

MINUTES OF THE Senate COMMITTEE ON Energy and Natural Resources

The meeting was called to order by Senator Ross Doyen at
Chairperson

8:10 a.m./p~~xx~~ on February 16, 1989 in room 423-S of the Capitol.

All members were present except: quorum was present.

Committee staff present:

Don Hayward, Revisor
Raney Gilliland, Research
Lila McClaflin, Committee Secretary

Conferees appearing before the committee:

Senator Sallee
Jack Euler, attorney, Elwood, KS.

List of others present is on file.

Chairman Doyen opened the hearing on S.B. 239. He called on Senator Sallee to brief the committee on the bill.

Senator Sallee presented written testimony supporting S.B. 239 (Attachment I).

Spencer Tomb, Kansas Wildlife Federation, Inc., written testimony was distributed (Attachment II).

The hearing was closed.

The hearing on S.B. 240 was opened.

Senator Sallee brief the committee on S.B. 240 (Attachment III).

Jack Euler, attorney, from Elwood, gave background information on S.B. 240. (Attachment IV).

Secretary of State, Bill Graves stated he would like to see this concern settled.

Bob Meinen, Secretary of Wild Life and Parks, responded in answer to a question, he would be glad to work with the individuals involved to see if this could be resolved.

The hearing was closed.

The chairman referred back to S.B. 239.

Senator Sallee made a motion to report S.B. 239 favorable for passage. The motion was seconded by Senator Thiessen, and the motion carried.

The meeting adjourned at 9:31. The next meeting will be on February 21, 1989.

Date February 16, 1989

GUEST LIST

<u>NAME</u>	<u>REPRESENTING</u>
Philip Lacey of Atchison, Kansas	Atchison - Doniphan Co Drainage District 15-45
Dobie McCastill	K. Dept. of Commerce
Bob Meinen, Wildlife & Parks	
Harvey Dupree	St. Joseph Missouri Levee Dist.
Bryan Faden	Elwood Cladden Drainage Dist.
Vernon Ripple	Elwood Cladden Drainage Dist.
Jacek Euler, Troy KS	→ " " " " + City of Elwood, KS
Jim Ludwig	KPL

The Honorable Ross Doyen, Chairperson
Senate Committee on Energy and Natural Resources
Senate Chamber
Third Floor, Statehouse

Dear Senator Doyen:

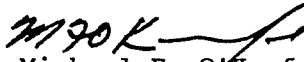
SUBJECT: Fiscal Note for SB 239 by Committee on Energy and Natural Resources

In accordance with KSA 75-3715a, the following fiscal note concerning SB 239 is respectfully submitted to your committee.

SB 239 directs the Secretary of State to convey by quitclaim deed any title of the state of Kansas in any tract of land located in Atchison county between the west Missouri river meander line established by the Kansas survey of 1872 and the east Missouri river meander line established by the Missouri survey of 1862 to the person or person claiming such tract under color of title. The act further stipulates that the deed would be conveyed "without consideration."

The act would become effective upon publication in the Kansas Register.

Any expenditures which may be required upon passage of this act can be absorbed by the Secretary of State within the amounts recommended in the FY 1990 Governor's Report on the Budget.


Michael F. O'Keefe
Director of the Budget

MFO:WD:dlf

cc: The Honorable Bill Graves, Secretary of State

5999

REPORTS OF STANDING COMMITTEES

MR. PRESIDENT:

Your Committee on Energy and Natural Resources

Recommends that Senate Bill No. 239.

"AN ACT directing the secretary of state to convey certain land in Atchison county to certain persons claiming such lands under color of title."

Be amended:

In line 26, by striking "person" where it appears the second time and inserting "persons";

And the bill be passed as amended.

Chairperson

STATE OF KANSAS

DON SALLEE
SENATOR, FIRST DISTRICT
ATCHISON, BROWN, DONIPHAN, JACKSON
AND JEFFERSON COUNTIES
R.R. 2
TROY, KANSAS 66087



TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS

CHAIRMAN: ELECTIONS
VICE-CHAIRMAN: ENERGY AND NATURAL RESOURCES
MEMBERS: AGRICULTURE
LABOR, INDUSTRY AND SMALL BUSINESS
TRANSPORTATION AND UTILITIES

Testimony Before Senate Energy and Natural Resources on
Senate Bill 239

By Senator Don Sallee

Mr. Chairman and Committee members:

Thank you for this opportunity to appear before your committee. S.B. 239 would allow Atchison County to establish property boundaries on certain tracts that were changed by the Missouri River many years ago. During reappraisal it was discovered that some bottom land property did not measure as it should. I understand this will not require a survey and the cost would be very minimal. I stand for questions.

SF&NR
2/16/89
Attachment I

Kansas Wildlife Federation, Inc.

200 S.W. 30th, Suite 101 • P.O. Box 5715 • Topeka, KS 66605

February 14, 1989

Honorable Ross Doyen
Kansas Senate
Capitol
Topeka, KS 66612

Dear Senator Doyen:

I am concerned about Senate Bill 239. I would like to have a legal and ecological description of the land involved.

Sincerely,

Spencer Tomb
Spencer Tomb
Vice President

ST/sjs

SE4NR
2-16-89
(attachment II)

STATE OF KANSAS

DON SALLEE
SENATOR, FIRST DISTRICT
ATCHISON, BROWN, DONIPHAN, JACKSON
AND JEFFERSON COUNTIES
R.R. 2
TROY, KANSAS 66087



TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
CHAIRMAN: ELECTIONS
VICE-CHAIRMAN: ENERGY AND NATURAL RESOURCES
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LABOR, INDUSTRY AND SMALL BUSINESS
TRANSPORTATION AND UTILITIES

Testimony Before Senate Energy and Natural Resources on
Senate Bill 240

By Senator Don Sallee

February 14, 1989

SB 240 pertains to a problem that has existed in Doniphan County for more than three decades. The Missouri River overflowed in 1952 and changed its course, leaving some of Missouri on the Kansas side. Consequently, a boundary dispute ensued. After much time and difficulty, the problem was resolved. The resolution resulted in some excess land, which is to be sold. It has been agreed upon by all involved that the land will be sold by the Secretary of State in a manner he deems appropriate. A portion of this land, which is wet land and a small lake, is sought by the Wildlife and Parks Department. This wet land is of dual value: it is a habitat for wildlife and fish, and it also encompasses a ponding area which serves as flood protection for the city of Elwood, as well as other farm communities in the area. Again, everyone involved agrees that this would be a satisfactory arrangement. S.B. 240 would allow Wildlife and Parks to acquire this land.

SE & NR
2/16/89
Attachment III

RE: SB 240

Official views vary about Browning Lake wetlands

BY MARY WINDER

What should be done with Browning Lake? It's a question that state agencies and elected officials have been groping with for a long time. An answer may be close at hand.

Browning Lake is an oxbow lake in Doniphan County located between Wathena and Elwood, near Rosecrans Memorial Airport. It was formed when the Missouri River changed its channel during a flood in 1952. This change in the channel caused confusion about where the boundary line between Kansas and Missouri was located. After Kansas had spent \$120,000 on surveys of the area, the boundary was finally established.

So, the State of Kansas currently owns approximately 450 acres of this Browning Lake area, which includes 255 acres of wetland marsh vegetation, 80 acres of riparian (along the banks of a stream or lake) woodland, 50 acres of lake open water, and 65 acres of cropland. The Kansas Secretary of State Bill Graves, is in charge of deciding what to do with this land. Graves has found this task to be anything but simple. Numerous agencies and individuals have offered suggestions and input as to what to do with Browning Lake.

Graves must be guided by the State Accreted Land Law in this matter. This law states that the land shall be sold. Dan Rice, formerly with the Secretary of State Office, indicated last August that the Secretary of State has considerable discretion over the sale. Rice further stated that he saw no reason that the state couldn't purchase the land from itself.

"If the Secretary of State has these discretionary powers, I hope he uses these powers to protect Browning Lake, which has been described by some as an oasis of wildlife habitat, by making sure it remains in state ownership," said Jerry Hazlett, executive manager of the Kansas Wildlife Federation. "I believe the only way to save this wetland is to keep it in public trust owned by the state."

Hazlett went on to say that he has learned that since 1952, some of this land has been illegally farmed by surrounding landowners and some of the wetland has been illegally filled, in violation of the Clean Water Act, Section 404.

"In December 1988, the KDWP made five recommendations for courses of action to take on this issue," explained Kramer. The first recommendation involves asking Secretary Graves to have this area restored to its natural condition, which would include taking out illegal drainage ditches at the expense of those who put them in. Secondly, the Department recommended that Secretary Graves be asked to place restrictions on the land use, through easements, to protect the land. Thirdly, the Department recommends that Secretary Graves be asked to transfer the main portion of the Browning Lake area to KDWP with the other part of the land being offered for sale to anyone. If Secretary Graves doesn't agree to this recommendation, the Department recommended that the land be sold to a private conservation group with necessary restrictions in place. And finally, the Department recommended that it continue its involvement in protecting the area by making comments, reporting violations, etc.

Ken Brunson, a Stream Fisheries Biologist with KDWP, is looking into yet another possibility for Browning Lake. He is working on the Missouri River Mitigation Project, which involves finding ways for the U.S. Army Corps of Engineers to replace and help make up for the many acres of wildlife habitat it destroyed when the Missouri River was channelized. "Browning Lake could be looked at as a potential mitigation area," Brunson said.

Governor Mike Hayden has also taken an interest in Browning Lake. "John Strickler, who is the Governor's Special Assistant for Environment and Natural Resources, is in the process of collecting information on this issue from various groups," said Frank Ybarra, Deputy Press Secretary for Governor Hayden.

State Representative Artie Lucas of Highland is in the process of researching the Browning Lake issue, as well. "I'm trying to talk with everyone involved," he said. "I would certainly like to hear the views of my constituents on this issue. They can leave a message for me by calling this toll-free number: 1-800-432-3924."

"If this unique area is sold back to private ownership, I don't think Section 404 will necessarily protect it," explained Hazlett, noting that this law has apparently failed to protect it in the past. "I encourage people to contact Governor Hayden, Secretary of State Bill Graves, and Secretary of the Kansas Department of Wildlife and Parks Robert Meinen and urge them to keep Browning Lake under state ownership to save this wetland."

John Reinhart, Press Secretary for Secretary of State Graves, said the ball is in the court of the Kansas Department of Wildlife and Parks (KDWP) now. "I understand that KDWP will be putting together a proposal on the Browning Lake issue to present to the legislature this session," he explained. "Then it will be up to the legislature to take action."

"We certainly believe this Browning Lake area is worth saving, worth protecting," said Joe Kramer, Fish and Wildlife Chief with KDWP. "The state doesn't own that many wetlands areas."

"Wetland loss is a serious problem in the U.S., especially in Kansas," stated Randy Whiteaker, District Wildlife Biologist with KDWP. "In fact, Browning Lake is the only riverine wetland we have left in Kansas, that I know of."

Whiteaker also mentioned that there have been reports of bald eagles using the Browning Lake area. In addition, he said that it is quite possible that threatened and endangered aquatic species live in the Browning Lake since the lake has an outlet to the Missouri River. He added that the Browning Lake land could be the home of threatened or endangered terrestrial species, as well, although this has not been verified.

Since November 1987, KDWP personnel have made at least two site evaluations of Browning Lake, one by air and one on foot.

State Senator Don Sallee of Troy has formulated an opinion. "The land needs to be sold to whomever pays the highest price because that's what the statute says to do," he stated. "I think the state may end up with the lake and timber area because no one else will want it. The landowners are interested only in the cropland and one other spot they need for a pooling area."

"I believe wetlands are worth saving if they are of any size and quality. But, I don't see much value to that mudhole (Browning Lake) down there, except it does act as a pooling area and helps prevent flooding in the bottoms," he added, noting that 12,000 acres drain into Browning Lake.

"I think this land ought to revert back to the landowners, or the landowners ought to have a chance to buy it," said Jan Laipple of Wathena, who owns land adjacent to the Browning Lake land now owned by the state. "I would like to think that it is possible to reach some kind of compromise on this issue."

Laipple related an incident that occurred in the fall of 1988 when the Elwood Levee District dug a ditch in this area to maintain drainage. Excavated material was piled onto a wetland near Browning Lake in violation of Section 404 of the Clean Water Act, mentioned earlier. "The Corps of Engineers said they broke the law," said Laipple. "They were supposed to have a permit to do work like that, but they didn't know that. They're not trying to drain a wetland. We just have to have drainage."

When asked about Section 404 violations in the Browning Lake area, Roger Dulac, Biologist with the U.S. Army Corps of Engineers, did not mention this particular case, but he did discuss a similar case the Corps is investigating that occurred on the Missouri side of Browning Lake. In this case, the St. Joseph Airport Levee District extended a ditch for 4/10 mile through a wetland area. This District also failed to get a permit and also piled excavated material onto the wetland.

"We're in the process of coordinating with Missouri State and Federal agencies to work out a satisfactory resolution," explained Dulac. He went on to say that what usually happens in cases like this is that the Corps would allow the District to apply for the permit after the fact, which this District has already done. Then, the District is given the opportunity to remove the material or mitigate their unlawful action in some way.

"The airport supports the District's request for a permit to maintain this drainage ditch," said Jim George, maintenance foreman with Rosecrans Memorial Airport. "The airport's drainage depends on this drainage."

Dulac said he met in January with Kansas landowners from the Browning Lake area and encouraged them to develop a long range plan to solve their drainage needs.

So, what should be done with Browning Lake? It is apparent that many people have strong, sometimes contrasting, opinions about the answer to this seemingly simple question. The issue has therefore become very complicated. "I really don't know how it's all going to come out," said Laipple. "But, I would really like to see this settled somehow soon."

Listed below are the names and addresses of people to contact in order to give your opinion on this issue.

Governor Mike Hayden, State Capitol, Topeka, Kansas 66612-1594 (913) 296-3232.

Bill Graves, Secretary of State, 2nd Floor, State Capitol, Topeka, Kansas 66612-1594, (913) 296-2281.

Robert Meinen, Secretary of Wildlife and Parks, 900 E. Jackson, Suite 502, Landon-5 Office Building, Topeka, Kansas 66612-1220, (913) 296-2281.

SF & NR
2/16/89

attachment IV

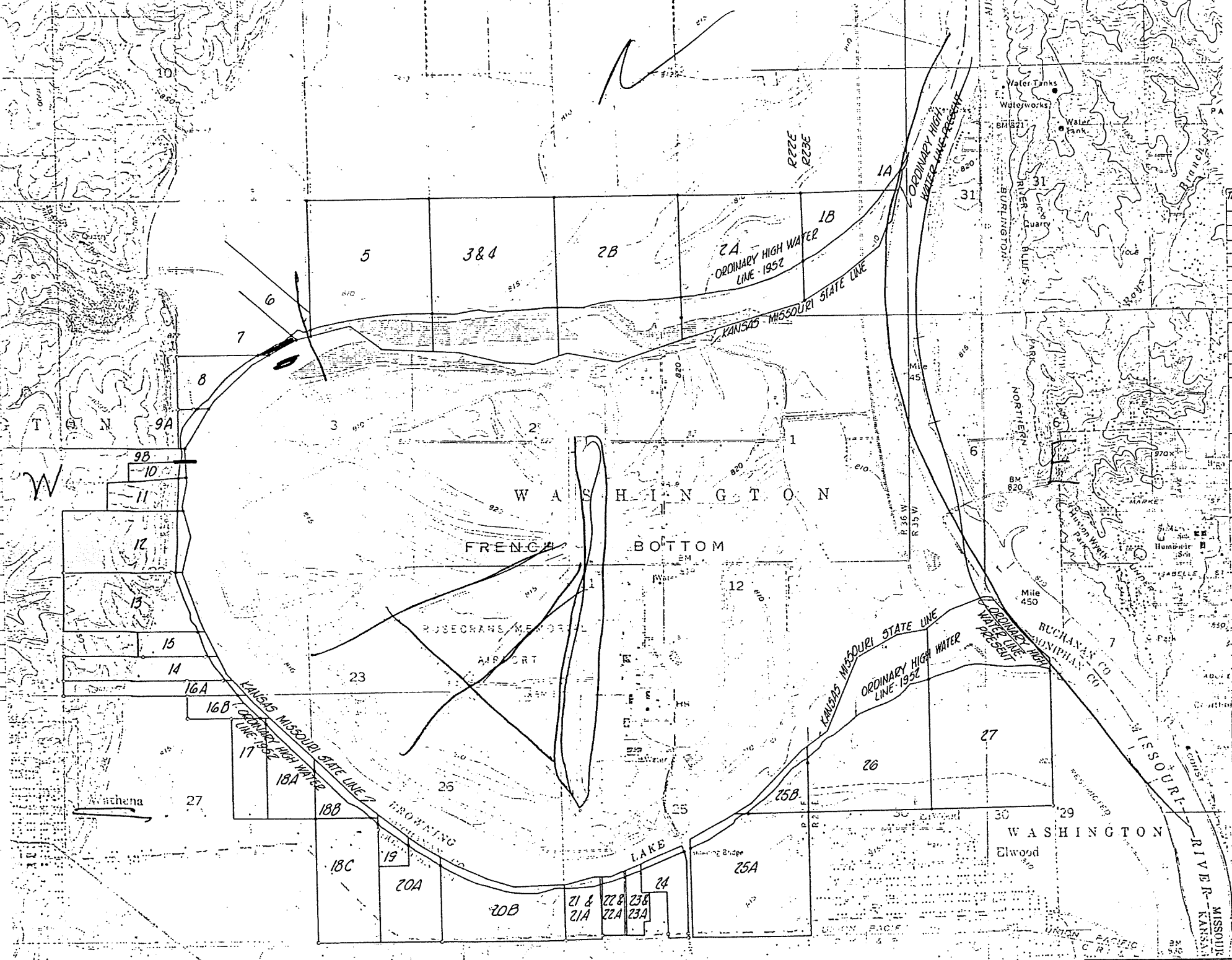
RE: SB 240

Scale: 1"=1000'

H-2

Tract No.	Acreage	Sht. No.
1A	2,1598	2
1B	40,0712	3
2A	46,8730	4
2B	66,9719	5
3&4	62,6678	6
5	29,0705	7
6	1,2478	8
7	2,0967	9
8	5,2827	10
9A	3,3317	11
9B	0,5933	12
10	1,0603	13
11	2,1763	14
12	6,5180	15
13	4,9064	16
14	1,9429	17
15	2,0823	18
16A	1,8195	19
16B	2,1887	20
17	0,1900	21
18A	3,3924	22
18B	6,8712	23
18C	0,2332	24
19	3,0537	25
20A	2,7150	26
20B	9,3934	27
21	2,7816	28
21A	2,6981	29
22	1,5034	30
22A	1,8842	31
23	1,1030	32
23A	0,0683	33
24	3,1324	34
25A	5,0067	35
25B	6,2136	36
26	56,4479	37
27	65,1564	38

INDEX	
Tract No.	Owner
1A	Laipple Farms, Inc.
1B	Laipple Farms, Inc.
2A	Manville Meadows Farms, Inc.
2B	Manville Meadows Farms, Inc.
3&4	Manville Meadows Farms, Inc.
5	Connie J. Laipple
6	Oscar Pohl & Lydia M. Pohl
7	Laipple Farms, Inc.
8	Charles W. Manville & Mariella Manville
9A	Pete J. Sluder, Jr.
9B	Pete J. Sluder, Jr.
10	Clyde A. Propheter & Alice D. Propheter
11	Raymond L. Munger & Linda M. Scott
12	Paul E. Geeling & Juanita M. Munger
13	Paul E. Geeling & Barbara J. Geeling
14	Charles W. Manville & Mariella Manville
15	Peter J. Sluder & Catherine L. Sluder
16A	Charles W. Manville & Mariella Manville
16B	Charles W. Manville & Mariella Manville
17	Ezra W. Shields & Phyllis J. Shields
18A	Groh Orchards, Inc.
18B	Groh Orchards, Inc.
18C	Groh Orchards, Inc.
19	Ruth Catherine Sullwold, David A. Sullwold & Charles R. Sullwold
20A	Milton Groh & Mary Margare & Marquerite V. Price
20B	Milton Groh & Mary Margare & Marquerite V. Price
21	The City of St. Joseph, Mo.
21A	The City of St. Joseph, Mo.
22	Lenora E. Davis, William L. Davis & Virgell O'Dell Davis
22A	Lenora E. Davis, William L. Davis & Gladys M. Newhart
23	Excel, Inc.
23A	Excel, Inc.
24	Clarence H. Davis & Melba & Ethel Miller
25A	Union Pacific Land Resources
25B	Union Pacific Land Resources
26	Missouri River Farms, Inc.
27	Missouri River Farms, Inc.



ALUMINUM MONUMENT

•• Denotes Aluminum Monument Set
 •• Denotes Survey Monument Found

BOGINA CONSULTING ENGINEERS
 2018 Euclid Road • P.O. Box 1411 • Kansas City, MO 64111 • 816-234-1779
ABANDONED MISSOURI RIVER CHANNEL SURVEY

REK 5 B 290

Dispute Lingers as Kansas Eyes Missouri Land

By Michael H. Rudeen
A Member of the Staff

Metro Area News

It's not exactly a border war, but Kansas officials are anxious to settle a dispute with Missouri over about 100 acres of premium farmland west of St. Joseph.

The boundary controversy began 24 years ago when a severe flood changed the course of the Missouri River. Before the April, 1952, flood, the river looped west of the French Bottoms, an unincorporated area of Buchanan County, but the high waters moved the river three miles to the east, to the western boundary of St. Joseph.

As long as the river was there, the precise border was moot because it was covered with water. But now that part of the border area is rich, dry farmland, some of it valued at more than \$1,000 an acre, a few hundred feet one way or the other makes a lot of difference.

The problem is that the legal compact defining the border is ambiguous, making the precise line a matter of interpretation. Kansas officials say the boundary should be the thalweg line. The term thalweg, derived from the German words for valley (Tal and way (Weg), refers to the middle of the chief navigable channel of a waterway.

Missouri officials use a different standard—a line drawn midway between the highest points of the river banks for determining the state boundary.

Along the 7-mile loop of the former channel, the two lines cross twice. The thalweg line swings from bank to bank, following the deepest part of the channel, which was cut by the centrifugal force of the water as it flowed around the bends. Along the northern leg of the old channel, the thalweg line is on the Missouri side of the midpoint of the river; when the channel bends south, the thalweg line crosses to the Kansas side of the midpoint. The thalweg line crosses back to the Missouri side just before the old channel intersects with the river.

There are about 275 acres between the two lines in the old channel, Robert E. Myers, Missouri state land surveyor, said. If the thalweg line were used, as Kansas officials urge, Missouri would gain 25 acres more than it now has using the midpoint line.

But most of the land in the border area, especially the western and southern legs of the old channel, either is underwater or swampy. Most of the dry farmland is along the northern leg of the old channel, and there Kansas would gain about 100 acres if the thalweg line were used, Myers estimated.

"When we (Kansas and Missouri officials) looked into it, it became apparent that the Missouri interests possessed the land in question," Andrew Rothschild, Missouri assistant attorney general, said. "All we could do would be to somehow co-operate with Kansas to deprive Missouri people of that property. There's no act we could take that would benefit Missouri interests."

The legislation passed by both states and ratified by Congress in 1950 that sets the boundary does not distinguish between the thalweg and midpoint lines.

The law states: "The center of the channel of the Missouri River as its flow extends from its intersection with the 40th parallel, north latitude (the northern boundary of Kansas), southward to the middle of the mouth of the Kansas or Kaw River, shall be that portion of the true and permanent boundary line between the states of Missouri and Kansas subject only to changes which may occur by the natural processes of accretion or reliction (gradual increase of land area from water-suspended deposits or from recession of water) but not by avulsion (rapid change, as by flood)."

Robert Sweatt, Kansas assistant attorney general, and other Kansas officials said they think state and federal precedents clearly indicate where the boundary should be. "Case law states that any time the wording 'middle of the river' is used in an agreement . . . it refers to the middle of the navigable part of the river," Sweatt said. This line, the thalweg line, has been accepted by Congress and the courts unless the boundary agreement spells out an alternative, he said.

Kansas officials have proposed that a survey be conducted to determine the thalweg line and set the border, but Missouri officials disagree that a clear precedent in case law exists for using the thalweg line and argue that a survey would be meaningless until a boundary agreement is reached.

"A survey isn't going to establish anything unless the assumption on which the survey is made is a proper assumption," Brook Bartlett, Missouri first assistant attorney general, said. "We're not going to obligate the state of Missouri to another expensive survey. Boundary disputes are one of the longest types of litigation and one of the most expensive types of litigation that one can engage in."

Although unresolved for 24 years, it appeared for a time this year that the dispute would finally have to be settled, or at least dealt with.

In February the Missouri Department of Corrections announced that the French Bottoms had been selected as the site for a 500-inmate, \$15-million medium-security prison. Soon after the announcement Curt Schneider, Kansas attorney general, said he believed that part of the 200-acre site was in Kansas: "I do not intend to allow the state of Missouri to proceed with the construction of this proposed prison until the question of the dispute over the boundary between the two states has been resolved." Schneider threatened to take the matter to the U.S. Supreme Court.

About that time the Kansas secretary of state asked the state Legislature for a \$50,000 appropriation for the survey. The appropriation was

approved in the House but just as the drive to settle the border dispute was picking up steam, Missouri officials started having doubts about locating the prison in the French Bottoms. (The problem was not the border but legal complications that Missouri officials feared would be involved in the transport of prisoners to the new prison. There is no bridge across the river at St. Joseph and prisoners would have to be taken through Kansas.)

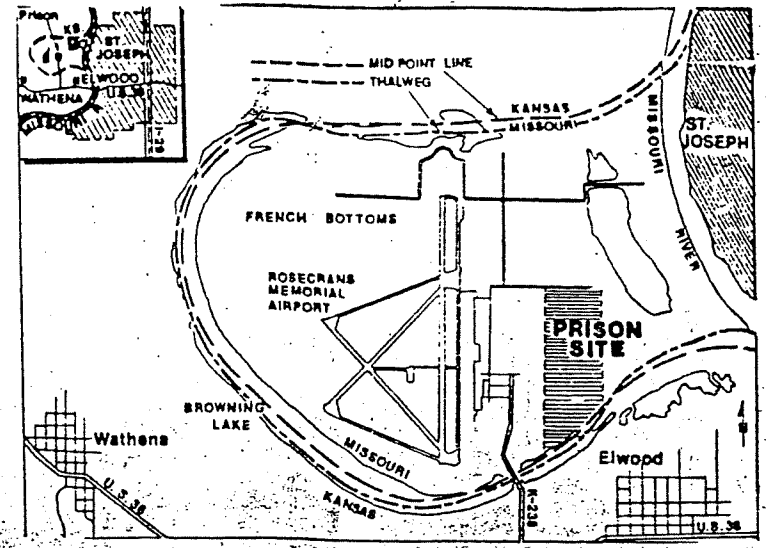
Then on Tuesday the Kansas Senate deleted the \$50,000 appropriation for the survey. "We were willing to pay for it," Sen. Wint Winter (R-Ottawa), chairman of the Senate Ways and Means Committee, said, "but not if it is not necessary. We decided we didn't care too much whether those ducks were floating in Kansas or Missouri."

Whether part of the site of the proposed prison is in Kansas seems no longer to be an issue. "It might well be that the prison site is north of the (thalweg) line," Sweatt said.

But Kansas officials are interested in more than the prison site and Senator Winter's ducks; they want the border question settled along with that of the ownership of the farmland. The only hope is to have the appropriation restored in conference committee.

"If we don't have the money, then we won't make the survey," Jack Brier, Kansas assistant secretary of state, said. "And without the survey the boundary can't be determined and we won't be able to settle the complaints of the landowners up there."

Jack R. Euler, a Troy, Kan., attorney who represents many of the Kansas landowners whose property abuts the old river channel, said, "The thing ought to be resolved without a lot of



Battle Lines

Kansas officials insist that the thalweg line, which marks the deepest point of the old Missouri River channel, is the true border between Kansas and Missouri at St. Joseph. Missouri officials have opted for the midpoint between the banks of the old river channel. The dispute has lingered since the river swung about three miles east during a 1952 flood.

(Staff map by Rick Brownlee)

litigation. It's present indefinite state is the fault of neglect on the parts of the two states, and as far as I'm concerned, mostly on the part of Missouri.

"Just from the standpoint of law and individual rights, it's important," he said. Issuance of hunting licenses and patrolling of Browning Lake, the name given to the part of the channel still

full of water, is complicated by the boundary dispute, he added.

"It's rather a confusing situation," Myers said, "I presume that the only way it could be really resolved is in a court case eventually."

Rothschild said, "It's conceivable that Kansas has grounds for a lawsuit against Missouri."

4-3