

No. 371

NAVIGABLE WATERS—WATERS AND WATER-COURSES—HIGH WATER MARK DEFINED

Held: The high water mark is the line which defines that part of the bed of a navigable stream, which, though not covered at all times by the waters of the stream, is submerged so long and so frequently in ordinary seasons that vegetation does not grow upon it; the great annual rises of the river which sometimes overflow fertile and usable land or any unusual floods do not have any effect or bearing upon the location of the high water mark which, because of the absence of vegetation and a different character of soil below it, can and should be readily distinguished in most instances.

March 10, 1942.

Honorable J. W. Walker
Commissioner of State Lands and Investments
State Capitol Building
Helena, Montana
Attention: Miss B. Fox, Mineral Clerk

Dear Mr. Walker:

You have asked the opinion of this office as to the meaning of the term "high water mark," as the term is used with respect to navigable streams. You say you have been asked whether the term means "the highest known water level."

Fresh water rivers are not subject to tide rise and fall at certain seasons and thus have defined high and low water marks. The "high water mark" is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture. (State v. Longfellow, 169 Mo. 109, 69 S. W. 374.)

In the case of *City of Peoria v. Central National Bank*, 224 Ill. 43, 79 N. E. 296, 12 L. R. A. (n. s.) 687, the following language was used:

"The courts have attempted to define high-water mark as the point below which the presence and action of the waters is so common, usual, and long continued in ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as soil, . . ." (Emphasis mine.)

A good definition of the term appears in the case of *Austin v. City of Bellingham*, 69 Wash. 677, 126 Pac. 59, where it is said:

"High-water mark has been defined to be 'the upland boundary of tide and shore lands.' *Washougal Transp. Co. v. Dalles, etc., Nav.*

Co., 27 Wash. 490, 68 Pac. 74. 'High-water mark does not mean the height reached by unusual floods; for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes; nor does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes. The line, then, which fixes the high-water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner; that is, the owner of adjoining land. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it may be regarded as a part of the bed of the river which overflows it.'"

It is my opinion, therefore, under the above definitions, the high water mark is the line which defines that part of the bed of a navigable stream which, though not covered at all times by the waters of the stream, is submerged so long and so frequently in ordinary seasons that vegetation does not grow upon it; the great annual rises of the river which sometimes overflow fertile and usable land or any unusual floods do not have any effect or bearing upon the location of the high water mark which, because of absence of vegetation and a different character of soil below it, can and should be readily distinguished in most instances.

Sincerely yours,

JOHN W. BONNER
Attorney General