



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 89- 5

Robert A. Walsh
Cloud County Attorney
Cloud County Courthouse
Concordia, Kansas 66901

Re: Waters and Watercourses -- Navigable Waters --
Republican River; Navigability to Determine
Ownership to River Bed

Synopsis: Riparian owners of land upon a nonnavigable stream own to the thread of the stream. If the stream is navigable, title of the bed is in the state, and riparians own to the bank of the stream. Navigability to determine title is determined from the facts as they existed at the time of statehood. Therefore, ownership of the bed of the Republican River depends on whether the criteria to determine navigability established in Holt State Bank v. United States were present when Kansas became a state, January 29, 1861. Cited herein: L. 1864, ch. 97, §§ 1, 2; L. 1913, ch. 259, § 10.

* * *

Dear Mr. Walsh:

As county attorney for Cloud County, you have asked our opinion whether the Republican River is a navigable or nonnavigable stream for purposes of ownership of the river's bed. Your question is important to determine the proper methodology for cadastral mapping as it relates to reappraisal.

Kansas law is clear that riparian owners of land upon a nonnavigable stream own to the thread of the stream. Kregar v. Fogarty, 78 Kan. 541, 549 (1908). If the stream is navigable, title of the bed is in the state, and riparians own to the bank of the stream. Wood v. Fowler, 26 Kan. 682, 689 (1882); The State, ex rel., v. Akers, 92 Kan. 169, 179 (1914). Three rivers in this state have been declared to be navigable: Missouri River (State ex rel., Kansas City v. State Highway Comm'n, 163 S.W. 2d 948, 952 (1942)); Kansas River (Wood v. Fowler, 26 Kan. at 686); and Arkansas River (Dana v. Hurst, 86 Kan. 947, Syl. ¶ (1912)). Also, three Kansas rivers have been found to be nonnavigable: Delaware River (Piazzek v. Drainage District, 119 Kan. 119, Syl. ¶ 2 (1925)); Neosho River (Webb v. Neosho County Comm'rs., 124 Kan. 38 (1927)); and Smoky Hill River (Kregar v. Fogarty, 78 Kan. at 547).

There is no case law deciding whether the Republican River is navigable. In 1864 the Kansas legislature declared the Kansas, Republican, Smoky Hill, Solomon, and Big Blue rivers to be not navigable and authorized railroad and bridge companies to bridge or dam the rivers. See L. 1864, ch. 97, §§ 1, 2. In 1913 this statute was repealed. See L. 1913, ch. 259, § 10. The argument has been made that the 1864 law implies that the named rivers were navigable before the statute, and that its repeal restored the legal status of navigability. See Comment, "Maritime Jurisdiction and the Amphibious Worker," 9 U. Kan. L. Rev. 62, 64 (1960). See also Drainage District v. Railway Co., 99 Kan. 188, Syl. ¶ 2 (1916) (discussing navigability of the Kansas River).

We do not believe it can be assumed from the 1864 law that prior to its passage the Republican River was navigable for purposes of determining title to the river bed. The legislature cannot transfer titles of vested property rights. If the Republican River was in fact navigable prior to 1864, the legislature cannot divest the state of its title to the bed of a navigable stream. Wood v. Fowler, 26 Kan. at 688. Rather, the 1864 declaration of navigability was for the purpose of sanctioning the building of bridges and dams across the listed rivers. Kregar v. Fogarty, 78 Kan. at 547 ("Chapter 97 of the Laws of 1864, declaring the Smoky Hill and other rivers not navigable, does not conclusively establish the fact that they were navigable before. . . .").

To determine navigability for title purposes, Kansas has applied the following test:

"[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." Dana v. Hurst, 86 Kan. at 950. See Webb v. Neosho County Comm'rs, 124 Kan. at 40.

The title to the bed of a stream found to be navigable will not change if the stream is presently nonnavigable or becomes nonnavigable:

"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. If when this land was granted to the patentee the title to the bed of the stream was in the state, it is in the state now, regardless of present navigation or present navigability." Dana v. Hurst, 86 Kan at 950. See Wood v. Fowler, 26 Kan. at 688.

The test for navigability to determine property rights to the bed of the Republican River must be applied at the time of Kansas statehood. In United States v. Holt State Bank, 270 U.S. 49, 55, 70 L.Ed. 465, 468, 46 S.Ct. 197 (1925), the Supreme Court ruled that the determination of navigability of a stream to establish state ownership of the bed is a question of federal law. The court set forth a test to determine navigability for purposes of vesting title in the state:

- "1) the waterbodies were used, or were susceptible of being used, as a matter of fact, as highways for commerce;
- 2) such use for commerce was possible under the natural conditions of the waterbody;
- 3) commerce was or could have been conducted in the customary modes of trade or travel on water; and
- 4) all of these conditions were satisfied at the time of statehood." James B. Wadley, "Recreational Use of Nonnavigable Waterways," 56 J.B.A.K. (Nov./Dec.) 27, 28.

Navigability to determine ownership of the stream bed

"is determined as of the time of the formation of the union of the original thirteen states, or of the admission to statehood of those formed later. . . ."
78 Am. Jur. 2d Waters § 73 (1975).

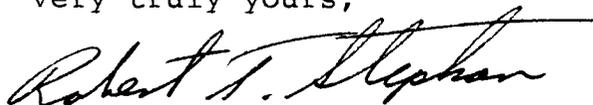
See United State v. Appalachia Electric Power Co., 311 U.S. 377, 408, 85 L.Ed. 243, 253, 61 S.Ct. 291 (1940) reh. denied 312 U.S. 712, 85 L.Ed. 1143, 61 S.Ct. 548 (1941). See also Scott v. Lattig, 227 U.S. 229, 242, 243, 57 L.Ed. 490, 496, 497, 33 S.Ct. 242 (1912); Oklahoma v. Texas, 258 U.S. 574, 583, 66 L.Ed. 771, 775, 42 S.Ct. 406 (1921). Although the Kansas definition of navigability was established before the Holt case, the two tests are virtually the same except for the fourth criteria set out in Holt. While the Kansas cases do not specifically state that title is established at the time of statehood, they do suggest that navigability for title purposes is determined at the origination of title. See Dana v. Hurst at 950; The State, ex rel., v. Akers, 92 Kan. at 187.

The principle that title to the stream bed is determined at the time of statehood is based on the "equal-footing" doctrine. In Martin et al. v. The Lessee of Waddell, 41 U.S. 367, 10 L.Ed. 997 (1842), the United States Supreme Court held that the ownership of land under navigable waters was derived from the crown as a matter of English common law. When independence from England was gained, the court stated

that thirteen colonies acquired the ownership interest in the lands. The court in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230, 11 L.Ed 565 (1845), ruled that the federal government held the lands under navigable waters in the territories "in trust" for the future states. The doctrine of "equal footing" provides that new states admitted to the Union have "the same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders." Mumford v. Wardwell, 73 U.S. (6 Wall) 423, 436, 18 L.Ed. 756 (1867). See Shively v. Bowlby, 152 U.S. 1, 18, 26, 38 L.Ed. 331, 338, 341, 14 S.Ct. 548 (1893). "Accordingly, title to lands beneath navigable waters passed from the Federal Government to the new States, upon their admission to the Union, under the equal-footing doctrine." Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 318, 38 L.Ed. 2d 526, 534, 94 S.Ct. 517 (1973). Title underneath navigable waters does not vest in the state only if the federal government passed title to third parties before the territory became a state. Utah Division of Lands v. U.S., 55 U.S.L.W. 4750, 96 L.Ed. 2d 162, 169, 107 S.Ct. 2318 (1987).

Whether a stream is navigable is a question of fact to be determined from the evidence. Webb v. Neosho County Comm'rs., 124 Kan. 38, Syl § 1. We are without evidence as to whether the Republican River was navigable on January 29, 1861, when Kansas gained statehood Ad Astra per Aspera. Therefore, we cannot conclude that the Republican River is nonnavigable for purposes of determining title to the river's bed.

Very truly yours,



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