



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

August 30, 1978

ATTORNEY GENERAL OPINION NO. 78- 279

Mr. Don Vsetecka
Finney County Attorney
118 West Pine Street
Garden City, Kansas 67846

Re: County Home Rule--Powers--Land Reclamation

Synopsis: Because the Arkansas River is a navigable stream, it is beyond the exercise of the local legislative powers of the board of county commissioners of any county through which it passes to impose, under K.S.A. 1977 Supp. 19-101a, requirements governing the restoration of the bed and channel of the river by operators of sand-dredging operations thereon, upon the cessation of such operations. However, similar requirements may be adopted in the exercise of county home rule powers applicable to lands in the county not lying in the bed and channel of the river.

* * *

Dear Mr. Vsetecka:

You advise that the board of county commissioners of Finney County, Kansas, wishes to adopt a resolution which will require the operators of sandpits to restore the terrain operated by them for that purpose to the condition existing prior to the commencement of operations, at any time when the operator ceases and abandons operations thereon. The sandpits, you advise, are located on both private and public property, the latter being the riverbed of the Arkansas River. You request our opinion whether it is within the authority of the county to adopt such a resolution, and whether it may enforce it by penalties such as a fine to be assessed for each day the operator fails to provide for such restoration.

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K.S.A. 19-101a(a) commences thus:

"Counties are hereby empowered to trans-act all county business and perform such powers of local legislation and administration as they deem appropriate, subject only to the following limitations. . . . [none of which are pertinent here.]"

The Arkansas River is a navigable stream, and accordingly, title to the bed and channel to ordinary high-water mark is vested in the State of Kansas. *Siler d/b/a American Sand Company v. Dreyer, d/b/a Dreyer Sand Company*, 183 Kan. 419, 327 P.2d 1031 (1958).

The fact that the river is a navigable stream bears heavily, in my judgment, upon the authority of the county to exercise its local legislative authority over the channel and bed thereof. In *Dana v. Hurst*, 86 Kan. 947, 122 P. 1026 (1912), the court considered a question bearing upon the navigability of the Arkansas River. In a lengthy and comprehensive opinion, the court reviewed the history of the river. Concerning the general test of navigability, the court stated thus:

"[A]ny water to be navigable should be susceptible of use for purposes of commerce or possess the capacity for valuable floatage in transportation to market of the products of the country through which it runs, and should be of practical usefulness to the public as a public highway in its own state and without the aid of artificial means; that a theoretical or potential navigability, or one that is temporary, precarious and unprofitable, is not sufficient. But present navigability must not be confused with past navigability or setting apart for highway purposes, for we can not conceive or concede that the title to the bed of a navigable stream to-day in the state will to-morrow be in the riparian owner because the river has in the meantime filled up or ceased to flow." 86 Kan. at 950.

The court recognized that if the test of present navigability in fact were determinative, "to hold that this stream is navigable

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is equivalent to ruling that sand may be navigated." However, the court emphasized that such a test was not determinative:

"If we are forced to hold that the river was navigable in fact when set apart as a public highway, then we are compelled to hold that it is still thus set apart, or else that in some way this setting apart has been abrogated, the power of the government lost, and the title to the bed of the stream diverted. We have been pointed to no reason or authority for holding the latter and can find none. There is no indication in any public act or declaration that the intention was to set apart for a public highway only so much of a stream as might from time to time, without improvement, remain navigable in fact." 86 Kan. at 963.

Finally, the court concluded thus:

"[C]onsidering the character, width and length of the river, the various acts and declarations by congress in reference thereto, and the policy shown thereby with reference to waters which more than one hundred years ago were navigable according to the needs and uses of that time, and which led into the Mississippi, we deem it justifiable to hold, and do hold, that while the stream is not now navigated in fact anywhere in Kansas it has, nevertheless, not ceased to be a highway set apart by national act and declaration for public use in the manner and at the time to be determined upon by the federal government. This being true, the title to the bed is in that state, and islands therein not surveyed or claimed by the government belong also to the state, and under the act of 1907 may be sold as school land. . . .

It is not the ordinary question of navigability in law, depending upon present navigability in fact. It is one rather of governmental intention, declaration, acts and power

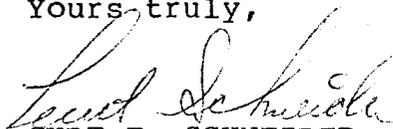
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considered in connection with the character
and history of the stream." 86 Kan. at 964.

The legislative power of the county under K.S.A. 1977 Supp. 19-101a extends only to matters of "local legislation." [Emphasis supplied.] As a matter of law, the bed and channel of the Arkansas River constitute a highway "set apart by national act and declaration for public use." *Dana v. Hurst, supra*. The regulation of the bed and channel is not merely a local matter subject to the legislative powers of the respective counties through which the river happens to pass. In my judgment, the character of the river as a navigable stream, as consistently recognized by the Kansas Supreme Court, and its status as a public highway, notwithstanding the present nonuser, renders the control of the bed and channel thereof a subject which is beyond the local legislative powers of the respective counties through which the stream passes, and that the board of county commissioners of Finney County may not enforce the proposed resolution against operations insofar as they occur on the bed and channel of the river, title to which is vested in the state.

However, insofar as the proposed resolution is sought to be applied to operations on private property, its subject matter is clearly in my judgment, a matter of local concern with which the board of county commissioners may deal in the exercise of its local legislative powers under K.S.A. 1977 Supp. 19-101a. At K.S.A. 49-402, the Kansas legislature has declared the public policy of this state regarding the reclamation of lands which are ravaged by surface mining operations. If the board of county commissioners deems an analogous public policy to be needful in Finney County, and which calls for the restoration and reclamation of terrain which is subject to sand-dredging operations it is within the legislative authority of the board of county commissioners to adopt an appropriate resolution imposing such requirements, which it may enforce through appropriate fines and penalties.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj