence these lands, or to join with others in fencing them for the purpose of protecting its rights can be imposed by a state. The rights given by the state statutes to the subjects of the state extend only to the lands of the state. They end at the borders of the government lands. At that border the laws of the United States intervene, and it is within their province to forbid trespass. Such laws being within the power of Congress, it is not necessary to discuss the question whether it is sovereign power or police power, of what may be its nature, for there is no power vested in the state which can embarrass or interfere with its exercise."

In this case the court discusses Shannon v. U.S. supra, and cites many more cases of like kind where the decision was the same as here, where the court decided that landowners living in

Hon. Roy W. McGhee

open range territory, of which the United States lands were a part, could be enjoined in an equity proceeding from allowing their cattle to range and graze upon government land included in the wild life refuge.

CONCLUSION

It is, therefore, the opinion of this office that the United States, as an owner of land, is not required to fence its land included in wild life refuge in open range territory as is required of private landowners, to keep stock from ranging and grazing upon their land.

Respectfully submitted,

A. BERTRAM ELAM  
Assistant Attorney General

APPROVED:

  
\_\_\_\_\_  
J. E. TAYLOR  
Attorney General

ABE:mw