

FILE

Subject: Halt Boards
Economic Development
Copy to Waters
General



STATE OF KANSAS

Office of the Attorney General

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VERN MILLER
Attorney General

May 2, 1974

Opinion No. 74-137

Mr. James DeCoursey
Director
Department of Economic Development
State Office Building
Topeka, Kansas 66612

Re: Public use of non-navigable streams flowing on
or adjacent to privately owned property.

Dear Mr. DeCoursey:

You advise that a number of proposals have been suggested for the establishment of canoeing trips on scenic streams in certain areas of this state. Because these streams for the most part flow through privately owned property, the question arises whether public use of these streams is permissible if initial entry upon the stream is made either from publicly owned land or from private property with the consent of the owner thereof.

The precise question presented has not been examined by the Kansas Supreme Court. However, in 1962, this office prepared an opinion on an issue substantially paralleling the one at hand. That ruling dealt with public fishing rights to non-navigable streams, and concluded that riparian landowners along such streams owned the stream bed to the center of the stream according to prior Kansas law. Consequently, it was held that since the riparian owner held title to the property beneath the stream, he could therefore exercise the same authority and control over the stream, its banks and bed as the property adjacent to the stream itself.

Our 1962 opinion and the Kansas and federal case law upon which it was premised rest essentially upon a somewhat modified common law approach generally followed in this country with respect to public access to navigable and non-navigable waters. This theory, briefly summarized, recognizes a public right to access and

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use of those waters which are "navigable in fact." See 56 Am.Jur. Waters, §§ 177-195, 207-217 (1947). A definition of this phrase is illustrated by the following quotation, cited and followed with approval by the Kansas Supreme Court:

"[T]he settled rule in this country [is] the test of navigability in law, and . . . whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on waters." Oklahoma v. Texas, 258 U.S. 574, 586, 66 L. Ed. 771 (1922). See also Webb v. Board of County Commissioners, 124 Kan. 38, 40, 257 Pac. 966 (1927).

It has been suggested that the Water Appropriation Act (Chapter 390, Laws of 1945; cited as K.S.A. 82a-701 et seq.) and the principles encompassed therein provide a significant basis upon which to alter or reverse our position as expressed in the 1962 opinion. Essentially this proposition is premised upon the view that the private (i.e., non-navigable) streams in this state are transformed into public streams by legislative enactment since all waters are recognized or declared to be dedicated to the use of the people of the state, subject to appropriation for beneficial use as provided for by law. This, it is argued, consequently should allow the public to canoe (boat, fish, float, etc.) the waters of the non-navigable streams. This office is not so persuaded.

Declaring the objective of the Water Appropriation Act, K.S.A. 82a-702 provides:

"All water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein prescribed."

It is the opinion of this office that the gravamen of this statute (and Act) pivots upon an application and/or an interpretation of the phrase "dedicated to the use of the people of the state." We believe these words mean, in accordance with the objectives as directed by the title of the Act, "[t]o conserve, protect, control and regulate the use, development, diversion and appropriation of water for beneficial and public purposes," that all waters within the state of Kansas belong to the state and are subject to state control, and as such they are intended to be reserved in trust for those who shall desire and who may be able to appropriate such water for beneficial

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use in accordance with the laws of the state. We do not hold to the view that this Act or doctrine abrogates any rights of the riparian owner along non-navigable streams as previously recognized by this state. Accordingly, we concur with the penetrating and vigorous dissent by Justice Bickley in State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945) which in part concludes:

" . . . [T]hat [since] the beds of nonnavigable, fresh water natural streams contiguous to lands in private ownership belong to the owner of the contiguous lands, the streams which wash such lands as streams are private streams even though the waters thereof are public in the sense that they are impressed with a trust in favor of the public awaiting such time as one entitled to do so in accordance with the laws of the state has effectuated an appropriation of the waters of such streams.

"That 'the unappropriated water of every natural stream' is declared to belong to the public does not mean that the stream itself is public.

"Until waters of natural streams are appropriated 'in accordance with the laws of this state' some one must have the control, custody and possession of such water even though the custody and possession may be a very short space of time because the water is running down the stream The only custody which the public officials will have is constructive. The actual possession and custody must necessarily be in the various owners of the bed and banks of the stream. The stream of water is joined to the bed of the stream and rests upon it, and so the water of the stream is in the custody of the collective number of the various portions of the bed of the stream up and down its length. This custody is not ownership" [Latter emphasis supplied.] 182 P.2d at 440.

The decision of the majority in this case rested upon a number of facts having specific application to New Mexico waters. The state constitution provides that "[t]he unappropriated waters of every natural stream perennial or terroential . . . is hereby declared to belong to the public and subject to appropriation for beneficial use." This provision, the court held, was declaratory of prior existing law under Spanish and Mexican dominion. The appellee's title derived from a congressional grant

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of confirmation, based upon an early Mexican grant, and was thus subject to the pre-existing law as thus declared. The court went on to hold that use for recreation and fishing was to be considered as among the uses which usually and ordinarily pertained to public waters. The special doctrines of Mexican and Spanish law, as embodied in the New Mexico state constitution, do not, of course, appertain here.

Our attention has been directed to Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (1954), where the court upheld public fishing rights upon the waters of a non-navigable stream. This decision should not be regarded as broad authority for public fishing rights generally in nonnavigable waters for, as the court cautioned, the case "must be decided with reference to its own peculiar facts." The court concluded that although the stream in question was non-navigable, as that term is used for determining title, the stream was

"'navigable in fact by canoes, rowboats, and other small floating craft of similar size and nature, but that it is not navigable in fact by larger boats and vessels.'"

In the past, the stream had been used for floating logs and timber. These facts, the court stated,

"are the essential facts upon which the legal rights of the respondent, as a member of the public, must necessarily depend."

The court cited congressional acts dating back to 1814 providing that "[t]he Mississippi and Missouri rivers, and the navigable waters flowing into them, and the carrying places between the same, shall be common highways" The court reiterated its conclusion thus:

"In view of the admitted facts concerning the capacity, suitability and use of the river at the place in question for public and commercial purposes, the provisions of the several Acts of Congress and the Constitutions mentioned and the well established applicable case law of this state, we must and do hold that the waters of the Meramic River are public waters and the submerged area of its channel over and across appellant's farm is a public highway for travel and passage by floating and by wading, for business or for pleasure, and that in traveling the course of the stream by canoe or wading, respondent was not a trespasser on the property of appellant."

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This case does not support a broad conclusion reached purely as a matter of law that the 1945 Kansas Water Appropriation Act so far alters the pre-existing law regarding the rights of riparian owners on non-navigable streams in this state as to entitle members of the public to fish in the waters of a non-navigable stream against the expressed objection of a riparian owner.

Accordingly, our previous position remains unaltered. The test of navigability continues to be the decisive factor in determining right to public travel on any given non-navigable stream in Kansas. Absent evidence to support a finding of navigability in fact such non-navigable streams are owned to their center or thread by the contiguous riparian owner thereto who necessarily enjoys the same rights and powers over his stream (including its bed and banks) as he does over the adjacent land. Thus, the public may not canoe upon a non-navigable stream without the express consent of the riparian owner adjacent to said stream, and notwithstanding that the traveler initially entered upon the stream from public lands or from other private property with the consent of the owner thereof.

Yours very truly,

VERN MILLER
Attorney General

VM:JPS:jsm

cc: Earl B. Schurtz
Professor of Law
University of Kansas
Lawrence, Kansas

Opinion No. 62-15

February 1, 1962

ATTORNEY GENERAL'S OPINION

Re: Real property - Rights of an Owner of Land Through Which a Non-Navigable Stream Flows - Forestry, Fish and Game, G.S. 1949, 32-138, 32-139, 32-143.

Request by: Mr. Robert M. Brown, County Attorney, Shawnee County, Courthouse, Topeka, Kansas.

- Question: 1. Does the owner of land through which a non-navigable stream flows have the right to construct a fence across the stream?
2. Assuming there is no fence constructed, do the sections G. S. 1949, 32-138, 32-143 and G. S. 1961 Supp., 32-139, apply to a person who is fishing from a boat on a stream flowing through the lands of another?

- Answer: 1. Yes.
2. Yes, as to G. S. 1949, 32-138 and 143. We do not think the terms of G. S. 1961 Supp., 32-139 are applicable.

It is the law of this state that land under a non-navigable stream is owned by the owners of the land through which the stream flows. The test of navigability as defined in Webb v. Neosho County Commissioners, 124 Kan. 38, 257 Pac. 966, and cases cited therein, is whether the stream is susceptible to use for the purpose of transporting people and commerce. The mere fact that over a certain portion of a stream a small boat, such as used for fishing, can travel does not make the stream navigable.

I do not find where the courts of this state have approached the exact question posed, however, there is an extensive annotation in 47 A.L.R. 2d at page 381, which covers this question. It is my conclusion that despite the differences expressed therein as to the definition of navigable, the rights of the public to travel through and fish in a stream are determined by a test similar to that of this state for navigability. Therefore, I would conclude that on a non-navigable stream in this state the public has no right except by permission of the owner of the stream bank and stream bed to travel over and fish in a non-navigable stream. Therefore, the owner or owners of both banks of a stream could erect a fence across the stream and prevent passage of a boat into their land.

With the above conclusion in mind it appears that those portions of Chap. 32, Art. 1 of the General Statutes of 1949, which prohibit a person from entering upon the occupied premises of another for hunting, fishing or loitering without permission of the owner or person in possession of the land do apply to entry by boat upon a stream passing through the land. G. S. 1961 Supp., 32-139, however, pertains to hunting from a road or railroad right-of-way and fishing in any posted private lake from such. Since a criminal statute must be strictly construed, it would not apply to fishing in a stream from a boat.

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