STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 24, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79- 187

Mr. James G. Kahler
Rice County Attorney
119 1/2 West Main
Lyons, Kansas 67554

Re: Appropriation of Water for Beneficial Use--Dedication and Use of Water--County Home Rule Power

Synopsis: K.S.A. 82a-702 does not express a clear legislative intent to retain exclusive jurisdiction in the state to regulate the impoundment of irrigation water. The county may legislate in this area pursuant to its home rule power, as provided in K.S.A. 19-101a et seq.

A county resolution providing for regulation in addition to and not in conflict with K.S.A. 82a-706c is a valid exercise of the county home rule power.

* * *

Dear Mr. Kahler:

You have inquired whether a county may enact a charter resolution pursuant to county home rule powers making the act of operating an irrigation system unlawful unless the system is equipped with facilities sufficient to impound tail water from flowing upon public property or private property of another. Your proposed resolution includes a penalty of up to a $1,000 fine and/or up to six months in jail. The question arises whether such resolution would conflict with any provisions of Chapter 82a, Article 7 of the Kansas Statutes Annotated. In our judgment, no conflict exists and the county may enact an ordinary resolution as proposed, for the reasons given below.

In 1974, counties were granted the power "to transact all county business and perform such powers of local legislation and administration as they deem appropriate" subject to certain limitations. Subsection (a) of K.S.A. 1978 Supp. 19-101a (as amended by L. 1979, ch. 52, §9). Subsection (b) of K.S.A. 1978 Supp. 19-101a provides, in pertinent part:

> "If no statutory authority exists for such local legislation other than that set forth in subsection (a) of this section and the Local legislation is not contrary to any act of the legislature, such local legislation shall become effective upon passage of a resolution of the board and publication in the official county newspaper." (Emphasis added.)

Although there are no Kansas cases construing these sections, the Kansas Supreme Court has enunciated certain interpretative principles in discussions of the constitutional home rule power of cities (Kansas Constitution, Article 12, Section 5), and those principles are applicable to county home rule questions.

First, unless there exists actual conflict between a municipal ordinance and a statute, the ordinance should be permitted to stand. Leavenworth Club Owners Association v. Atchison, 208 Kan. 318 (1971). Second, an ordinance may parallel a state statute so long as there is no conflict and the state legislature has not preempted the field. City of Junction City v. Lee, 216 Kan. 495 (1975). Third, municipal regulation may add to state law. Hutchinson Human Relations Comm. v. Midland Credit Management, Inc., 213 Kan. 308 (1973).

The first issue we address is whether local legislation, by which irrigation and water impoundment activities are regulated, is preempted by state law. K.S.A. 82a-702 provides:

> "All water within the State of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner herein provided."

Does the foregoing establish exclusive jurisdiction in the state thereby prohibiting a county resolution as you propose? We think not. Before it can be held that the state has retained exclusive jurisdiction to regulate in a field, the intent to do so must be clearly manifested by statute. Garten Enterprises, Inc. v. City of Kansas City, 219 Kan. 620, 623 (1976); City of Junction City v. Lee, supra; Hutchinson Human Relations Comm. v. Midland Credit Management, Inc., supra; City of Beloit v. Lamborn, 182 Kan. 288 (1958). The preemptive provision of K.S.A. 41-208 concerning the power to regulate alcoholic liquor was the subject of discussion in Garten Enterprises. K.S.A. 41-208 provides, in part:

> "No city shall enact any ordinance in conflict with or contrary to the provisions of this act and any ordinance of any city in effect at the time this act takes effect or thereafter enacted which is in conflict with or contrary to the provisions of this act shall be null and void."

The court held that the lack of such a preemptive provision in Article 26 of Chapter 41, concerning the consumption of alcohol, was significant and regarded that legislative omission as intentional. Therefore, cities are allowed to regulate the hours of consumption of alcoholic beverages. City of Junction City v. Lee, supra, held that the Weapons Control Act, K.S.A. 21-4201 et seq., does not clearly indicate a legislative intent to preempt the field of weapons control, despite the fact that K.S.A. 21-3102 stated:

> "(1) No conduct constitutes a crime against the State of Kansas unless it is made criminal in this code or in another statute of this state . . . ."

The foregoing provision was not held to prohibit local legislation in the area of gun control.

The Kansas act against discrimination is another example in which our state's highest court viewed the omission of a preemptive provision as "having significance" and refused to find a clear legislative intent by the state to retain exclusive jurisdiction. Hutchinson, supra. Thus, the absence of an express preemptive provision concerning a field of state regulation is considered significant in determining legislative intent to retain exclusive jurisdiction over a given area. In the present case we do not find that K.S.A. 82a-702 is a clearly preemptive statute. It neither expressly forbids local regulation nor grants exclusive jurisdiction to the state. Therefore, we believe a county may legislate in the area you propose.

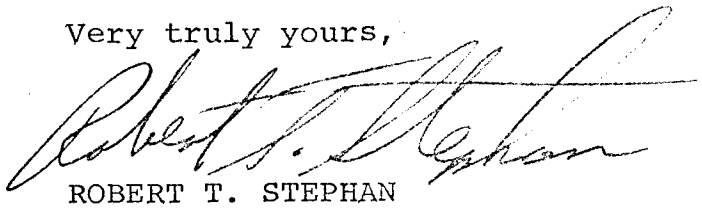
Next, we turn to various provisions of the act in question to determine if your proposed resolution would conflict with any state law. K.S.A. 82a-706 authorizes the chief engineer to make periodic "water waste" checks. "Waste of water" is defined at K.A.R. 5-1-1(y)(c) as:

> "Water which an irrigator permits to escape and drain from the authorized place of use."

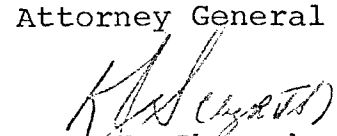
In such event, the chief engineer's remedy is to request the Attorney General to bring suit in the name of the State of Kansas to enjoin the unlawful waste of water. K.S.A. 82a-706d. Would the proposed resolution conflict with K.S.A. 82a-706c? We do not believe a conflict exists. Initially, we view your proposal as primarily concerning the impoundment of excess irrigation water. While this necessarily involves wasted water, that issue is secondary to the resolution you propose. We believe the resolution adds to state regulation by requiring the impounding of excess water and, as such, is a permissible exercise of county home rule power. Hutchinson Human Relations Commission v. Midland Credit Management, Inc., supra. Further, using the same reasoning we do not find that K.S.A. 1978 Supp. 68-184, which prohibits the sprinkling of irrigation water upon public roads or highways, conflicts with the Rice County proposal.

In summary, we find that the state has not preempted the field concerning the impoundment of irrigation water so as to prohibit local legislation on the same subject. We believe the county may enact, by ordinary resolution, the proposal about which you inquire. Such a resolution does not conflict with K.S.A. 82a-706c.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Kurt J. Shernuk
Assistant Attorney General

RTS:TDH:KJS:gk