



STATE OF KANSAS

## Office of the Attorney General

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**Curt T. Schneider**  
Attorney General

January 12, 1976

ATTORNEY GENERAL OPINION NO. 76- 8

Mr. Harold S. Herd  
City Attorney  
Post Office Box 216  
Coldwater, Kansas 67029

Re: Cities--Claims

Synopsis: There is no constitutional or statutory prohibition against the execution of an agreement by a Kansas city whereby it agrees to satisfy claims by another party for damages resulting to the property of such other party from the operations, acts or omissions of the city. Payment of any obligation arising out of such an agreement must comply, however, with the Kansas cash-basis law.

\* \* \*

Dear Mr. Herd:

You advise that the City of Coldwater wishes to enter into an agreement with the Santa Fe Railway Co., agreeing to satisfy claims by the railroad for any provable damage which might result to its right of way from flooding caused by a dam owned by the city, located downstream on Cavalry Creek. In consideration for such an agreement, the railroad would agree to settle a pending controversy over damages in an eminent domain action.

Under present Kansas law, a city is immune from liability for damages occurring in the performance of a governmental activity, and is liable as is a private party for damages occurring in the performance of a proprietary function. That immunity may be waived, however, as the Kansas Legislature has done in agreeing to indemnify the United States under certain circumstances

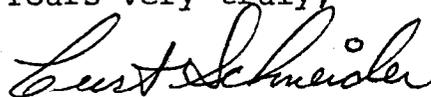
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arising out of the use of water storage space and release of water therefrom. See K.S.A. 1974 Supp. 82a-934. If the flood damage for which indemnity is proposed to be agreed upon with the railroad arises out of a governmental activity, it is fully within the authority of the city governing body, as the legislative body of the city, to waive that immunity to the extent that it is deemed appropriate and needful for the conduct of the affairs of the city. You indicate that the operations of the city involved here, the construction and maintenance of the dam, are deemed to be proprietary in nature.

Satisfaction of any obligation under the indemnity agreement must comply, of course, with the cash-basis law. K.S.A. 1974 Supp. 10-1113 prohibits the incurring of any indebtedness, or payment thereof, which is "in excess of the amount of funds actually on hand in the treasury of such municipality at the time for such purpose . . . ." Execution of an indemnity agreement, in and of itself, does not create a present indebtedness.

Accordingly, it is my opinion that there is no constitutional or statutory objection to execution of an agreement such as described above. It is necessary, however, that satisfaction of any obligation arising under such an agreement comply with the Kansas cash-basis law.

Yours very truly,



CURT T. SCHNEIDER  
Attorney General

CTS:JRM:kj