



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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November 8, 1982

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ATTORNEY GENERAL OPINION NO. 82- 240

Terry R. Fuller
Edwards County Attorney
P. O. Box 394
Kinsley, Kansas 67547

Re: Roads and Bridges -- Minimum Maintenance Roads --
River Crossing; Title of Land Held by State

Synopsis: Title to the bed and channel of any navigable river is held by the State of Kansas. In that the Arkansas River is legally declared to be a navigable river, title to the bed, even if dry, remains with the state, and its use by a county for road purposes would be subject to the approval of the state. In the absence of such approval, county equipment should not be used to maintain the crossing. Additionally, while a county may designate the county road leading to the crossing as a minimum maintenance road, pursuant to K.S.A. 1981 Supp. 68-5,102, an easement from the state would be required before the crossing itself could be so posted. Cited herein: K.S.A. 68-119, K.S.A. 1981 Supp. 68-5,102.

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Dear Mr. Fuller:

As County Attorney for Edwards County, Kansas, you request our opinion on a question concerning potential liability for a crossing over the Arkansas River. Specifically, you inform us that a county bridge over the river at that point was closed several years ago as being unsafe, and local residents have taken to driving across the bed of the river. You wish to know what the liability of the county, as well as the township, would be for this situation, and whether county equipment should be used for maintaining access to the river bottom, as well as the bed itself.

Terry R. Fuller
Page Two

From your letter, it is our understanding that neither the township nor the county has taken any action to encourage the use of this crossing across the Arkansas River. Rather, due to the county's closing of the bridge at a point near there, and the inconvenience of driving to another bridge, local landowners began driving on the bed of the river, which is usually either completely dry or at most two feet deep in a few places. The county road leading up to the closed bridge is still open, but the county has not assisted in clearing any access route from the road down to the river bed.

You first inquire whether the provisions of the minimum maintenance road statute, K.S.A. 1981 Supp. 68-5,102, could be of assistance here. That statute provides that if the county commission determines that a road is used only occasionally or by a few persons, it may declare the road to be a minimum maintenance road. Pursuant to subsection (d), signs are to be posted on the affected stretches of road which state "Minimum maintenance, travel at your own risk." Once such signs have been posted, the county, as well as any township through which the road passes, are exempt from liability under the Kansas Tort Claims Act, K.S.A. 1981 Supp. 75-6101 et seq. K.S.A. 1981 Supp. 68-5,102(f). While this office has expressed reservations about certain aspects of the statute (Attorney General Opinion No. 81-125), to the best of our knowledge it has not been challenged in the courts as of this time. A copy of our prior opinion is enclosed for your reference.

In our opinion, the provisions of this statute would not be capable of application here, where the trafficway in question is across the bed of the river, and not on a road which has been officially opened and maintained by the county. Indeed, any traffic across the river bed is unauthorized, in that it is occurring on land owned by the State of Kansas. Since the early case of Wood v. Fowler, 26 Kan. 682 (1881), it has been established in Kansas that a riparian owner holds title only down to the high-water mark, with title to the river bed held by the state. Since the Arkansas River has been declared to be legally navigable, regardless of the actual state of the river [Dana v. Hurst, 86 Kan. 947 (1912)], any private use of the river bed must be approved by the state. See, e.g., Siler v. Dreyer, 183 Kan. 419 (1958). Accordingly, while the county could obtain an easement from the riparian owner for the access road down to the high-water mark, permission for anything beyond that would need to be obtained from the state, through action of the legislature. K.S.A. 82a-201 et seq.

Assuming, however, that such an easement were granted, the county could go through the steps of laying out a road across the river bed, applying, if desired, K.S.A. 1981 Supp. 68-5,102 after having done so. This would alert motorists

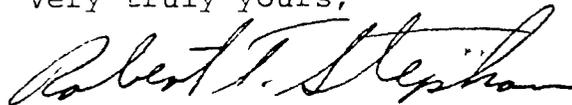
Terry R. Fuller
Page Three

using the road that caution should be observed, as well as relieving the county and township of liability for negligent acts. K.S.A. 1981 Supp. 75-6104(g). If the crossing is thereby given an official status, K.S.A. 68-119 imposes an additional duty on the township, to-wit:

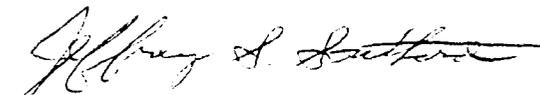
"Each township trustee within his township shall erect and maintain, at the expense of the township, posts or boards at the fords of every river or creek that in high water becomes impassable, which posts shall be set at or near low watermark, on which shall be inscribed in legible letters, or plain figures, the depth or water at low water, together with a scale of feet showing the number of feet above low watermark to the height to which said stream is known to have ever risen."

In conclusion, title to the bed and channel of any navigable river is held by the State of Kansas. In that the Arkansas River is legally declared to be a navigable river, title to the bed, even if dry, remains with the state, and its use by a county for road purposes would be subject to the approval of the state. In the absence of such approval, county equipment should not be used to maintain the crossing. Additionally, while a county may designate the county road leading to the crossing as a minimum maintenance road, pursuant to K.S.A. 1981 Supp. 68-5,102, an easement from the state would be required before the crossing itself could be so posted.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

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