

Opinion No. 38-1902

March 4, 1938

BY: FRANK H. PATTON, Attorney General

TO: Mr. G. F. Conroy State Highway Engineer Santa Fe, New Mexico. Attention: Mr. R. W. Bennett.

{*217} This is to acknowledge receipt of your letter of March 3 in which you state that there is a sand bar in the middle of the Chama River near a designated highway project. You wish to know if sand is taken therefrom whether the State of New Mexico or its contractor would be liable to the riparian owners for payment of the same.

It is impossible to give a dogmatic answer to this question. Although ownership of waters in all streams is vested in the State and subject to prior appropriation (Article 16, Sections 1, 2 and 3 of the Constitution, and Section 151-101, New Mexico Statutes Annotated, 1929 Compilation), our Constitution and statutes are silent as to the ownership of the bed of the stream. There is no uniformity at all in the various holdings as to who has title to a stream bed. If the stream is considered a navigable stream, it has been variously held that title to the entire bed is in the State, that if the circumstances are such that navigation is not feasible title does not remain in the State. This rule is subject to several qualifications and exceptions. See 27 R.C.L., pp. 1358 through 1370. If the stream is non-navigable the weight of authority seems to be that title to the river bed is vested in the owner of abutting land to the middle of the stream, although there is no uniformity in the holdings. See 27 R.C.L., p. 1371, Sec. 280.

Such being the case, it would seem advisable to obtain consent of the land owners before removing any {*218} gravel or sand from the Chama River.

By: RICHARD E. MANSON,

Asst. Atty. Gen.