

OFFICIAL OPINION NO. 77-61, Klondike Dam: ownership of dam site on Iowa-South Dakota border

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Mr. Richard F. Bogue  
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206 East 5th Street  
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Official Opinion No. 77-61

**Klondike Dam: ownership of dam site on Iowa-South Dakota border**

Dear Mr. Bogue:

You have requested an opinion based on the following facts:

FACTS:

There exists an old milldam across the Big Sioux River on Section 16, Township 99, Range 48, touching both Iowa and South Dakota. The dam was built for mill purposes around 1870 by a person who owned the property on both sides of the Big Sioux River.

The dam has fallen into disrepair and the mill site itself has been purchased by private individuals. There is now a movement to restore the dam and to create a park area adjacent thereto, which involves the State of South Dakota, Lincoln County, the State of Iowa, and the Federal Government.

In an opinion issued by David W. Casjens, Lyon County Attorney for the State of Iowa, the State of Iowa was declared the owner of that portion of the dam structure, river bed, and banks of the river "located within the State of Iowa up to the high water mark."

The questions presented are:

QUESTIONS:

1. Who owns that portion of the bed and banks of the Big Sioux River located in the State of South Dakota at the site of the Klondike Mill Dam?
2. Who owns that portion of the dam structure located in the State of South Dakota?

IN RE QUESTION NO. 1:

Ownership of the bed and banks of the Big Sioux River can be determined only after addressing the threshold issue: Is the Big Sioux River a “navigable stream”?

The South Dakota Supreme Court has adopted a very broad definition of “navigable”:

In the early history of the common law the rights of the public in navigable waters were confined to navigation. But the term “navigable” has been extended and includes waters that are not navigable in the ordinary sense. In *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796, 798, it was held, after a consideration of the statutory provisions quoted and a review of many of the leading cases, that whether or not waters are navigable depends upon the natural availability of waters for public purposes taking into consideration the natural character and surroundings of a lake or stream. This division of lakes and streams into navigable and non-navigable is the equivalent to a classification of public and private waters.

Based on the above definition, I must conclude that the Big Sioux River is a “navigable” stream. Having made that determination, one must look to South Dakota statutes to define the law governing ownership of navigable stream beds and banks.

SDCL 43-17-2 explains the ownership rights of upland owners:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways.

Between the high- and low-water mark, the State has qualified ownership of the land, not in a proprietary capacity, but as a public trustee. 1955-56 AGR 356, Official Opinion No. 76-99.

The upland owner has no ownership rights in land below the low-water mark, or in the bed of the stream. SDCL 43-17-1 provides:

The ownership of land below the ordinary high-water mark, and of land below the water of a navigable lake or stream, is regulated by the laws of the United States or by such laws of the state as the Legislature may enact.

Based on the reading of SDCL 43-47-1, SDCL 43-17-2, and AGR 1955-56, page 356, it is possible to conclude that the current upland owner owns the banks of the stream above the low-water mark, subject to the State's public trust in the strip of land between the low- and high-water marks.

Ownership of the riverbed was vested in the State of South Dakota upon admission to statehood in 1889:

On the public domain within the states created out of territories, the states acquired title to the beds and banks up to high-water mark of that water which was navigable under the federal test on the date of admission of each such state. In these states, the federal government continued to hold nearly all of the remaining land as public domain, the newly admitted states acquiring only thin ribbons of land comprising the beds and banks of navigable waters. That may sound ridiculous, but it is true. Clark, Ed., *Waters and Water Rights*, Vol. 1, § 40.2, page 250 (1967).

The State conceded to private ownership, subject to the State's public trust, only those strips of land between the high- and low-water marks. SDCL 43- 17-2; *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796 (1915); *Anderson v. Ray*, 37 S.D. 17, 156 N.W. 591 (1916); *State ex rel. Clark v. Deisch*, 162 N.W. 365 (S.D. 1917). Title to lands below the low-water mark of navigable streams has remained vested in the State.

Title to the riverbed was not affected by over a century of "adverse possession," since title to the bed of streams cannot be acquired by prescription of adverse possession as against the United States or the State of South Dakota. Anno., 55 A.L.R.2d 554 (1957), § 15, at 585-7. Title to the riverbed has been vested in the State since 1889. Prior to that time, ownership was vested in the federal government. Title could not have been divested by adverse possession, and the State has not voluntarily relinquished ownership. Therefore,

title to the riverbed is in the State of South Dakota.

IN RE QUESTION NO. 2:

Ownership of the dam structure presents an interesting question. There is considerable doubt whether the person who constructed the dam around 1870 had the legal right to do so:

A riparian owner, whose lands border on a stream, the bed of which is owned by the state, has no right to use the water power of the river at that point, where the only practicable method for using that power requires the construction of a dike or dam extending into the river on the state-owned lands. 94 C.J.S. *Waters*, § 371, pages 451-2.

He probably was unaware of the fact that the Big Sioux River was subject to a navigational servitude. The status of the original navigational servitude is now a purely academic question--water over the dam.

The South Dakota Supreme Court has on two occasions allowed the owners of milldams constructed across navigable streams to acquire prescriptive rights to maintain the dams as originally constructed. In *Tosini v. Cascade Milling Co.*, 117 N.W. 1037 (S.D. 1908), the court held that the person who constructed a dam across the Big Sioux River in Sioux Falls in the 1880's had acquired a prescriptive right to use the dam. And in *Shearer v. Hutterische Bruder Gemeinde*, 28 S.D. 509, 134 N.W. 63 (1912), the Hutterite Colony was allowed to maintain its milldam across the James River as it was originally constructed in 1875. The decisions do not precisely define the nature of the prescriptive right acquired, but courts in other jurisdictions have deemed the upland owner who built a dam across a navigable river without objection by the State to be a licensee of the State. The upland owner thus acquires only a prescriptive easement--not legal title. *Watervliet Hydraulic Co. v. State*, 119 Misc. Rep. 743, 197 N.Y.S. 348 (1922); *Re Commissioners of State Reservation*, 37 Hun. 537, appeal dismissed, 102 N.Y. 734, 7 N.E. 916 (1885); *Finch, Pruyn and Co. v. State*, 122 Misc. 404, 203 N.Y.S. 165 (1924).

Assuming the original owner did acquire a prescriptive easement to maintain the dam, that easement could be passed on to subsequent grantees of the mill site:

The grant of a mill or factory or other plant operated by water power will pass as an

appurtenance the dam and pond by which the power is supplied, or, according to the circumstances, the right to erect such a dam or to maintain and use the existing dam . . . .

In order for such rights and easements to pass by a conveyance of the mill or factory they must be legally appurtenant to the mill or factory conveyed. 93 C.J.S. *Waters*, § 217, pages 1065-6.

However, sometime during the past century, the subsequent grantees of the original owners allowed the milldam to fall into a state of disrepair. By so doing, any prescriptive easement which might have existed was extinguished by misuse. SDCL 43-13-13. (Had the easement not been extinguished, the State may have been required to pay nominal compensation for appropriation of the dam, even though the State had title to the riverbed. See, *Watervliet Hydraulic Co. v. State*, 119 Misc. Rep. 743, 197 N.Y.S. 348 (1922).)

With the easement extinguished, all interest in the dam reverted to the State.

Based on the foregoing, it is my opinion that:

1. The State of South Dakota owns the riverbed and banks of the South Dakota side of the Big Sioux River up to the low-water mark;
2. The upland owner owns the banks of the river down to the low-water mark, subject to a public trust in the strip of land between the high- and low-water marks; and
3. The State of South Dakota owns that portion of the dam structure located on the South Dakota side of the Big Sioux River.

Respectfully submitted,

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Attorney General

WJJ:LLF:pk