



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

October 16, 1981

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ATTORNEY GENERAL OPINION NO. 81-244

Mr. Joe P. Rishel, Chairman  
Kansas Fish & Game Commission  
Box 54A, Rural Route 2  
Pratt, Kansas 67124

Re: State Boards, Commissions and Authorities--Fish  
and Game Commission--Authority to Accept Donation  
of Mined Lands

Synopsis: Pursuant to the provisions of K.S.A. 74-3302 and  
K.S.A. 32-214, the Kansas Fish and Game Commission  
may accept a donation of certain mined lands located  
in Cherokee County, Kansas. Cited herein: K.S.A.  
32-214, 74-3302, 75-3036; K.S.A. 1980 Supp. 75-3739;  
and L. 1981, Ch. 25, §6(a).

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Dear Mr. Rishel:

You request our opinion as to whether the Kansas Fish and Game Commission (hereinafter referred to as "the Commission") has the authority to accept a donation of approximately 8,208 acres of mined land in Cherokee County, Kansas, from Gulf Oil Corporation (hereinafter referred to as "Gulf"), and whether it has the authority to enter into a proposed Real Estate Donation Agreement, a copy of which is attached hereto as Exhibit "A." Under the terms of the donation agreement, Gulf would convey to the state of Kansas, by special warranty deed, all of its right, title and interest in and to certain mined lands which are described therein. Additionally, Gulf would enter into a trust agreement whereby an aggregate amount of \$250,000.00 would be donated for the

Mr. Joe P. Rishel  
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improvement of the donated lands. The donated monies would be deposited in a passbook savings account at the National Bank of Pittsburg, to be administered by said bank as trustee under the terms of the trust agreement.

As you are aware, this office has, in informal correspondence, already addressed certain legal questions related to this transaction, and we will not repeat our previous observations here. Rather, we have attached the previous correspondence hereto as Exhibits "B" and "C."

Initially, it should be observed that the Commission has broad statutory authority to accept gifts of land and other property. K.S.A. 74-3302 provides, in part, that the Commission may "on behalf of the people of the state . . . accept gifts and grants of land and other property." Also, K.S.A. 32-214 provides, in part, that the Commission

"shall have the power and authority to take and acquire in the name of the state, by donation, devise or bequest . . . title to lands, including any and all rights therein or thereon . . . for the purpose of establishing, improving, keeping and maintaining the same as public forestry, recreational grounds, fish and/or game preserves . . . ."

The last-cited statute also authorizes the Commission to "contract relative to improvements and upkeep of roads in and about . . . forestry preserves and recreational grounds."

The first question which arises in relation to the proposed donation is whether the Commission can accept the title to be conveyed by the special warranty deed proffered by Gulf. As we have previously observed (see Exhibit "B"), the conveyance will only warrant against encumbrances by persons claiming through Gulf, and Gulf is unwilling to provide any proof of title to the property (either abstracts or title insurance). Under these circumstances, it is not possible to determine whether the state of Kansas will receive a "clear" title to the subject property, and it may only be concluded that the conveyance would be subject to possible irregularities or defects in title. However, as the above-quoted statutory provisions indicate, the Commission is specifically authorized to accept gifts and grants of land, and to acquire, by donation, title to lands. Regardless of advisability of accepting such a gift, we are unaware of any statutory provision which would limit the Commission to accepting only a perfect or marketable title, and it is our opinion that the Commission may accept the title to be conveyed by the special warranty deed proffered by Gulf.

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Another question concerning the proposed donation is whether the Commission lacks authority to accept title to the subject lands because of possible tort claims which may or may not be made against it as the owner. In this regard, it should be noted that the donation agreement contains the following provision:

"However, Kansas recognizes that the Donated Lands have been strip-mined and that there may exist thereon presently undiscovered problem areas or individual sites that could contain conditions, which if uncorrected could impact individuals or surrounding areas in an undesirable manner."

As we have previously noted (see Exhibit "B"), the foregoing provision subjects the state to possible liability to third parties who may be damaged by "undiscovered" problems and conditions relating to past strip-mining of the land by Gulf. While this is a very important factor to consider in deciding whether to accept the donation, and we have previously called this matter to the attention of the Commission (see Exhibit "B"), we are unaware of any statutory provision which would prohibit the Commission from accepting a donation of land because of possible tort claims which may arise in connection with ownership of the property. In our judgment, the possibility of such claims is a matter to be weighed by the Commission prior to acquisition of real property, and such possibility does not affect the Commission's statutory authority to accept title to lands.

The next question presented is whether there is any statutory provision which prohibits the Commission from accepting gifts of money under circumstances where the subject funds will be conveyed to a trustee and not be deposited in the state treasury. In this regard, it should be noted that K.S.A. 75-3036 provides that moneys received under the terms of a gift for a specific purpose, and deposited in the state treasury, are not to be placed in the state general fund or ever become a part of it. Also, the 1981 Kansas Legislature established a private gifts and donations fund within the state treasury for the Kansas Fish and Game Commission. See L. 1981, ch. 25, §6(a). However, in our judgment, neither of these statutory provisions can be construed to prohibit the Commission from accepting gifts of money where the funds will be held in trust rather than be deposited in the state treasury, and we are unaware of any other relevant statutory prohibition. In our opinion, if the Legislature had intended to prohibit the Commission from accepting gifts of money under the terms of a trust agreement, it would have done so in unequivocal language in the enabling statutes cited above.

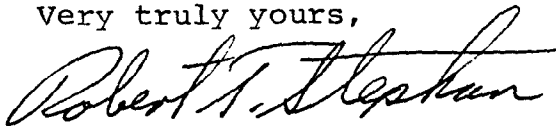
Mr. Joe P. Rishel  
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The final question which is presented is whether the trustee which will administer the trust fund for improvement of the donated lands will be subject to the requirements of K.S.A. 1980 Supp. 75-3739. Said statute requires, subject to certain exceptions, that all state contracts for construction and repairs, and all purchases of and contracts for supplies, materials, equipment, and contractual services, be based on competitive bids. We have previously opined that the competitive bidding requirement is applicable to the award of a construction contract by the federal government where a federal agency is supervising the construction of park facilities at a state park and the state of Kansas is contractually obligated to pay 50% of the construction costs and to bear all costs of operation and maintenance of the completed facilities. See Kansas Attorney General Opinion No. 81-138.

The facts presented here are distinctly different, however, from those considered in the last-cited competitive bidding opinion. Here, the moneys to be expended are not part of the state treasury and were not raised through taxation. Also, the subject moneys are to be held in trust, a relationship under which the trustee would have legal title to the property, and the state of Kansas would have an equitable ownership therein. See 76 Am.Jur.2d Trusts §2. The purpose of competitive bidding requirements is "to protect the taxpayers and the public." Williams v. City of Topeka, 85 Kan. 857, 861 (1911). In our judgment, the requirements of K.S.A. 1980 Supp. 75-3739 are not applicable to contracts (for the improvement of state-owned lands) entered into by a trustee where the moneys to be expended have never entered the state treasury and were not raised through taxation.

In summary, we have reviewed the proposed real estate donation agreement, and it is our opinion that the Commission has the statutory authority to enter into the agreement and accept the proposed donation of 8,208 acres of mined land. However, it should be understood that this office has not endorsed such action, nor determined that it is in the best interests of the state of Kansas. Such judgmental determinations are, under the applicable law cited above, entrusted to the Commission.

Very truly yours,



ROBERT T. STEPHAN  
Attorney General of Kansas



Terrence R. Hearshman  
Assistant Attorney General



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN  
ATTORNEY GENERAL

June 11, 1981

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

Mr. Fred Warders  
Assistant Director  
Kansas Fish and Game Commission  
Box 54A, Rural Route 2  
Pratt, Kansas 67124

Re: Proposed Land Donation, Gulf  
Oil Corporation

Dear Fred:

As you are aware, I attended a meeting in Pittsburg on June 2nd, together with Cal Groen of your staff, regarding a proposed land donation by Gulf Oil Corporation to the Kansas Fish and Game Commission. An attorney for Gulf attended the meeting and presented a draft copy of a real estate donation agreement, under which Gulf would convey, by special warranty deed, approximately 8,208 acres of strip-mined land to the state of Kansas. Although I recognize that your staff feels that this land could be developed, under the agreement, for wildlife management and public recreation potential without considerable expenditure of public moneys, I believe that it is my responsibility, as your legal counsel, to outline two reasons which mitigate against accepting the donation.

First, the conveyance by Gulf will only warrant against encumbrances by persons claiming through Gulf, and Gulf is unwilling to provide any proof of title to the property (either abstracts or title insurance). The verbal statements by the Gulf attorney, at the meeting, that any title problems would be cured by the Marketable Title Act, K.S.A. 58-3401, et seq., are not accurate. A marketable title under the act exists only where (1) a person has an unbroken chain of title of record extending back at least forty years; and (2) nothing appears of record purporting to divest such person of title. Without title insurance or abstracts, it is impossible to

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determine whether either of these conditions have been met. Even if it were to be assumed (which it cannot be) that Gulf has an unbroken chain of title of record with nothing purporting to divest, the Gulf attorney stated that Gulf has owned the property for only 30 years. Therefore, the state would have to hold the property for 10 more years, with nothing purporting to divest, before the Marketable Title Act might possibly be of some relevance. But it is frivolous to engage in this type of speculation, and the "bottom line" is that, without title insurance or abstracts, Fish and Game would be accepting the conveyance subject to possible irregularities or defects in the title which could expose it to the possibility of adverse claims and litigation in the future. Additionally, without proof of title, it would be impossible for the state to sell any part of the property in the future.

Another reason for rejecting the donation relates to the fact that the state would be subjected to possible liability to third parties for "undiscovered" problems and conditions relating to the past strip-mining of the land by Gulf. The section of the agreement creating this liability provides as follows:

"However, Kansas recognizes that the Donated Lands have been strip-mined and that there may exist thereon presently undiscovered problem areas or individual sites that could contain conditions, which if uncorrected could impact individuals or surrounding areas in an undesirable manner."

The Gulf attorney explained, at the meeting, that this provision would, under well-established case law, prevent third parties from "going up the chain of title" in seeking redress for damages occurring on adjoining property. Therefore, as the record owner, the state could be left "holding the bag" for any "undiscovered" conditions causing damages to persons or property. The Gulf attorney advised that the donation would not be possible unless this provision is included.

I understand that Fish and Game personnel have contacted many adjoining landowners and that no present problems seem to be evident. However, I also believe that Gulf would not insist on including the above-quoted clause unless there were some possibility of future problems. Since I am not a geologist and cannot even guess at the likelihood of such problems,

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I can only conclude that acceptance of the donation would subject the state to a liability which is totally uncertain, both as to amount and probability of occurrence.

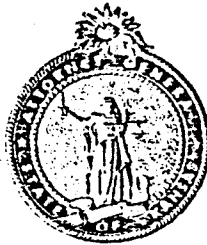
In summary, as I view this matter, the donor is offering an uncertain title to 8,208 acres of land, and if the donation were accepted, the state would be subject to an uncertain liability relating to past strip-mining of the property. Due to these uncertainties, and the impossibility of determining the net effect (either positive or negative) of the proposed donation, I must recommend that it be rejected by the Commission. If, however, the liability problem could be somehow eliminated (which does not appear to be possible), I would not recommend against acceptance of the donation.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL  
ROBERT T. STEPHAN

Terrence R. Hearshman  
Assitant Attorney General

TRH:jm



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July 9, 1981

Mr. Fred A. Warders  
Assistant Director  
Fish and Game Commission  
R. R. 2, Box 54-A  
Pratt, Kansas 67124

Dear Mr. Warders:

By previous letter this office advised you as to certain liabilities in regard to a gift of land from Gulf Oil. I discussed the letter with Terry Hearshman, Assistant Attorney General, and the letter was issued because we felt it was important that all possible problems be made known. We realize that the liabilities are extremely remote. Certainly when one weighs the great benefit to be gained from the acquisition of the site I would not be critical of the acceptance of the gift if the Fish and Game Commission felt that the benefits outweighed the liability. It is impossible to pinpoint any specific area of liability and in weighing the benefits I would presume that this would be a matter of concern.

If you have any further questions please feel free to call upon me.

Very truly yours,

*Robert T. Stephan*  
Robert T. Stephan  
Attorney General

RTS:pc  
bcc: Honorable Don Musser

*7/24/81*  
*Copies*  
*R. Q. Krause*  
*J. Bachmann*