



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

October 18, 1977

ATTORNEY GENERAL OPINION NO. 77- 341

Mr. Donald S. Simons
Chief Attorney
Kansas Department of Transportation
State Office Building
Topeka, Kansas 66612

Re: Airports--State Grants--Constitutionality

Synopsis: Under Article 11, § 9 of the Kansas Constitution, neither the Secretary of Transportation nor any other state agency or official may provide financial assistance to public agencies in the state for the construction of airports and airport facilities, whether the funds for the assistance derive from state sources or non-state sources, including the federal airport and airway trust fund.

* * *

Dear Mr. Simons:

I have your letter of October 14, 1977, enclosing a copy of an opinion from your office of the same date, addressed to Mr. Ray Arvin, Director of Aviation, and considering the question whether the State of Kansas may accept and disburse funds which are proposed to be allocated to it under proposed amendments to the Airport and Airways Development Act of 1970, 49 U.S.C. § 1701 et seq.

As background for this question, your opinion indicates that the Congress has established a trust fund for the proceeds of federal aviation fuel and registration taxes. Under the Act the Congress reserves to itself the right to allocate those funds. However, the trust fund has now grown to approximately three billion dollars of unallocated moneys. In order to expedite the allocation of

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the fund, it has been proposed that the fund be allocated proportionately to each of the states, which would then distribute airport development moneys directly to municipalities, to be used for the construction, development and improvement of local airport facilities. Each state would establish standards and criteria determining eligibility for the funds, and its only responsibility to the federal government would be to provide an accounting of the expenditure of the funds.

In 1970, the Kansas legislature enacted legislation designed to facilitate implementation of federal airport acts in Kansas. Those acts are defined by K.S.A. 3-604(b) to include

"the aviation facilities expansion act of 1969 or the airport and airways development act of 1969 or such other title as the referred to acts shall be finally enacted under by the United States congress during its 1970 session, and such other existing federal acts as are referred to therein."

Under K.S.A. 3-605, the Kansas Secretary of Transportation is hereby empowered to

- "(1) act as the agent of sponsors located in the state;
- (2) accept in behalf of the sponsors and disburse to them all payments made pursuant to agreements under the federal airport act;
- (3) acquire by purchase, gift, devise, lease, or otherwise, any property, real or personal, or any interest therein, including easements, necessary to establish or develop airports;
- (4) engage in airport systems planning on a statewide basis; and
- (5) undertake airport development, or provide financial assistance to public agencies within the state for carrying it out."

In Opinion No. 76-296, I concluded that Article 11, § 9 of the Kansas Constitution prohibits use of state funds for the construction and development of municipal and county airports. It is

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unnecessary to repeat or recapitulate that opinion here, other than to note that clearly, an airport is an "internal improvement" to which the state may not be a party under the cited provision of our state constitution:

"The state shall never be a party in carrying on any work of internal improvement except that: (1) It may adopt, construct, reconstruct and maintain a state system of highways, but no general property tax shall ever be laid nor general obligation bonds issued by the state for such highways; (2) it may be a party to flood control works and works for the conservation or development of water resources." [Emphasis supplied.]

In opinion nos. 76-296 and 75-315, I discussed this prohibition at some length. You suggest, however, that it should not be deemed to apply to internal improvements undertaken with funds which are derived from non-state, i.e., federal, sources. I cannot agree. The language of Article 11, § 9 is unusually forthright and unqualified: "The state shall never be a party in carrying on any work of internal improvement" [Emphasis supplied.] Nothing in this language suggests that the state may be a party to internal improvements which are constructed with federal funds, but not with state funds. In Opinion No. 75-315, I stated that there is "no more meaningful manner in which the state may be deemed to be a party to an undertaking than that it appropriates and obligates funds therefor." As you describe the proposed changes, monies in the airport and airway trust fund would be distributed to the states on a proportionate basis, presumably according to a formula to be approved by the Congress. The monies so allocated to Kansas would be deposited in the state treasury, presumably, see K.S.A. 75-3734, to await appropriation for the construction, development and improvement of local airport facilities, either through appropriation for specific projects, or through appropriation to a state official, as, e.g., the Secretary of Transportation, who would then approve particular projects for funding, on the basis of duly adopted criteria for eligibility, and distribute the funds accordingly. On the basis of the information you provide, it is apparent to me that funds allocated to the State of Kansas from the airport and airway trust fund must be deposited in the state treasury; those moneys may not be spent, then, without duly enacted appropriations. In appropriating the funds for the construction of airports and airport facilities, the state thereupon becomes a party to those improvements.

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It is suggested that the use of federal funds for these projects affords an additional basis for distinguishing Article 11, § 1. In State ex rel. Boynton v. Atherton, 139 Kan. 197, 30 P.2d 291 (1934), and other decisions, cited in the referenced opinions above, the Kansas Supreme Court pointed out the historical origin of the section, noting that it was prompted by the nearly bankrupting experiences of other states which had undertaken ill-conceived and extravagant programs of public improvements, incurring great indebtednesses in the course thereof. Thus, it is suggested that because no state funds are involved in the proposed airport projects, and thus no state indebtedness can result, Article 11, § 9 should not be deemed applicable. However, Article 11, § 9 does not prohibit the state from being a party to only those works of internal improvement for which an indebtedness is contracted. Article 11, § 6 deals specifically with the incurring of public debts by the state. Article 11, § 9, flatly prohibits the state from being a party to internal improvements, without regard to the source of funding, whether it be from state levies, from federal revenue-sharing monies, or any other special revenues, either state or federal, and without regard to the incurring of any indebtedness therefor.

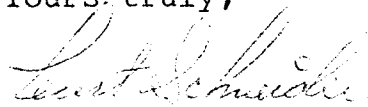
Lastly, it is suggested that the state may act as an agent of the federal government, and the Federal Aviation Administration or other appropriate federal agency, in the administration of these funds, and that Article 11, § 9 does not prohibit the state's construction of public improvements in the capacity as an agent for its principal, the federal government. The theory is as unconvincing as it is novel. In the first instance, it is entirely unclear that under the proposed amendments to the Airport and Airway Development Act of 1970, that the state in fact is merely an agent of the United States or its Secretary of Transportation. Secondly, Article 11, § 9 prohibits the state's being a party to an internal improvement in any capacity. That section imposes a clear limitation upon the legislative power of the state. The legislature may not authorize that which the constitution forbids. The federal government may be a party to internal improvements. The state may not. The state may not avoid this constitutional limitation upon its legislative power merely under the guise of agency, for what it may not do for itself, it may not do for another. The legislature is powerless to authorize the state or its agencies to act in an agency capacity in violation of the Kansas Constitution.

In sum it is my opinion that under Article 11, § 9 of the Kansas Constitution, neither the Secretary of Transportation nor any other state agency or official may provide financial assistance to public agencies in the state for the construction of airports

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and airport facilities, whether the funds for that assistance derive from state sources or non-state sources, including the federal airport and airway trust fund.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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