Opinion No. 39-3152

May 27, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. A. Gilberto Espinosa, Assistant United States Attorney, Albuquerque, New Mexico.

*{*54}* We have your request of May 24 for an opinion as to whether lands within the river bed of the Rio Grande or any other non-navigable stream belong to the riparian owner or belong to the State of New Mexico.

In Tagliaferri v. Grande, 16 N.M. 486, 120 P. 730, the Supreme Court referred to the general rule that "the presumption is that the adjoining land owner has title to the center of the stream." Since the precise question there was as to the bed of an acequia, however, this case cannot be said to be authority, and our courts have apparently never passed upon the question.

The general rule in this country is, of course, that the riparian owners own the bed of the stream; and, with the possible exception of Texas (State v. Grubstake Inv. Ass'n., 117 Tex. 53, 297 S.W. 202), all states in which the question has arisen seem to follow the common-law rule that the title to the bed of non-navigable streams is in the riparian owners. 67 C.J. 821, and notes; 27 R.C.L. 1371-1372, and notes.

The Texas cases and the text writers point out that the Civil Law of Mexico at the time of the Mexican cession to the United States placed the ownership of all river beds, navigable and non-navigable, in the public, and Kinney on Irrigation, Volume I, Section 331, declares at page 54, as to fresh water navigable streams:

"Many of the states of the arid region have entirely repudiated the doctrine of riparian rights; and, of course, as the right of ownership of the soil under a navigable stream is one of the riparian rights, **this has gone with the rest** * * *."

And again in the same section at page 545:

"In the following States the common law of riparian rights is rejected in toto: Arizona, Colorado, Idaho, New Mexico, Nevada, Utah, and Wyoming. As the ownership of the beds of fresh water streams navigable in fact is one of the riparian rights, it follows that this right was also rejected and the ownership of the beds of these streams is in the States under whose jurisdiction these waters flow * * *."

It would seem that the same reasoning, if sound, would apply to non-navigable streams. It is well settled, of course, that New Mexico does not recognize riparian rights to water, but follows the doctrine of prior appropriation. However, so far as I can find, no New Mexico court, or any other court, has ever stated that because riparian rights in the

water are not recognized in the states above named, riparian rights in the river bed are not recognized either. On the contrary in two of the states mentioned, Colorado and Idaho, the common law as to riparian rights to the bed of non-navigable streams is followed.

In Hanlon v. Hobson, 24 Colo. 284, 51 P. 433, 42 L.R.A. 502, a contention that "by analogy to the doctrine prevailing in Colorado respecting the right of the people to the waters of public streams, and to divert the same, which is contrary to the common law doctrine of riparian ownership, the rule should be that the beds of the streams, as well as the waters, belong to the public," was rejected.

And in Johnson v. Johnson, 14 Idaho 561, 95 P. 499, 24 L.R.A. (NS) 1240, ownership of the bed of non-navigable as well as navigable streams was recognized, notwithstanding the fact that navigable rivers are reserved as public highways.

California, like New Mexico, acquired its territory from Mexico together with the law then existing under the republic with respect to ownership of the bed of all streams, and prior appropriation of water. By the adoption of the common law as the rule of practice and decision, however, it was decided in Lux v. Haggin, 10 P. 674, that the Mexican rule had been abandoned, and the Supreme Court of the United States held that the Federal Government as a riparian owner had title to the river bed in a non-navigable stream in California on the authority of Lux v. Haggin, saying this case held that the adoption of the common law as the rule of decision in the state operated, at least from the admission of the state to the union, as a transfer to all riparian proprietors of the property of the state, if any she had, in the non-navigable streams and the soil beneath *{*55}* them. Donnelly v. United States, 57 L. Ed. 820 at 829.

Of course, California recognizes riparian rights to water and we do not. We say that all unappropriated waters, whether perennial or torrential, are public and subject to appropriation. Article XVI, Section 2, of the Constitution; Section 151-101, 1929 Compilation. But the right to the flow of water is quite distinct from the ownership of the bed of the stream, and there is no reason why the rule as to either could not be displaced without affecting the other. State of Oklahoma v. State of Texas, 258 U.S. 574, 66 L. Ed. 771 at 780. See also Kinney on Irrigation, Vol. I, Sec. 334. And it is significant that neither in the constitution nor in the statute is anything said about the soil under the water.

Beals v. Ares, 25 N.M. 459, 185 P. 780, states that "the effect of the act of adoption of the common law (in New Mexico) may well be described by the application of the language of Lux v. Haggin," p. 485. It then proceeds at page 486 to state that where there is a statute copied after the civil law, the common law occupied all the field of jurisprudence outside such statute.

It is my opinion that the doctrine of Lux v. Haggin, as interpreted in State v. Donnelly, supra, is applicable to the question of ownership in the soil of non-navigable streams, and since the Constitutional provision and statute above cited are limited to the waters

only, and that the state does not own the bed of any of our streams, except as riparian owner. I find no authority to the contrary, other than the above statements in Kinney on Irrigation.

Texas also adopted the common law, but it had a statute placing the ownership of all streams more than thirty feet wide in the state. State v. Grubstake Inv. Ass'n., supra; Maury v. Robison, 56 S.W. (2d) 438.

The Rio Grande in New Mexico is, of course, non-navigable. The contrary was not held in Rio Grande Dam & Irr. Co. vs. United States, 174 U.S. 690, 43 L. Ed. 1136, reversing the state court in 9 N.M. 292. Navigability in fact is the test of navigability in law. State of Oklahoma vs. State of Texas, 66 L. Ed. 771. The Rio Grande seems to be navigable in fact only from Rio Grande City below El Paso on down, Rio Grande Dam & Irr. Co. v. United States, 10 N.M. 615.

In view of the above conclusion, it is unnecessary to answer your second question.

By: A. M. FERNANDEZ,

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