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July 22, 1980

ATTORNEY GENERAL OPINION NO. 80-161

Mr. Frank L. Korte
County Attorney
Sumner County Courthouse
Wellington, Kansas 67152

Re: Crimes and Punishments -- Crimes Against Property --
Applicability of Criminal Trespass to Non-Navigable
Body of Water

Synopsis: The term "land" as used in defining criminal trespass
includes non-navigable bodies of water, and is not limited
to dry ground. Cited herein: K.S.A. 77-201 and
K.S.A. 1979 Supp. 21-3721 (as amended by L. 1980,
Ch. 99, §1).

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Dear Mr. Korte:

You have inquired whether a non-navigable body of water is included
within the term "land" as used in K.S.A. 1979 Supp. 21-3721 (as amended
by L. 1980, Ch. 99, §1), which states in pertinent part:

"Criminal trespass is entering or remaining upon or
in any land, . . . or watercraft . . . by a person who
knows he or she is not authorized or privileged to do so. . . ."

Specifically you inquire:

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"Is it a violation of K.S.A. 21-3721 for a landowner to enter a non-navigable body of water, to-wit: a pond, on that portion of the pond that he owns and then proceed to boat and fish on that portion of the pond which rests upon land owned by another after due warning has been given as provided by the statutes?"

The above statute is silent to whether "land" includes non-navigable water, and the question you present appears to be one of first impression for Kansas. Thus, we must examine decisions of other jurisdictions to answer your question.

In State v. Almokary, 212 La. 783, 33 So.2d 519, 520 (1947) the court was asked to interpret a statute relating in essential part:

"Criminal trespass is . . . the unauthorized and intentional entry upon any . . . enclosed and posted plot of ground."
(Emphasis supplied).

In ruling upon a factual situation in which at no time did the defendant walk on or pass over any dry land possessed by the complainant, the court notes at page 520:

"By using the general word 'ground' and failing to employ any restrictive language in connection with it, the lawmakers, obviously, had in mind the entering upon not only dry land but also non-navigable water covered areas. Ground can be covered with water and nonetheless be 'ground' or 'land.' "

Thus, the court found the statute to apply to a lake separating contiguous plots of dry land.

We also note United States v. Pollmann, 364 F.Supp. 995, (D. Mont. 1973) in which the information charged that the defendant "did without lawful authority or permission willfully and knowingly go upon land . . . a portion of the Flathead lake . . . belonging to" Id. at 997. (Emphasis added). The defendant's primary defense was that he believed the waters were not "land" within the meaning of the statute in question. However, the court held that "land includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein,

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whether by nature, as water . . . It embraces not only the surface of the earth, but everything under or over it. . . . It has in its legal signification an indefinite extent upward and downward. Blacks Law Dictionary (Rev. 4th Ed. 1968)." Id. at 1009.

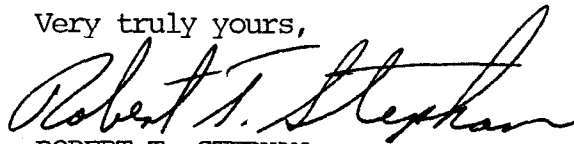
Of additional consideration is United States v. Brouhard, 464 F.Supp. 1316 (W.D. Wis. 1978) in which there was a question of whether a statute relating to unlawful hunting, trapping or fishing on Indian land applied to waterways. The defendant was charged with trespassing upon a waterway belonging to an Indian tribe, and held in trust by the United States for the purpose of fishing. Included among other claims made by the defendant was his contention that water is not "land" within the meaning of the statute. The court in citing Pollmann held that the term "land" clearly and unambiguously includes waterways. Congressional intent was found to prevent trespass upon Indian lands for the purpose of fishing, hunting or trapping. "Fishing can only be done in water, of course; a person fishing from a boat is trespassing in the same sense as a person fishing from shore." Id. at 1334.

We must, however, consider that "penal statutes must be strictly construed in favor of persons sought to be subjected to their operations. . . . Such a statute should not be read to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it." State, ex rel., v. American Savings Stamp Co., 194 Kan. 297, 300 (1965). (Emphasis added). We also are guided by the language of K.S.A. 77-201 Second which attributes to words and phrases the approved usage of the language.

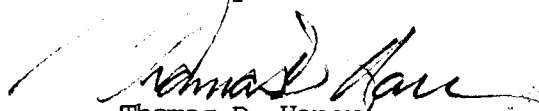
Even in light of these restrictive rules of construction, however, it would appear a non-navigable body of water would be included within the term land, as there does not appear any legislative intent to restrict the scope of "land" to dry ground. To hold otherwise would find the statute inapplicable to swamps, man made lakes, ponds or possibly swimming pools.

Based upon the above, it is our conclusion that the term "land" as used in K.S.A. 1979 Supp. 21-3721 (as amended) would include non-navigable bodies of water. To construe the statute in any other manner would appear inconsistent with the manifest legislative intent underlying the statute.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Thomas D. Haney
Deputy Attorney General