

Answer by letter-Wood

October 2, 1970

OPINION LETTER NO. 150



Honorable George M. Cook
State Representative
District No. 162
P. O. Box 37
Caruthersville, Missouri 63830

Dear Representative Cook:

You have requested my opinion as to the legal ownership of Wolf Bayou in Pemiscot County. We are advised by the Missouri Geological Survey that Wolf Bayou, in Sections 3 and 4, Township 19 North, Range 13 East, was in all probability at one time a channel but not necessarily a navigable channel of the Mississippi River. The Lower Mississippi Division of the Corps of Engineers informs us that in 1820, upon Missouri's entry into the Union, Wolf Bayou was probably not a navigable stream but instead a minor drainage channel useful only to very small boats.

The title to lands underlying navigable waters was reserved to the respective states upon their admission to the Union (*United States v. State of Oregon*, 295 U.S. 1, 6, 14, 79 L.Ed. 1267, 1270, 1274 (1934)). Whether or not particular waters are navigable is a federal question (*United States v. State of Oregon*, *supra*, 79 L.Ed. at 1274). In the case just cited, the United States Supreme Court concluded that three natural lakes and their connecting channels were not navigable when Oregon was admitted to the Union in 1859, and thus, the beds of these bodies of water did not belong to the State of Oregon.

"The evidence, taken as a whole, clearly establishes the flat topography of the disputed area, the shallow water without defined banks, ice bound from three to four months of the year, the separation of areas covered by water of sufficient depth to float boats, the presence of

Honorable George M. Cook

tules and other forms of water vegetation, a dry season every year, and frequent dry years during which Mud and Harney Lakes are almost entirely without water, and Lake Malheur is reduced to a relatively few acres of disconnected ponds surrounded by mud. These conditions preclude the use for navigation of the area in question, in its natural and ordinary condition, according to the customary modes of trade or travel over water, and establish an absence of that capacity for general and common usefulness for purposes of trade and commerce which is essential to navigability. . . . At most the evidence shows such an occasional use of boats, sporadic and ineffective, as has been observed on lakes, streams or ponds large enough to float a boat, but which nevertheless were held to lack navigable capacity. . . ." (Emphasis added) (United States v. Oregon, supra, 79 L.Ed. at 1278)

The plat of the original United States Survey of Township 19 North, Range 13 East, dated April 21, 1848, recites that it is based on surveys conducted in 1820-1821 for the outer boundaries, and 1847 for the subdivision and various meander lines. The 1820-1821 survey would have included the north line of Section 3 and the plat reflects no body of water along this line. The 1847 survey of the subdivision lines for Sections 3 and 4 is reflected on the plat to show a lake that is approximately centered on the West Quarter Corner of Section 3 - East Quarter Corner of Section 4 and a narrow bayou traversing the line between Sections 3 and 4 south of the lake. The 1956 Edition, United States Army Corps of Engineers Portageville Quadrangle topographic map shows the 1847 lake as a dry ground depression and a body of water extending from the north line of Section 3 in a south and west arc to the west line of Section 4, designated Wolf Bayou. This body of water is not indicated on the 1847 plat, and we conclude that Wolf Bayou, as it exists today, was not "navigable water" at the time of Missouri's admission to statehood.

"To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary,

Honorable George M. Cook

precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon. Mere depth of water, without profitable utility, will not render a water course navigable in the legal sense, so as to subject it to public servitude, nor will the fact that it is sufficient for pleasure boating or to enable hunters or fishermen to float their skiffs or canoes. To be navigable a water course must have a useful capacity as a public highway of transportation. . . ." (Harrison v. Fite, 148 Fed. 781, 783-784 (8th Cir. 1906))

Being nonnavigable waters, the underlying land could be disposed of like any other lands by the United States. Carlton's Abstracts of the Pemiscot County land records show that the United States made the following dispositions in Sections 3 and 4, Township 19 North, Range 13 East:

- (1) Direct entry of W1/2, SW1/4, Section 4, by John P. Faust; September 12, 1848
- (2) Direct entry of SE1/4, SW1/4, Section 4, by Elizabeth Lee; October 8, 1849
- (3) Direct entry of NE1/4, SW1/4, Section 4, by W. W. Outlaw; October 14, 1849
- (4) Direct entry of N1/2, NW1/4, Section 3, by Joseph Labuxien; December 4, 1849
- (5) Swampland Patent No. 3, August 22, 1856, to State of Missouri: SE1/4, Section 4; E Fractional 1/2, Section 3; Lot 1, NW1/4, Section 3; SW1/4, Section 3
- (6) Swampland Patent No. 16, March 13, 1878, to State of Missouri: NE Fractional Part of SE1/4, Section 3; Fractional Part of NE1/4, Section 3

The State of Missouri in turn issued swampland patents to Pemiscot County, pursuant to present Sections 241.010, et seq, RSMo, in Sections 3 and 4, Township 19 North, Range 13 East as follows:

Honorable George M. Cook

Swampland Patent No. 16, March 1, 1870, to
Pemiscot County; E Fractional 1/2, Section 3;
Lot 1 of NW1/4, Section 3; SW1/4 of Section 3;
SE1/4 of Section 4

Thus, any interest held by the State of Missouri to the title to the land underlying the major portions of Wolf Bayou, as the Bayou is located in the 1956 Portageville Quadrangle map, was divested in 1870. The course of this title since then could only be determined upon preparation and examination of abstracts of title to the property.

Yours very truly,

JOHN C. DANFORTH
Attorney General