

STAFF REPORT
(One-Step Final Plat)

CASE NUMBER: SUB 2005-89 -- MOUNT CARMEL RIVER ADDITION

OWNER/APPLICANT: Curtis J. Harshfield, 1972 N. Mt. Carmel, Wichita, KS 67203

SURVEYOR/ENGINEER: K.E. Miller Engineering, 516 S. Market, Wichita, KS 67202

LOCATION: South of 21st St. North, West of Meridian

SITE SIZE: .53 acres

NUMBER OF LOTS

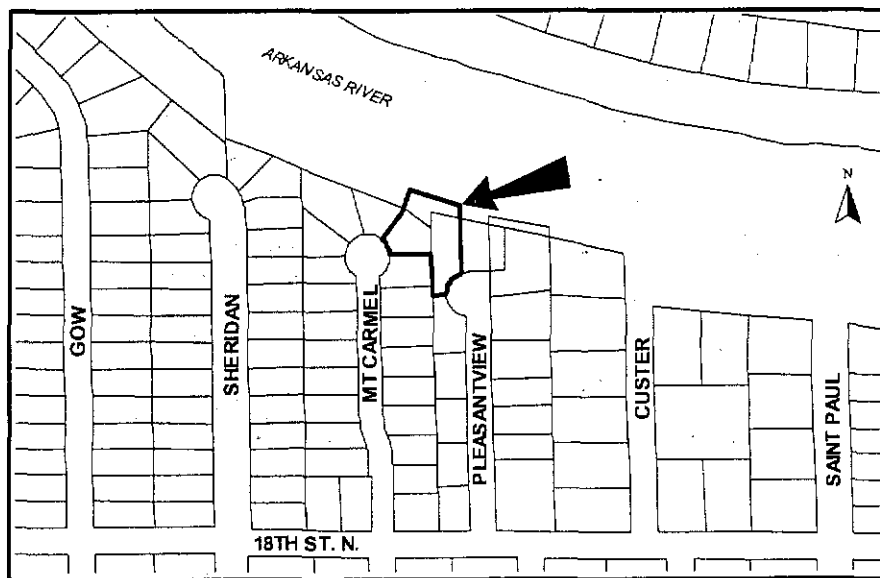
Residential:	1
Office:	
Commercial:	
Industrial:	
Total:	<u>1</u>

MINIMUM LOT AREA: 20,873 sq. ft.

CURRENT ZONING: SF-5, Single-Family Residential

PROPOSED ZONING: Same

VICINITY MAP



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September 1, 2005 - Page 2

NOTE: This replat is a consolidation of Lot 8, Indian Hills 3rd Addition and Lot 6, Snodgrass 3rd Addition.

STAFF COMMENTS:

- A. Municipal services are available to serve the site. City Water and Sewer Department requests that the 8-ft utility easement be increased to 10 feet.
- B. If improvements are guaranteed by petition, a notarized certificate listing the petitions shall be submitted to the Planning Department for recording.
- C. City Engineering needs to comment on the status of the applicant's drainage plan.
- D. The adjoining street right-of-way widths needs to be denoted.
- E. The owner's certificate in the plat's text needs to reference "a Lot, Block and Reserve".
- F. The final plat shall state in the plat's text the purposes of the proposed reserves as well as the ownership and maintenance responsibilities.
- G. Provisions shall be made for ownership and maintenance of the proposed reserve. A covenant shall be submitted regarding ownership and maintenance responsibilities.
- H. The Reserve needs to be labeled as Reserve A.
- I. For those reserves being platted for drainage purposes, the required covenant which provides for ownership and maintenance of the reserves shall grant, to the City, the authority to maintain the drainage reserves in the event the owner(s) fail to do so. The covenant shall provide for the cost of such maintenance to be charged back to the owner(s) by the governing body.
- J. The applicant shall submit a covenant which provides for four (4) off-street parking spaces per dwelling unit on each lot which abuts a 58-foot street. The covenant shall inventory the affected lots by lot and block number and shall state that the covenant runs with the land and is binding on future owners and assigns.
- K. A lot number and block number should be denoted on the face of the plat.
- L. The Applicant has platted a 20-ft building setback which represents an adjustment of the Zoning Code standard of 25 feet for the SF-5, Single-Family Residential District. The Subdivision Regulations permit the setback provisions to be modified by the plat upon the approval of the Planning Commission.
- M. The Applicant is reminded that a platting binder is required with the final plat. Approval of this plat will be subject to submittal of this binder and any relevant conditions found by such a review.
- N. The plat's text shall include language that a drainage plan has been developed for the plat and that all drainage easements, rights-of-way, or reserves shall remain at established grades or as modified with the approval of the applicable City or County Engineer, and unobstructed to allow for the conveyance of stormwater.

SUB 2005-89 -- One-Step Final Plat of MOUNT CARMEL ADDITION
September 1, 2005 - Page 3

- O. The applicant shall install or guarantee the installation of all utilities and facilities which are applicable and described in Article 8 of the MAPC Subdivision Regulations. (Water service and fire hydrants required by Article 8 for fire protection shall be as per the direction and approval of the Chief of the Fire Department.)
- P. The applicant's engineer is advised that the Register of Deeds is requiring the name(s) of the notary public, who acknowledges the signatures on this plat, to be printed beneath the notary's signature.
- Q. To receive mail delivery without delay, and to avoid unnecessary expense, the applicant is advised of the necessity to meet with the U.S. Postal Service Growth Management Coordinator (Phone 316-946-4556) prior to development of the plat so that the type of delivery, and the tentative mailbox locations can be determined.
- R. The applicant is advised that various State and Federal requirements (specifically but not limited to the Army Corps of Engineers, Kanopolis Project Office, Rt. 1, Box 317, Valley Center, KS 67147) for the control of soil and wind erosion and the protection of wetlands may impact how this site can be developed. It is the applicant's responsibility to contact all appropriate agencies to determine any such requirements.
- S. The owner of the subdivision should note that any construction that results in earthwork activities that will disturb one (1) acre or more of ground cover requires a Federal/State NPDES Storm Water Discharge Permit from the Kansas Department of Health and Environment in Topeka. Also, for projects located within the City of Wichita, erosion and sediment control devices must be used on ALL projects. For projects outside of the City of Wichita, but within the Wichita Metropolitan area, the owner should contact the appropriate governmental jurisdiction concerning erosion and sediment control device requirements.
- T. Perimeter closure computations shall be submitted with the final plat tracing.
- U. Recording of the plat within thirty (30) days after approval by the City Council and/or County Commission.
- V. The representatives from the utility companies should be prepared to comment on the need for any additional utility easements to be platted on this property.
- W. A compact disc (CD), which will be used by the City and County GIS Departments, detailing the final plat in digital format in AutoCAD. If a disc is not provided, please send via e-mail to Cheryl Holloway (E-Mail address: cholloway@wichita.gov). Please include the name of the plat on the disc.

Huang, Vicky

From: Moshier, Doug
Sent: Thursday, September 01, 2005 8:43 AM
To: Armour, James
Cc: Huang, Vicky ; Gunzelman, Paul ; Lang, Joe; Lindebak, Scott
Subject: RE: Kirk Miller Replat on 18th St. North at Mt. Carmel (Next to River)

Sensitivity: Private

He can plat what he owns. Don't we require a certificate of ownership from a title company as part of the platting process? Does he have something showing that he owns that area. Just because it is part of the river bank doesn't mean that it isn't privately owned. If we think we own it, on what basis is that?

-----Original Message-----

From: Armour, James
Sent: Wednesday, August 31, 2005 5:17 PM
To: Moshier, Doug
Cc: Huang, Vicky ; Gunzelman, Paul ; Lang, Joe; Lindebak, Scott
Subject: RE: Kirk Miller Replat on 18th St. North at Mt. Carmel (Next to River)
Sensitivity: Private

Doug, I think there is one wrinkle here that makes this different. He is replatting, and claiming area that is currently outside the original plat and is currently part of the Ark River bank. Our question is, can he take possession of it by platting? I agree with your comment, that the easement within the plat is regulatory. Vicky and/or Scott Lindebak have some maps on this if you would have time Thurs morning to review. thanks.

-----Original Message-----

From: Moshier, Doug
Sent: Wednesday, August 31, 2005 3:58 PM
To: Armour, James
Cc: Huang, Vicky ; Gunzelman, Paul ; Lang, Joe
Subject: RE: Kirk Miller Replat on 18th St. North at Mt. Carmel (Next to River)
Sensitivity: Private

Get with Chris C. about this. He and I and Mitch Mitchell talked about this today when we were over at the County for the annexation hearing.

If I understand the issue the property involved is private property on which there currently is a dedicated easement or restriction for us to maintain the bank, beautify it and keep it open space. The way for us to continue this protection is for the Planning bodies to require the platter to dedicate similar easements to the City when this comes up. I know this is not the way that Mitch likes to operate (looks too much like the City restricting private property rights---aaargh) but this isn't a legal issue. It is a regulatory issue and the regulatory bodies--- subdivision, MAPC and City Council need to step up and require the restrictions and state some public purposes for doing so.

Doug

-----Original Message-----

From: Armour, James
Sent: Wednesday, August 31, 2005 3:38 PM
To: Moshier, Doug
Cc: Huang, Vicky ; Gunzelman, Paul
Subject: FW: Kirk Miller Replat on 18th St. North at Mt. Carmel (Next to River)
Sensitivity: Private

Doug, did you and I ever discuss this one? Claim by Miller that he can take more of the riverbank for a plat? I vaguely recall you agreed with us on it, that no, he could not. I'll be gone tomorrow but Vicky has this info.

-----Original Message-----

From: Carrier, Christopher
Sent: Monday, August 29, 2005 5:49 PM
To: Armour, James

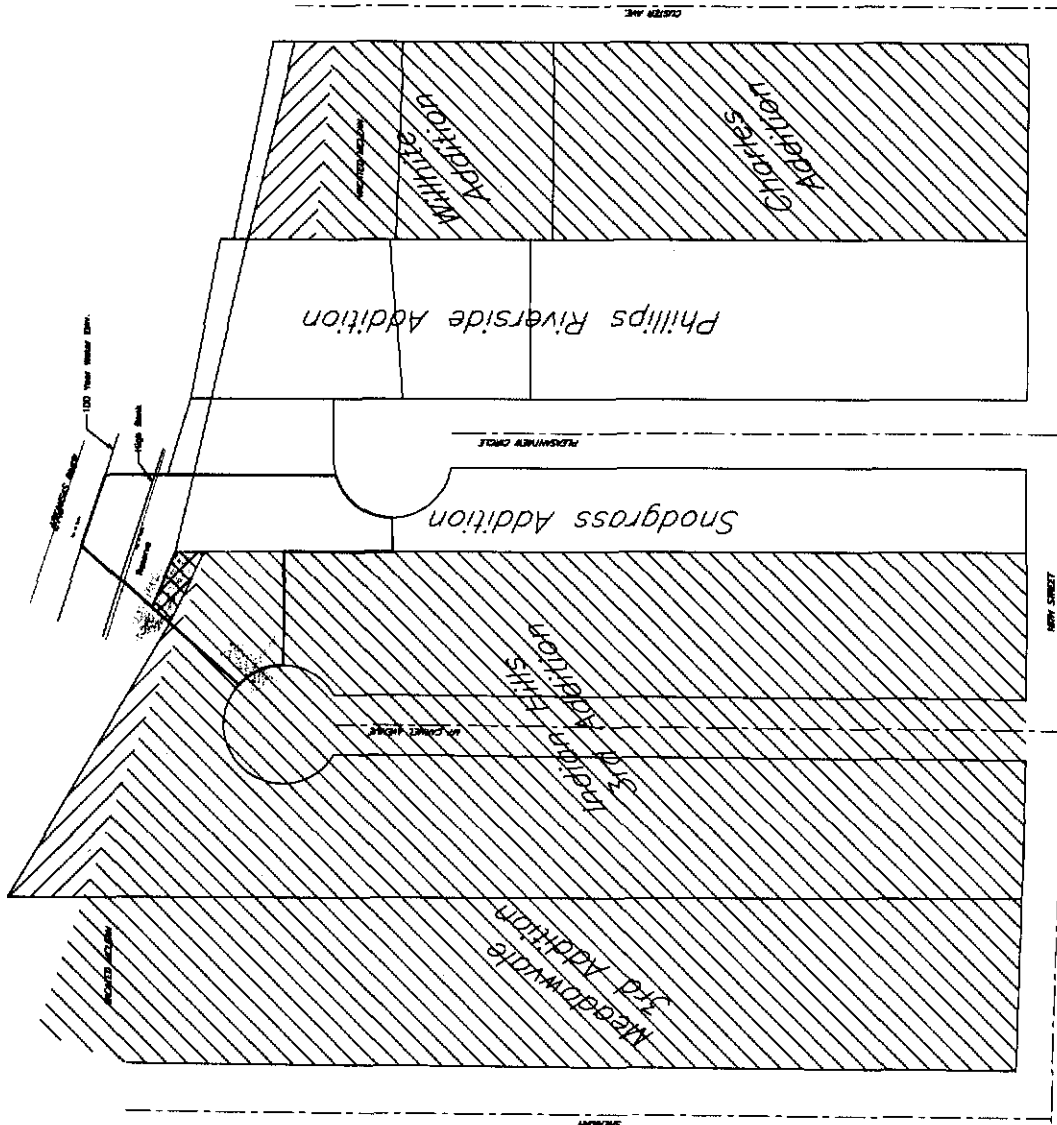
**SUB 2005-89 -- One-Step Final Plat of MOUNT CARMEL RIVER ADDITION
November 29, 2007 - Page 2**

NOTE: This replat is a consolidation of Lot 8, Indian Hills 3rd Addition and Lot 6, Snodgrass 3rd Addition. The lots have been expanded to include the Reserve areas previously dedicated for drainage, river bank maintenance and flood control, in addition to Reserve A proposed with this plat.

STAFF COMMENTS:

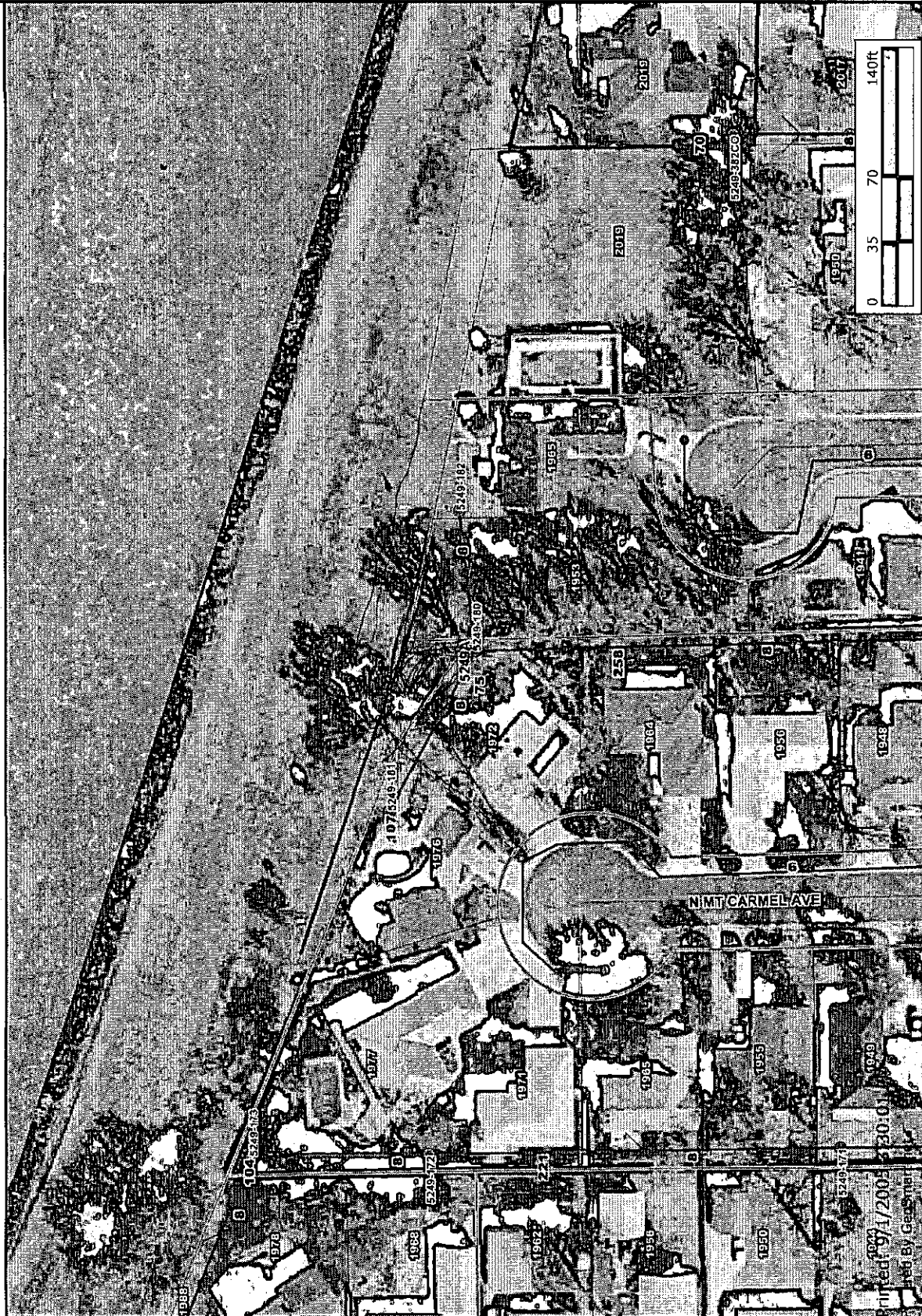
- A. Municipal services are available to serve the site.
- B. If improvements are guaranteed by petition, a notarized certificate listing the petitions shall be submitted to the Planning Department for recording.
- C. City Engineering needs to comment on the status of the applicant's drainage plan.
- D. The adjoining street right-of-way widths need to be denoted.
- E. The owner's certificate in the plat's text needs to reference "a Lot, Block and Reserve".
- F. County Surveying requests benchmark datum.
- G. County Surveying requests dimensions/bearings for Reserve A.
- H. Provisions shall be made for ownership and maintenance of the proposed reserve. A covenant shall be submitted regarding ownership and maintenance responsibilities.
- I. For those reserves being platted for drainage purposes, the required covenant which provides for ownership and maintenance of the reserves shall grant, to the City, the authority to maintain the drainage reserves in the event the owner(s) fail to do so. The covenant shall provide for the cost of such maintenance to be charged back to the owner(s) by the governing body.
- J. The applicant shall submit a covenant which provides for four (4) off-street parking spaces per dwelling unit on each lot which abuts a 58-foot street. The covenant shall inventory the affected lots by lot and block number and shall state that the covenant runs with the land and is binding on future owners and assigns.
- K. A lot number and block number should be denoted on the face of the plat.
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- M. The Applicant is reminded that a platting binder is required with the final plat. Approval of this plat will be subject to submittal of this binder and any relevant conditions found by such a review.
- N. The Parks and Pathways Plan has indicated a recreation corridor along the north line of this plat. The Land Use Staff has requested the applicant dedicate a public access easement within Reserve A.
- O. The plat's text shall include language that a drainage plan has been developed for the plat and that all drainage easements, rights-of-way, or reserves shall remain at established grades or as modified with the approval of the applicable City or County Engineer, and unobstructed to allow for the conveyance of stormwater.
- P. The applicant shall install or guarantee the installation of all utilities and facilities which are applicable and described in Article 8 of the MAPC Subdivision Regulations. (Water service and fire hydrants required by Article 8 for fire protection shall be as per the direction and approval of the Chief of the Fire Department.)
- Q. The applicant's engineer is advised that the Register of Deeds is requiring the name(s) of the notary public, who acknowledges the signatures on this plat, to be printed beneath the notary's signature.
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Mt. Carmel River Addition



	Identified Features
	Sewer Line Diameter
	Sewer Line Length
	Sewer Manholes
	Sewer Observation Manholes
	Hydrant Schematic
	Water Valve Schematic
	Water Node Schematic
	SS Main BD
	Property Parcels
	Lot Block
	Subdivisions
	Sewer Flow
	Sewer Lines
	Water Lines Schematic
	Major Roads
	State Highway
	US Federal Highway
	Interstate
	KTA
	Arterial
	Collector
	Ramp
	Roads
	Railroads
	Quarter Section
	Waterways
	Streams
	2000 County Aerial Photo

Every reasonable effort has been made to assure the accuracy of the maps and associated data provided herein. This information is provided with the understanding that the data are susceptible to a degree of error, and conclusions drawn from such information are the responsibility of the reader. The City of Wichita makes no warranty, representation or guaranty as to the content, accuracy, timeliness or completeness of any of the data provided herein. Some data provided here and used for the preparation of these maps has been obtained from public records not created or maintained by the City of Wichita. The City of Wichita shall assume no liability for any decisions made or actions taken or not taken by the reader in reliance upon any information or data furnished hereunder. The user should consult with the appropriate departmental staff member, e.g. Planning, Parks & Recreation, etc. to confirm the accuracy of information appearing in the visual presentations accessible through these web pages.

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 Planning Department
 1000 E. Douglas Ave., 2nd Floor
 Wichita, KS 67202
 Phone: 316.946.2200
 Fax: 316.946.2201
 Email: planning@cityofwichita.org

ANSAS

Established Flood control and

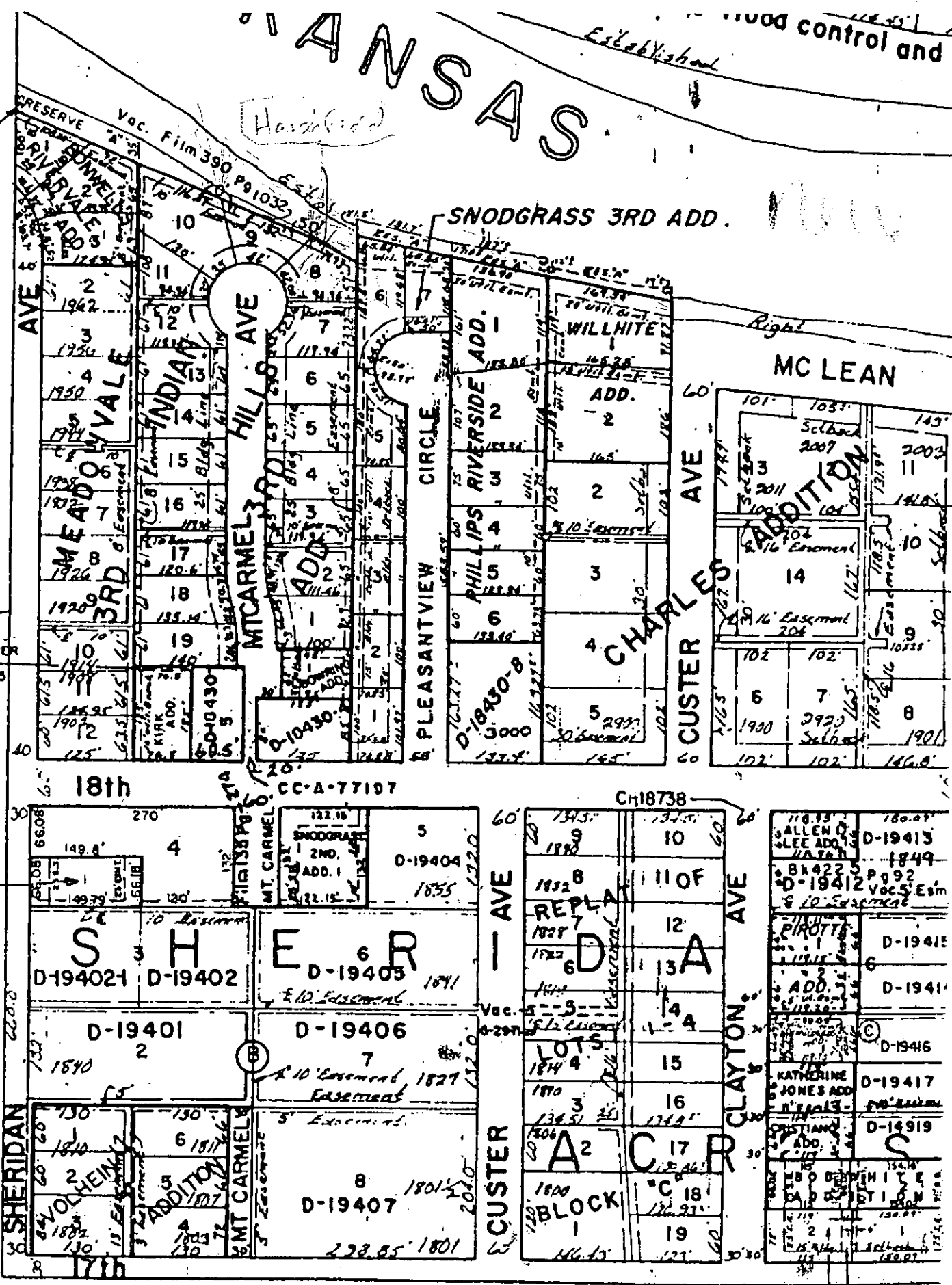
Handicapped

Vac. ALL OF MEADOWS
Dedicated for 400
River bank main
Flood Control and

Misc. BK 547 Pg 117
Lot 1, McLean Blvd., Sheridan Ave.
in Meadowvale 3rd Add. Vacated 10-27-64
Replotted as Bonwell's Riverdale Add.

6" PRIVATE SEWER
EASEMENT
FILM 126 P1225

BLACK'S
SHERIDAN
ACRES



ORCHARD ADD. K.G.B.E. Eas
& Sewer Eas

ADAMS & JONES

CHARTERED

PHILIP L. BOWMAN
ROGER D. HUGHEY
MERT F. BUCKLEY
JOHN W. SUMI
MONTE VINES
LARRY D. SPURGEON
KENNETH G. GALE
PATRICK B. HUGHES
KATHERINE A. HUTCHINSON
SABRINA K. STANDIFER
DAWN S. WAYLE

 MERITAS LAW FIRMS WORLDWIDE

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WICHITA, KANSAS 67201-1034
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August 24, 2004

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FAX (316) 265-9719
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Curtis Harshfield
1972 Mt. Carmel
Wichita, KS 67203

Kirk E. Miller, P.E.
KEMiller Engineering
516 S. Market
Wichita, KS 67202

Re: **Riverbank**

Dear Curtis and Kirk:

Per your mutual requests, I enclose a copy of the opinion by the Kansas Supreme Court in Siler v. Dreyer, issued July 7, 1958, in which the Court states that the boundary line for navigable rivers in Kansas is the "ordinary high water mark." Said another way, "The ordinary high water mark is the boundary line between the bed of the river and the land of the riparian [adjoining] owner." The Court also said that the ordinary high water mark is "the line to which water rises in ordinary seasons of high water."

We have confirmed from another Kansas opinion that the Arkansas River is deemed a "navigable" river. For your information, the other two navigable rivers in Kansas are the Missouri and Kansas rivers.

I also enclose an opinion by the Kansas Attorney General issued on October 4, 2000, stating: "The high water mark on the bed and banks of the Arkansas River constitutes the boundary between land owned by the State and land owned by the adjoining riparian owner."

Please let me know if you have any further questions about this.

I understand that we are awaiting an estimate from Kirk on the cost of replatting, and that Curtis will then talk to his neighbors to see if they are willing to participate in sharing the cost.

Sincerely,



Mert Buckley

/kc
Encs.

KEYCITE

C Siler v. Dreyer, 183 Kan. 419, 327 P.2d 1031 (Kan., Jul 07, 1958) (NO. 41040)

Citing References
Positive Cases (U.S.A.)

★★ Cited

- C** 1 State ex rel. Meek v. Hays, 785 P.2d 1356, 1358, 246 Kan. 99, 101 (Kan. Jan 19, 1990) (NO. 63,145) HN: 3,5 (P.2d)
- P** 2 State of California v. Superior Court (Lyon), 172 Cal.Rptr. 696, 703, 625 P.2d 239, 246, 29 Cal.3d 210, 221, 11 Env'tl. L. Rep. 20,476, 20476 (Cal. Mar 20, 1981) (NO. S.F. 23981) HN: 2 (P.2d)

Administrative Decisions (U.S.A.)

- 3 XVI Kan. Op. Atty. Gen. 90, Terry R. Fuller (1982) ★★ HN: 4,5 (P.2d)
- 4 Kan. Atty. Gen. Op. No. 79-172, The Honorable Jack H. Brier (1979) ★
- 5 Kan. Atty. Gen. Op. No. 78-279, Mr. Don Vsetecka (1978) ★★ HN: 4,5 (P.2d)

Secondary Sources (U.S.A.)

- 6 CJS Navigable Waters s 106, OWNERSHIP-WHAT LAW GOVERNS (2004)
- 7 CJS Navigable Waters s 113, GRANTS BY STATES (2004)
- 8 CJS Navigable Waters s 82, GENERALLY (2004)
- C** 9 RECREATIONAL USE OF NONNAVIGABLE WATERWAYS, 56-DEC J. Kan. B.A. 27, 34+ (1987) HN: 5 (P.2d)

100

C

Supreme Court of Kansas.

James E. SILER and Audrey Siler, d/b/a American Sand Company, Appellees,

v.

Milton G. DREYER, d/b/a Dreyer Sand Company, Appellant.

No. 41040.

July 7, 1958.

Rehearing Denied July 25, 1958.

Action by lessee of land bordering on bank of river to enjoin defendant sand company's operations in river landward of water's edge and in front of property leased. The Wyandotte District Court, Division No. 1, O. Q. Claffin, J., enjoined defendant which appealed. The Supreme Court, Wertz, J., held that title of riparian proprietor along navigable stream extended only to line of ordinary high water mark.

Reversed and remanded for new trial.

West Headnotes

[1] Navigable Waters §39(2)
270k39(2) Most Cited Cases

Extent of title of owner of lands bordering upon navigable waters depends upon local law.

[2] Navigable Waters §1(1)
270k1(1) Most Cited Cases

Common-law test of navigability never became law of Kansas.

[3] Navigable Waters §39(2)
270k39(2) Most Cited Cases

Riparian owner owns only to the bank and not to the center of a navigable stream.

[4] Boundaries §13
59k13 Most Cited Cases

Boundary line between riparian owner and state's navigable river bed is a line to which water rises in time of ordinary high water.

[5] Navigable Waters §37(6)
270k37(6) Most Cited Cases

Where defendant had lease from state to operate and

maintain certain sand pumping equipment in navigable stream, defendant was entitled to use of river bed and channel to ordinary high-water mark for the operation and maintenance of equipment. G.S.1949, 71-101 et seq., 71-106.

**1031 *419 Syllabus by the Court

The Kansas river being a navigable stream within this state its bed and banks to ordinary high-water mark belong to the state and the title of the riparian proprietor extends only to that line.

James H. Barnes and D. H. Corson, Jr., Kansas City, argued the cause, and Donald H. Corson, Kansas City, was with them on the briefs for appellant.

James K. Cubbison, Kansas City, argued the cause, and John J. Bukaty, Blake A. Williamson and Lee Vaughan, Kansas City, were with him on the briefs for appellees.

John Anderson, Jr., Atty. Gen., Robert J. Roth, and Charles H. Hobart, Asst. Attys. Gen., were on the brief of amicus curiae.

WERTZ, Justice.

Defendant appeals from an order of the trial court permanently enjoining him from maintaining and operating certain sand-pumping equipment in the Kansas river landward of the water's edge and in front of the property leased by plaintiffs. The injunction was based on a finding that the Kansas river is subject to the control of the state only from water's edge to water's edge.

The facts necessary to a decision on the question involved follow: Plaintiffs (appellees) and defendant (appellant) both operate sand plants on the Kansas river in Wyandotte county. Defendant operates a sand plant on a tract of land which borders on the north bank of the river. Plaintiffs' main plant operation is on a tract of land which borders on the south bank of the river. Plaintiffs also lease a tract of land on the north bank immediately upstream from the tract upon which defendant's plant is located. Defendant pumps sand from the river by virtue of a contract with the state of Kansas (G.S.1949, 71-101 et seq.). A previous decision of this court construed defendant's contract to permit him to pump sand from the *420 river to a point 1500 feet upstream from the extension of his west property line. Dreyer v. Siler, 180 Kan. 765, 308 P.2d 127. In pumping upstream from his property line, defendant projects a boom composed of pontoon **1032 floats out into the river. Pipe is strung out along the boom and from thence leads up to

defendant's tipple located upon his property. From such operation arose this controversy.

Plaintiffs (the Silers) filed a petition in district court alleging that defendant (Dreyer) and his employees were and had been trespassing upon their leasehold in operating the boom, that defendant and his employees had tied his sand barge to the bank and trees located on plaintiffs' leasehold, and that by reason of defendant's operation plaintiffs were unable to move their equipment from the south side of the river to their leasehold on the north bank. Plaintiffs' petition prayed that defendant be enjoined from tying to or using the bank of plaintiffs' leasehold and from obstructing plaintiffs' use of and right to use said property. Plaintiffs also asked for damages.

The district court rendered judgment for plaintiffs in accord with its memorandum opinion, the pertinent parts of which read:

'Plaintiffs contend that they have the exclusive right to use the river bank to the water's edge. Without attempting to decide ownership, the Court will hold that the plaintiffs, under their lease, are entitled, at least as against the defendant, to the *free and exclusive* use of their land to the water's edge.

'The defendant will be enjoined: (1) from placing or maintaining wires, cables or lines of any kind across any part of the land leased by plaintiffs; (2) from permitting any part of his dredging equipment, and particularly the pontoons upon which his flow line is floated, to at any time be north of the water's edge and west of defendant's west property line; and (3) to maintain the long piece of pipe in the flow line, clearly shown by Plaintiffs' Exhibit 4, at such an angle that it will cross the north water line of the river at a point east of defendant's west property line.

'Plaintiffs also contend that the position of defendant's flow line along the north bank of the river is an invasion of their rights. With this the Court cannot agree.

'From water's edge to water's edge the river bed is subject to the control of the State. The State in this instance has granted defendant the right to take sand within 1,500 feet upstream from his tipple. Since the State had the right to make such a grant to the defendant and did so, the Court is of the opinion that plaintiffs cannot be given relief on account of defendant's flow line and pontoons being in the water along the north river bank, so long as the flow line and pontoons are kept in the water.' [Emphasis supplied.]

It is apparent that the trial court predicated its judgment on the *421 premise that defendant under his lease with the state was entitled only to operate and maintain his pumping equipment in and take sand out of that portion of the river bed covered by water at any stage of the river flow, 'from

water's edge to water's edge.' The determinative question presented on this appeal, therefore, concerns the relative rights of the plaintiffs, the defendant and the state of Kansas in the area between the water's edge and the ordinary high-water mark along plaintiffs' leasehold, it being unquestioned that the Kansas river is a navigable stream at this point. Neither party disputes the state's ownership or right to control soil and sand in the bed and channel of the Kansas river. Defendant claims that title to the area between the water's edge and the ordinary high-water mark is in the state of Kansas and that, therefore, as a matter of law it was erroneous for the trial court to enjoin defendant, a lessee of the state, from entering or using this area. Plaintiffs' argument on this question is based largely upon a Wisconsin case, Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969, in which it was held, in accord with the previous Wisconsin view, that in regard to navigable waters a riparian owner holds a qualified title to the area between ordinary high-water mark and the water's *1033 edge, the qualification being that this title is subject to the public right to use for navigational purposes.

[1][2][3] It has long been settled that the extent of the title of the owner of lands bordering upon navigable waters depends on the local law. State, ex rel. v. Akers, 92 Kan. 169, 177, 178, 140 P. 637, and cases cited therein. Therefore, Kansas law on the point must be regarded as controlling. The common law test of navigability never became the law of Kansas. State, ex rel. v. Akers, supra, 92 Kan. 202, 140 P. 649. In State of Kansas v. State of Colorado, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956, it was stated that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. G.S.1949, 71-106 provides that the *bed and channel* of any river within this state and all islands and sand bars lying therein shall be considered to be the property of the state of Kansas unless this state or the United States has granted or conveyed an adverse interest therein. Since the early case of Wood v. Fowler, 26 Kan. 682, 40 Am.Rep. 330, it has been clear in Kansas that a riparian owner owns only to the bank and not to the center of a navigable stream. State, ex rel. v. Akers, supra, 92 Kan. 179, 140 P. 641.

Plaintiffs support their contention that Kansas law is the same *422 as announced for Wisconsin in Doemel v. Jantz, supra, with quotations from Kansas cases holding that the owner of land bordering a navigable stream may acquire additional land by the process known as accretion. These very quotations illustrate that the Wisconsin rule has not been considered in effect in Kansas. Included in plaintiffs' quotations from Fowler v. Wood, 73 Kan. 511, 544, 85 P. 763, 6 L.R.A.N.S., 162, is an excerpt from Wallace v. Driver, 61 Ark. 429, 33 S.W. 641, 643, 31 L.R.A. 317:

'According to the cases we have cited, the high-water mark, as thus defined, being the boundary-line of the riparian owner in this state, is the point at which the formation of all lands acquired by him by accretion must begin. A formation of alluvion beginning at any other point would belong to the state or other party.'

* This seems clearly to hold that the boundary line of the riparian owner is the ordinary high-water mark and that for the riparian owner to obtain land the accretion must shift the ordinary high-water mark. It was stated in the case of United States v. Mackey, D.C., 214 F. 137, 153:

'The condition and wants of the people of Oklahoma, so far as the rights of riparian owners upon navigable streams in the soil of the beds thereof are concerned, must be considered as identical with that of the people of the neighboring states of Kansas, on the one side, and Arkansas, on the other; in both of which the rights of the riparian owners are held only to extend to high-water mark, the title to the bed between high-water marks being in the state. This doctrine has the support of the best-considered opinions of the state Supreme Courts, and, as we have seen, has the approval of the Supreme Court of the United States.'

Both plaintiffs and defendant quote from Cushenbery v. Waite-Phillips Co., 119 Kan. 478, 484, 240 P. 400, 403:

'According to all the decisions in most of those states in which the lands were originally surveyed under the laws of the United States, the lines run by the United States surveyors along the river banks are not lines of boundary, the owners of the adjacent lands taking at least to the water's edge, thus giving them the benefit of the river frontage, with the right of access to the river, and the incidents of riparian proprietorship as to the use of the water. *The true boundary line of a navigable stream or lake is the point to which the water usually rises in ordinary seasons of high water.* The position of that line is a question of fact for the jury; and it controls although the meander line of the survey is found **1034 not to be coincident therewith. When landowners once become riparian proprietors, they are entitled to the accretions, or newly formed ground which may be left by the river after the survey and sale by the United States of the adjacent land, and which, if not their property, would separate them from the river. * * * [Emphasis supplied.]

*423 It appears that the court in the mentioned case regarded the boundary line of the navigable stream to be the point to which the water usually rises the ordinary seasons of high water, thus setting the state's boundary line. The theory of the owners taking to the water's edge seems to have been regarded as existing only for the purpose of

protecting the riparian right to access to the water frontage and access to the water.

Our cases appear to hold that the ordinary high-water mark is the boundary line between the bed of the river and the land of the riparian owner. In State ex rel. v. Berk, 129 Kan. 645, 648, 284 P. 386, 387, we approved a conclusion of law of the trial court that 'the north boundary line of the river is the south line of lots 1, 2, and 3, with their accretions, being *the line to which water rises in ordinary seasons of high water, * * **' [Emphasis supplied.]

* [4] It is therefore apparent we have held that the boundary line between a landowner and the state's navigable river bed is the line to which water rises in times of ordinary high water.

[5] In view of what has been said it is obvious that the trial court entered judgment, predicated on an erroneous premise, that the jurisdiction of the state over the river bed was from water's edge to water's edge. The Kansas river is a navigable stream and the title to the bed and channel to ordinary high-water mark is in the state of Kansas. Therefore, defendant as lessee of the state is entitled to the use of the river bed and channel to ordinary high-water mark for the operation and maintenance of his sand-pumping equipment. Under the circumstances the judgment of the trial court is reversed and the case is remanded for a new trial in accordance with the vires expressed herein.

It is so ordered.

183 Kan. 419, 327 P.2d 1031

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Office of the Attorney General
State of Kansas

*1 Opinion No. 2000-51
October 4, 2000

The Honorable Tim Tedder
State Representative
101st District
2406 E. Trail West Road
Hutchinson, Kansas 67501

Re: Waters and Watercourses--Navigable Waters--Arkansas River; Navigability; Ownership of Bed and Banks

Synopsis: Title to the bed and banks of a navigable river is vested in the State. The public land extends up to the high water mark, which is the point to which the water usually rises in ordinary seasons of high water. However, where no public access exists, one may need to obtain permission from the adjoining landowner in order to travel on private land to get to the public land. Additionally, some recreational activity may be restricted by the application of other state laws dealing with bank maintenance or conservation water structures. Cited herein: K.S.A. 24-126; 70a-106; 82a-301; 82a-307. * *

Dear Representative Tedder:

You inquire whether a navigable river is public, and what part of the river bed or banks is private land. You indicate that your question arises from a boundary dispute between those driving recreational vehicles on the bed and banks of the Arkansas river and an adjoining land owner who claims they are trespassing.

At issue is what part of the bed and banks of a navigable river constitutes public land for the purpose of recreational use. [Addressed elsewhere is whether the public and private ownership interests are fixed.]

It is well-settled in Kansas that title to the bed and banks of a navigable river is vested in the State. The Kansas Supreme Court has addressed the issue of where the boundary lies between the State and other proprietors on a navigable waterway. In *Siler v. Dreyer*, [dealing with an appeal from a district court's determination that on a navigable waterway, the State owned only from the water's edge to the water's edge] the Court interprets older cases to hold that the boundary line of the riparian owner (one owning land along a waterway) is the ordinary high-water mark, which is the line to which water rises in time of ordinary high water. Although the boundary line between proprietary owners on a navigable river has been conclusively established by *Siler*, it is confusing when current cases, most dealing with how accretion and avulsion affect ownership of adjoining lands, refer to older cases that state that the riparian owner's title extends to the river's banks, to the river's margin, and to the river's edge.

In sum, the high water mark on the bed and banks of the Arkansas River constitutes the boundary between land owned by the State and land owned by the adjoining riparian owner. Thus, the bed and banks, up to the line to which water rises in time of ordinary highwater, are public property that can be used by the public for lawful or non-destructive recreational purposes. However, where no public access exists, one may need

Westlaw.

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(Cite as: 2000 WL 1706871 (Kan.A.G.))

to obtain permission from the adjoining landowner in order to travel on private land to get to the public land. Additionally, some recreational activity may be restricted by the application of other state laws dealing with bank maintenance or conservation water structures.

Very truly yours,

*2 Carla J. Stovall

Attorney General of Kansas

Guen Easley

Assistant Attorney General

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