



STATE OF KANSAS

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February 17, 1981

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ATTORNEY GENERAL OPINION NO. 81- 47

The Honorable William W. Buntten  
State Representative, 54th District  
State Capitol, Room 501-S  
Topeka, Kansas 66612

Re: Finance and Taxation--Internal Improvements--State  
Supervision of Improvements

Synopsis: Article 11, Section 9 of the Kansas Constitution permits the state to become a party to works of internal improvement under the conditions specified therein. However, the state may expend state moneys in its role as coordinator, supervisor and regulator of internal improvement projects without becoming a "party" to such project in contravention of this section. Cited herein: Kan. Const. Art. 11, Sec. 9.

\* \* \*

Dear Representative Buntten:

You inquire regarding the expenditure of federal funds and moneys of local units of government for the revitalization of various Kansas railroads. Specifically, you desire to know if use of federal or state dollars by the Kansas Department of Transportation to "write contract specifications, make inspections, and audit," would make the State of Kansas an unlawful party to a work of internal improvement.

Your concern arises as a result of Article 11, Section 9 of the Constitution of Kansas which states:

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"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; (3) it may, whenever any work of internal improvement not authorized by (1) or (2) is once authorized by a separate bill passed by the affirmative vote of not less than two-thirds of all members then elected (or appointed) and qualified to each house, expend or distribute funds received from the federal government therefor and may participate with the federal government therein by contributing any state funds appropriated in accordance with law for such purpose in any amount not exceeding the amount received from the federal government for such improvement, but no general property tax shall ever be laid nor general obligation bonds be issued by the state therefor; and (4) it may expend funds received from the federal government for any public purpose in accordance with the federal law authorizing the same."

As you know Article 11, Section 9 was offered to the voters, amending the prior provision, pursuant to L. 1980, ch. 350 (see 1980 Senate Concurrent Resolution No. 1669), and was approved November 4, 1980. As this provision now reads, the State of Kansas may participate as a "party" in some projects which are deemed to be works of internal improvement. Where federal and state funds are used, a separate bill supported by a two-thirds vote is required. Where federal funds only are to be expended, no such extraordinary vote is required.

You wish to know if the state involvement described above would necessitate the two-thirds vote requirements of numbered clause (3) of Article 11, Section 9. For the reasons stated below, we would conclude that the two-thirds vote is not required.

First, to the extent only federal funds are used to fund the state activities, numbered clause (4) of the section is applicable, hence no two-thirds vote is mandated.

Second, if state moneys are to be utilized with or without reimbursement, numbered clause (3) would normally be applicable in the case of a work of internal improvement involving railroads. However, the role of

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the State Department of Transportation, as you describe it, is not sufficient, in our judgment, to make the State a "party" to the work of internal improvement. As we understand it, the proposed federal and local dollars would pay for the actual construction or repair of the railroad property. No state dollars would be utilized. State moneys would be used to pay contract administration costs, inspections and auditing of the overall projects. In short, the state's role would be that of supervisor, coordinator and regulator. If this is the context in which the state funds are to be expended the state is not a "party" to the work of internal improvement; hence, the exceptions to Article 11, Section 9 and their limitations are inapplicable.

Just over sixty years ago the Kansas Supreme Court interpreted the language of Article 11, Section 9 (then Article 11, Section 8) in an almost identical context. State ex rel. Hopkins v. Raub, 106 Kan. 196 (1920). The high court found the state not to be a "party to a work of internal improvement" in the supervision, coordination and regulation of the construction of local roads, where the roads were paid for by local, not state, sources.

There, the court reasoned extensively as follows:

"Nor is there any valid basis for the contention that the statute infringes the constitutional limitation that 'the state shall never be a party in carrying on any works of internal improvements.' (Art. 11, §8, Gen. Stat. 1915, §235.) The construction of highways is of course a work of internal improvement within the meaning of the constitution, and one in which the state as a state may not engage. (The State, ex rel., v. Knapp, 99 Kan. 852, 163 Pac. 181.) However, this limitation does not apply to counties, townships, and cities of the state, and the validity of the acts of these municipalities in building roads, streets and bridges is not and cannot be seriously questioned. It is urged that the fact of the legislature having provided for a state highway commission, which exercises supervisory power over the building of roads, and having appropriated considerable sums of money to pay salaries and the expenses of the department, makes the state a party to the improvement. The commission is authorized to administer the road laws and is given regulatory powers in the construction of roads and bridges throughout the state. The highway commissioners are state functionaries and their authority is state-wide, but the fact that they exercise a regulatory authority over the planning and building of highways, and over the expenditures made by municipalities for these purposes, gives no ground for the claim that the state as a state is engaged in carrying on a work of internal improvement.


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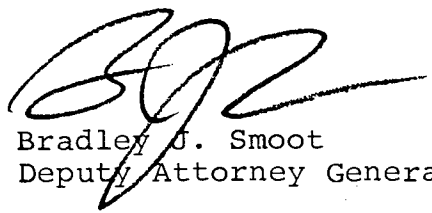
The public utilities commission is given supervisory power over the building, maintenance and operation of railroads and other public utilities, and the expenses of that commission are paid by the state, but it would hardly be contended that the state was engaged in railroading. The state also has a state oil department, which inspects and to some extent controls the oil business, and considerable money is appropriated to pay for the inspection and supervision of that department, but it never has been suggested that the state is in the oil business. So of other public boards and officers who are given supervisory authority over enterprises and works having a public interest, carried on by others. The fact that state funds are expended for inspection and regulation does not make the state a party to the business or the work carried on. In the building of roads and bridges the state neither buys nor furnishes any material, and does not directly invest any money in the work. The state highway commission is performing a very important work in an educational and regulatory way and in coordinating the efforts of the communities and municipalities of the state to build and maintain trunk and lateral highways throughout the state, but important as the work is, it does not furnish a basis for the complaint that the state itself is engaged in carrying on a work of internal improvement." Id. at 201, 202.

We believe this case to be dispositive of your inquiry, but we must caution that should the expenditure of state funds go beyond the purposes described in your letter and discussed in the Raub case, supra, the mandates of Article 11, Section 9(3) would become applicable.

In sum, Article 11, Section 9 of the Kansas Constitution permits the state to become a party to works of internal improvement under the conditions specified therein. However, the State may expend state moneys in its role as coordinator, supervisor and regulator of internal improvement projects without becoming a "party" to such project in contravention of this section.

Sincerely,

  
ROBERT T. STEPHAN  
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