

NAVIGABLE RIVERS-- Ownership of sand and gravel in the beds of such rivers.

1) The Osage River in Missouri is a navigable stream; 2) Miller County is the owner of the deposits of sand and gravel in the bed of the Osage River in said county as parts of islands formed in navigable waters of this State, and holds the same for school purposes; 3) The county may sell such property for school purposes.

FILED  
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October 22, 1954

Honorable LeRoy Snodgrass  
Prosecuting Attorney  
Miller County  
Tuscumbia, Missouri

Dear Mr. Snodgrass:

This will be the opinion you requested by letter from this office on the following subject:

"Ownership of Gravel in the Osage River in Miller County, Missouri, and whether the Osage River is a navigable stream." Your request for an opinion reads as follows:

"I would like to have an opinion from your office in regard to the above matter, since it has become most important from a pecuniary standpoint, in that if the gravel belongs to the county, a considerable sum of money may be secured for the school funds of the county. (MRS - 1949 - Sec. 241.290 et seq)

"FACTS: During the past years, considerable amount of gravel and sand have accumulated in the river bed of the Osage River. Some of this gravel has been deposited by way of accretion, some by forming what we call toe-heads (islands), and some by the filling up of the river bed. Eagnell Dam regulates the flow of the water in the river to a great extent, and Union Electric has a water easement over the land below the dam that extends to about 18 foot level. Low water mark of the river leaves practically a solid gravel bar from Tuscumbia to the Homer L. Wright eddy, a bar approximately  $3\frac{1}{2}$  miles long and averaging approximately 100 feet wide. Other

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are not quite as large. With the river stage at approximately 6 feet, practically all the gravel and sand is under water.

"Tens of thousands of cubic yards of gravel and sand are removed from the river bed, practically all of which is of first grade. It is being taken from the river constantly for road and construction purposes. Easements are given across town property and private property whereby trucks haul the gravel and sand from the river. Practically all the gravel is taken from above low water mark, some is taken from below the low water mark. The usual charge for the easements is based upon the gravel or sand taken, 10¢ per yard. The town of Tuscumbia and the private land owners do not sell the gravel or sand, just charge for the easements.

"QUESTIONS: Is the Osage River a navigable stream?  
Is the gravel in the river, whether below or above low water mark, whether formed by accretion to land-owner's land or by toe-heads (islands), owned by Miller County? If owned by Miller County, may the County Court sell the gravel and sand per yard? By surveyed areas?"

Your letter directs our attention to Section 241.290, V.A.M.S. 1949, on the question of whether Miller County, Missouri, is the owner of such sand and gravel and holds the same as parts of islands formed in the navigable waters of this State for school purposes under the terms of said section.

Said section, under the separate sub-title of "ISLANDS AND ABANDONED RIVER BEDS", reads as follows:

"All lands belonging to the state, not otherwise appropriated under the laws thereof, which have been formed by the recession and abandonment of their waters of the old beds of lakes and rivers in this state, or by the

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formation of islands in the navigable waters of the state, are hereby granted and transferred to the respective counties in which such lands are located, to be held by such counties for school purposes."

You have favored us, at our request, with additional information indicating that some of such islands in the Osage River in Miller County, Missouri, began to be formed thirty years and more ago, and at that time steamboats were using said river for commercial navigation, which information constitutes substantial and convincing proof that at that time and for a long time prior thereto the Osage River was a navigable stream in fact.

The test of navigability of a stream, generally, in the United States, is stated in 45 C.J. 406, 407 and 408, as follows:

"For the reason that the common-law test of navigability, based upon the ebb and flow of the tide, is not adapted to a country abounding in large fresh water rivers and lakes, the rule in the great majority of the states and Canada is that water is navigable in law, although not tidal, where navigable in fact, and is navigable in fact where it is of sufficient capacity to be capable of being used for useful purposes of navigation, that is, for trade and travel in the usual and ordinary modes. This is also the doctrine of the civil law under which rivers are navigable when they are navigable in the common sense of the term and although not rivers in which the tide flows and reflows. \* \* \*."

The Missouri Supreme Court gave a definition of the term "navigable" in State ex rel. vs. Taylor, et al., Judges of the County Court, 224 Mo. 383, l.c. 485, as follows:

"The substance of the legal definition of the latter word, as given by Mr. Burrill, is, by the common law, a river is considered navigable only so far as the tide

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ebbs and flows into it. That is also the doctrine in several of the states, but not of this State. Here all streams which are actually capable of floating and of permitting the passage of ordinary boats upon the bosom of their waters are considered navigable rivers. \* \* \*."

In the recent case of Elder vs. Delcour, 269 S.W. (2d) 17 (not yet permanently published), South Western Advance Sheets, of date August 10, 1954, our Supreme Court gave another construction and definition of the "navigability" of a stream, l.c. 485 (Advance Sheets) as follows:

"\* \* \* The capability of use by the public for the purpose of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. \* \* \*."

Under the facts recited and the information conveyed to us it is indicated that the Union Electric Company has a water easement from the Federal Government over the land below Bagnell Dam in Miller County, Missouri, that extends to the prospective 18 foot level in said river; that when the Osage River stage is at approximately 6 feet in depth, practically all of the sand and gravel which constitute parts of islands in said river, is under water; that the flow of water in said river is regulated to a great extent by Bagnell Dam; that before and at the period when the islands in question began to form in the Osage River, boats carried commerce on the river to Warsaw and perhaps farther upstream of said river; that

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the Coast Guard has, presently, and exercises jurisdiction over the Lake of the Ozarks in Miller County as a part of the Osage River; that the lock and dam system of controlling the flow of water in said river in Miller County, Missouri, has been abandoned and that the gates are left open for the free flow of water through them at all times; that while commercial navigation of the Osage River is no longer carried on, yet the said river is used and navigated by smaller craft for recreation, pleasure and fishing purposes, and that at times the said river does reach, and had reached, the stage of 18 feet. These facts, all and singular, constitute substantial and convincing evidence that the Osage River was, at the time such islands in said river in Miller County, Missouri, began and continued to form therein and had been, since this State was admitted to the Union, continuously and consistently, applying the rule and test of determining navigability adopted by our Supreme Court, and still is, a navigable stream in fact.

At common law the title and dominion of lands affected by the tide were in the King for the benefit of the Nation. The American Colonies succeeded to the same rights, as grantees under royal charters, in trust for the communities to be established. Upon the American Revolution these rights charged with a like trust were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States. Upon the acquisition of the territory by the United States, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the territory. The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in tidewaters and lands under them, within their respective jurisdictions. (Shively vs. Bowlby, 152 U.S. 1, 1.c. 57).

The information so submitted to us, and our research, establish as facts that all islands formed or existing in the Osage River in Miller County, Missouri, and in all other counties of this State formed in the navigable waters of the State, at the admission of the State of Missouri to the Union, became, under the common law, the property of the State.

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The State of Missouri as the owner of lands under the navigable waters of the State took no action, made no grant, and, as our research reveals, passed no enactment alienating the title of such lands until the year 1895.

The General Assembly of this State, April 8, 1895, passed an Act (Laws of Missouri, 1895, page 207), granting certain lake and river bed lands to the counties in which they were located, to be held by such counties for school purposes.

Section 1 of said 1895 Act reads as follows:

"All lands belonging to this state, not otherwise appropriated under the laws thereof, which have been formed by the recession and abandonment by their waters of the old beds of lakes and rivers in this state, are hereby granted and transferred to the respective counties in which such lands are located, to be held by such counties for school purposes."

It will be noted that said Section 1 of the 1895 Act, supra, as it was enacted, did not include islands formed in the navigable waters of this State in the lands of the State granted, and subject to grant, by the State to the counties in which such lands are located for school purposes. Said Section 1 of the 1895 Act was amended by the Act of 1899 (Laws of Missouri, 1899, page 276) to include such islands in such State lands. Section 1 of the 1899 Act, so amending Section 1 of the 1895 Act, and providing for the granting of such islands to such counties along with other State lands for school purposes is now Section 241.290, supra, which we are here discussing.

We have herein determined and hold it to be a fact that the Osage River in Miller County is, and at all of the times herein mentioned, was, a navigable stream as of the navigable waters of this State. We have herein determined and hold it to be the further fact, also, that the islands in the Osage River in said Miller County, Missouri, including sand and gravel as component physical

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parts of such islands, were formed in said Osage River as a navigable stream of this State.

These factors and conditions bring the question here considered inevitably within the terms of said Section 241.290, supra, as to whether such sand and gravel as are parts of islands which were formed in the navigable waters of this State in Miller County, Missouri, and whether such sand and gravel are owned by said Miller County, and to be held by said county for school purposes. In view of the facts herein existing and under the law herein cited and quoted applicable thereto, it appears indisputable that Miller County, Missouri, is the owner of such sand and gravel in the Osage River and that such sand and gravel are parts of islands formed in said river as of the navigable waters of this State, and we so hold. Having answered the principal questions submitted, to the effect that said Miller County, is the owner of such sand and gravel as parts of islands which were formed in the navigable waters in the State, in this case the Osage River in said Miller County, we deem it unnecessary to refer further to your question as to the method or proceedings to be followed respecting the sale of such sand and gravel, as the property of said Miller County, other than to direct your attention to Section 49.270, RSMo 1949, which gives County Courts of the counties of this State authority to manage, control and sell property of their respective counties, either real or personal, belonging to their counties.

#### CONCLUSION

Considering the premises it is the opinion of this office:

- 1) That the Osage River in Missouri is a navigable stream;
- 2) That the gravel and sand deposits in the bed of the Osage River in Miller County, Missouri, as parts of islands formed in said river, a navigable stream, are owned by said Miller County and are held by said county for school purposes;

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3) That Section 49.270, RSMo 1949, authorizes the several counties of this State to sell county property, either real or personal.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. George W. Crowley.

Very truly yours,

JOHN M. DALTON  
Attorney General

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