



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-9299

ATTORNEY GENERAL OPINION NO. 79-172

The Honorable Jack H. Brier
Secretary of State
Second Floor, State Capitol
Topeka, Kansas

Re: Waters and Watercourses--Navigable Waters--Sale
of Land in Abandoned Channel of Stream

Synopsis: The Secretary of State does not have authority to sell or convey any interest in islands in navigable streams pursuant to K.S.A. 1978 Supp. 82a-209 or any other statute. Absent such statutory delegation of the legislature's authority, the Secretary of State may not exercise such powers.

* * *

Dear Secretary Brier:

You have requested our opinion as to the Secretary of State's authority regarding the disposition of legal interest in an island located in the Kansas River near Lawrence under the provisions of K.S.A. 1978 Supp. 82a-209. The pertinent provisions of this statute read as follows:

"Whenever the channel, or any part thereof, of any navigable stream in or bordering upon the state of Kansas has heretofore been, or shall hereafter be, changed or altered by such stream establishing a new channel by flood or avulsion, so that any land situated between the banks of such stream at highwater mark shall be abandoned or no longer used as a channel for such stream and the title to such channel is not controlled by K.S.A. 1978 Supp. 24-454, or the provisions of K.S.A. 82a-201 to 82a-205, inclusive, are not applicable, the

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secretary of state of the state of Kansas shall cause said land to be surveyed by a surveyor selected by him or her, and shall thereafter sell and convey the same, or any part thereof, by grant or patent, as hereinafter provided" (Emphasis added.)

The foregoing statute was enacted in 1978 (L. 1978, ch. 430, §1). By careful inspection and comparison, it is apparent that its provisions are substantially the same as those of K.S.A. 1977 Supp. 72-2142, which was repealed by this same 1978 legislation. Thus, since 82a-209 is essentially a reenactment of 72-2142, it is appropriate to consider the scope and application of the latter statute in determining the powers and duties of the Secretary of State under 82a-209. As provided in K.S.A. 77-201, First, "[t]he provisions of any statute, as far as they are the same as those of any prior statute, shall be considered as a continuation of such provisions, and not as a new enactment."

The prior statute, 72-2142, was enacted in 1921 (L. 1921, ch. 272, §1). The title to this legislation indicates that it was enacted as supplemental to L. 1915, ch. 322, which was codified at 72-2128 et seq. We are not occasioned here to pass upon the effect of the title to the 1921 enactment, but we have no difficulty in determining that 72-2142 and 72-2128 et seq. are statutes in pari materia. As such, 72-2142 was, in fact, supplemental to the earlier legislation.

It becomes relevant, therefore, to examine certain provisions of the statutes existing at the time of the enactment of 72-2142. The entirety of 72-2128 et seq. generally vested in the state auditor powers and duties regarding the surveying and sale of lands "lying and being in and forming a part of the abandoned bed of any navigable stream in this state." (See L. 1915, ch. 322, §1.) However, 72-2129 specifically related to islands in navigable streams, providing as follows:

"All islands existing in the navigable streams of this state which have not been surveyed by the government of the United States and all land which did at any time in the past comprise an island, or any part thereof, in any navigable stream in this state, not now occupied by the adjacent landowner as an accretion, the title and ownership of which accretion is vested in such adjacent owner, shall be surveyed when the state auditor deems it advisable and sold as hereinafter directed and the proceeds of said sales credited to the permanent school fund."

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Thus, at the time 72-2142 was enacted, the legislature had specifically provided for the disposition of islands in navigable streams. As a result, it is our judgment that neither by implication nor by its express terms did 72-2142 encompass the sale or other disposition of such islands.

In 1974, the legislature abolished the office of state auditor and transferred a significant portion of the powers and duties thereof to the Secretary of State. (See L. 1974, ch. 364.) Included in such enactment were sections effecting reconciling amendments to K.S.A. 72-2130, 72-2141, 72-2142, 72-2145 and 72-2148. (See L. 1974, ch. 364, §§7 to 11, respectively.) However, the legislature did not transfer the auditor's powers and duties regarding islands in navigable streams under K.S.A. 72-2129. Instead, the legislature repealed this statute without replacing its provisions. (See L. 1974, ch. 364, §40.)

Thus, as concerns your specific inquiry, we are of the opinion that 82a-209 does not vest in the Secretary of State the authority to sell or convey a lesser interest in an island in the Kansas River. There is no question that such river is a navigable stream. Kansas, ex rel., Dawson v. Akers, 92 Kan. 169 (1914); Siler v. Dreyer, 183 Kan. 419 (1958). However, in our judgment, the provisions of 82a-209 do not confer on the Secretary of State the power to sell or otherwise dispose of an island therein. It is apparent to us that the specific language of 82a-209 does not include an island in the main channel of a navigable river within its purview, and, because of our previous analysis of this statute's legislative history, we are constrained from finding any legislative intent to include such land by implication.

Absent such statutory authority, we are aware of no other authority for the Secretary of State to convey any interest in the island in question. There should be no dispute that the state of Kansas owns such island. "The title to islands formed in navigable streams since the admission of Kansas into the Union is held by the state for the benefit of all the people." Winters v. Myers, 92 Kan. 414, Syl. para. (1) (1914). Thus, the State of Kansas holds title to all islands located in the Kansas River. However, as provided by general authority: "The power of the state with respect to its property rights is vested in the legislature and the legislature alone can exercise the power necessary to the enjoyment and protection of those rights by the enactment of statutes for that purpose." 81A C.J.S. States, §145. Further, "[s]tate property cannot be sold or disposed of

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except by authority of law . . . The power to dispose of state property is vested in the legislature which may make provision therefor by statute." 81A C.J.S. States, §149.

Therefore, the sale of state property can occur only pursuant to the state legislature statutorily providing for the sale of the land or delegating such authority to another body. We are not aware of any such statutory delegation having relevance to your inquiry. Similarly, it is our opinion that, absent specific statutory authorization, the Secretary of State has no power to lease, grant an easement or otherwise convey any other interest in said island.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:gk