STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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

March 11, 1988

ATTORNEY GENERAL OPINION NO. 88-35

The Honorable Betty Jo Charlton
State Representative, Forty-Sixth District
State Capitol, Room 272-W
Topeka, Kansas 66612

Re: Navigation and Navigable Waters--Protection of Navigable Waters and of Harbor and River Improvements Generally--In General; Obstruction of Navigable Waters

Synopsis: The United States Army Corps of Engineers, pursuant to the Rivers and Harbors Act, 33 U.S.C.A. §403, and other federal enactments, has the authority to prohibit dredge and fill or excavation activities on navigable rivers for the purposes of interstate commerce, navigation and conservation. This authority is superior to any interest the state may have in the lands beneath such navigable waters. Cited herein: 16 U.S.C.A. §§661 et seq.; 1531 et seq.; 33 U.S.C.A. §§403; 1151 et seq.; 1251 et seq.; 42 U.S.C.A. §§4331 et seq.; 43 U.S.C.A. §§1311, 1314; U.S. Const., Art. I, §8.

* * *

Dear Representative Charlton:

As State Representative for the Forty-Sixth District, you request our opinion regarding the authority of the State of Kansas over the bed and banks of the Kansas River, particularly with regard to a plan of the United States Army Corps of Engineers to terminate sand dredging on the river

from Kansas City to a point above Manhattan. Specifically you ask whether the Corps of Engineers has legal authority to stop dredging operations on the Kansas River and if so, whether the state, through executive or legislative action, has legal authority to overrule the Corps' decision.

In Attorney General Opinion No. 82-240 we discussed ownership of the bed of the Kansas River. It was opined that, for purposes of determining a riparian owner's right to use the river channel, title to the river bed is held by the state and therefore any private use of the river bed must be approved by the state. Attorney General Opinion No. 82-240, p. 2, citing Wood v. Fowler, 26 Kan. 682 (1881), Siler v. Dreyer, 183 Kan. 49 (1958). This conclusion is supported by the Submerged Lands Act, 43 U.S.C.A. §§1301 et seq., which states in part:

> "(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;
>
> "(b)(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;
>
> . . . .

> "(d) Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power. . . ." 43 U.S.C.A. §1311.

We would thus confirm the opinion that title to the bed and banks of the Kansas River, to the ordinary high water mark, is vested in the state within the boundaries of which such lands are located, the State of Kansas having title to the bed and banks located in Kansas.

The ability of the state to dictate the usage of the bed and banks of the Kansas River is not without exception, however. Subsection (d) of 43 U.S.C.A. §1311 (quoted above) sets forth a reservation in the United States of the "use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power. . . ." Additionally, §1314(a) of the Submerged Lands Act specifically retains in the federal government:

> "[A]ll of its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense and international affairs, all of which shall be paramount to . . . proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established and vested in and assigned to the respective States and others by section 1311 of this title." (Emphasis added.)

In construing these provisions the United States Supreme Court has held that "[n]othing in the Act was to be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of powers," and that "[t]he Act left congressional power over commerce and the dominant navigational servitude of the United States precisely where it found them." United States v. Rands, 389 U.S. 121, 127, 88 S.Ct. 265, 269, 19 L.Ed.2d 329, 335 (1967). Thus, though title to the bed and banks of navigable rivers may be vested in the state, the federal government retains control of these lands for purposes of commerce, navigation, etc. See United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703, 19 S.Ct. 770, 43 L.Ed. 1136, 1141 (1899) (the jurisdiction of the federal government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable waters of the country even against any state action.)

The Rivers and Harbors Act, 33 U.S.C.A. §§401 et seq., (a product of the Commerce Clause of the United States Constitution, Art. I, §8) prohibits the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States. Section 403 further provides that "it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any . . . channel of any navigable water of the United States, unless the work has been recommended by the Chief of [the Corps of] Engineers and authorized by the Secretary of [the Army]." By the terms of this provision, the Secretary of the Army, acting upon the recommendation of the Chief of Engineers, is to determine what constitutes an unreasonable obstruction. Sierra Club v. Andrus, 610 F.2d 581, 590 (9th Cir. 1979). It has been held that this language does not constitute a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and "anything wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition." United States v. Rio Grande Dam & Irrigation Co., 43 L.Ed. at 1143. The authority of the United States to prevent or remove obstructions to interstate commerce is superior to that of the states to provide for the welfare or necessities of their inhabitants. Sanitary District of Chicago v. United States, 266 U.S. 405, 426, 45

S.Ct. 176, 69 L.Ed. 352, 363 (1925); Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201, 88 S.Ct. 379, 19 L.Ed.2d 407, 415 (1967).

Several cases have held that pursuant to the Rivers and Harbors Act, the Fish and Wildlife Coordination Act, (16 U.S.C.A. §§ 661 et seq.), and the National Environmental Policy Act of 1969 (42 U.S.C.A. §§4331 et seq.), the Corps of Engineers may deny a permit to dredge on conservational grounds. See, e.g., United States v. Stoeco Homes, Inc., 498 F.2d 597, 607 (3d Cir. 1974) cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083 (S.D.N.Y. 1969), aff'd., 425 F.2d 97 (2d Cir. 1970) cert. denied, 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256 (1970); Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). See also Riverside Irrigation District v. Andrews, 758 F.2d 508, 512 (10th Cir. 1985) (Army Corps of Engineers is required, under both the Clean Water Act, 33 U.S.C.A. §§1251 et seq., and the Endangered Species Act, 16 U.S.C.A. §§1531 et seq., to consider the environmental impact of permit); United States v. Holland, 373 F.Supp. 665 (M.D. Fla. 1974) (pursuant to the Federal Water Pollution Control act, 33 U.S.C.A. §§1151 et seq., Congress has power to regulate activities such as dredging and filling which cause water pollution.)

The federal control of the nation's waterways is dependant upon their navigable capacity for purposes of interstate commerce. 33 U.S.C.A. §403; United States v. Rio Grande Dam & Irrigation Co., 43 L.Ed. at 1143. The case of Miami Valley Conservancy Dist. v. Alexander, 692 F.2d 447 (6th Cir. 1982) cert. denied, 462 U.S. 1123, 103 S.Ct. 3096, 77 L.Ed.2d 1355 (1983), is instructive in determining the navigable capacity of a river:

> "The question of navigability turns on whether the river has ever or is now used as a water highway for interstate commerce.
>
> . . . .
>
> "The earliest and most frequently cited definition of navigability appeared in The Daniel Ball v. United States, 77

U.S. (10 Wall.) 557, 563, 19 L.Ed. 999 (1871). The Supreme Court held:

"'Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.' (emphasis added).

"Subsequent cases have refined the definition of navigability. A river is navigable if it can be made useful through reasonable improvements. United States v. Appalachian Electric Power Co., 311 U.S. 377, 409, 61 S.Ct. 291, 300, 85 L.Ed. 243 (1940). The use of navigable streams may be limited to travel during seasonal water level fluctuations. Economy Light and Power Co. v. United States, 256 U.S. 113, 122, 41 S.Ct. 409, 412, 65 L.Ed. 847 (1921). Moreover, a river is still navigable despite 'occasional natural obstructions or portages. . . .' Id. However, where commercial use or susceptibility of use is 'sporadic and ineffective,' the river is not navigable. United States v. State of Oregon, 295 U.S. 1, 23, 55 S.Ct. 610, 619, 79 L.Ed. 1267 (1935). A waterway is not navigable when 'its use for any purpose of transportation has been and is exceptional, and only in times of temporary high water.' United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 699, 19 S.Ct. 770, 773, 43 L.Ed. 1136 (1899).

"The Supreme Court has emphasized repeatedly that a navigable waterway of the United States must be 'of practical service as a highway of commerce.' Economy Light, 256 U.S. at 124, 41 S.Ct. at 413. A navigable river is one of

> 'general and common usefulness for purposes of trade and commerce.' Oregon, 295 U.S. at 23, 55 S.Ct. at 619. The Rivers and Harbors Act protects 'the Nation's right that its waterways be utilized for the interests of the commerce of the whole country.' Appalachian Electric, 311 U.S. at 405, 61 S.Ct. at 298.
>
> . . . .
>
> "Under the historical use test of navigability a river is 'indelibly navigable.' State of Oklahoma ex rel. Phillips v. Guy F. Atkins, 313 U.S. 508, 61 S.Ct. 1050, 85 L.Ed. 1487 (1941). That is, a river is navigable as a matter of law if it has ever been navigable. For a river to be considered a navigable water of the United States, it is sufficient that the river has been used as a commercial highway even though it no longer is or can be used as such.
>
> "The test of navigability has been stated and restated by the federal courts for the last one hundred years. Navigability has been defined in countless ways but its essential elements have remained constant. The District Court here properly identified these elements: A navigable waterway of the United States must (1) be or have been (2) used or susceptible of use (3) in the customary modes of trade and travel in water (4) as a highway for interstate commerce." 692 F.2d at 449, 450.

Thus, if the Kansas River meets these criteria, it is subject to the control of the United States Army Corps of Engineers under the Rivers and Harbors Act. (But see United States v. Holland, 373 F.Supp. at 673 where the court finds that Congress is not limited by the "navigable waters" test in its authority to control pollution under the commerce clause.)

The Supreme Court of Kansas has opined that the Kansas River is a navigable stream in contemplation of federal law. Kaw

Valley Drainage District v. Missouri Pacific Railway Co., 99 Kan. 188, 202 (1916); Wood v. Fowler, 26 Kan. 682, 687, 688 (1882). It would thus appear that the Kansas River is a "navigable water of the United States" for purposes of the Rivers and Harbors Act, and any dredge and fill or excavation activities on this river are subject to the control of the Corps of Engineers.

Your final question involves the legal standing of the state, a private citizen or private company to take action in the courts against the Corps of Engineers. In general, a plaintiff who can show 1) an actual and direct interest (injury in fact) and 2) a personal stake (a distinct injury caused by the challenged conduct), is deemed to have standing to sue in federal court. See Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 985 S.Ct. 2620, 57 L.Ed.2d 595 (1978). A state normally does not have standing, as a representative of its citizens, to enjoin enforcement of a federal statute, for the interests of its citizens are protected by their political representatives in Congress. Massachusetts v. Mellon, 252 U.S. 447 (1926). However, if the state has a propriety interest of its own at stake, it will be accorded standing. Alfred C. Snapp, Inc. v. Puerto Rico, 458 U.S. 592, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). Application of these basic principles to the facts and circumstances will determine a party's legal standing.

In conclusion, the United States Army Corps of Engineers, pursuant to the Rivers and Harbors Act, 33 U.S.C.A. §403, and other federal enactments, has the authority to prohibit dredge and fill or excavation activities on navigable rivers for the purposes of interstate commerce, navigation and conservation. This authority is superior to any interest the state may have in the lands beneath such navigable waters.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Julene L. Miller

Julene L. Miller
Deputy Attorney General

RTS:JLM:jm