



STATE OF KANSAS

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February 12, 1982

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ATTORNEY GENERAL OPINION NO. 82- 34

The Honorable Robert H. Miller
State Representative, Eightieth District
Rm. 115-S, Statehouse
Topeka, Kansas 66612

Re: Waters and Watercourses -- Water Plan Storage --
Contracts for Withdrawal and Use; Provisions
Required

Synopsis: Pursuant to the State Water Plan Storage Act, K.S.A. 82a-1301 et seq., the Kansas Water Resources Board and its successor, the Kansas Water Office, are empowered to enter into contracts for the withdrawal and use of waters held in storage by the state. Waters so withdrawn and used by a purchaser are subject to a charge fixed by the respective state agency not less than 5 cents nor more than 10 cents per one thousand gallons of water. Regardless of the amount actually used in any one year, the purchaser is subject to a minimum charge equal to 50% of the annual amount contracted for multiplied by the rate fixed by the agency. While K.S.A. 82a-1306(c) provides that this rate shall be adjusted every 10 years after the contract is made, the provision fixes the maximum period which may elapse prior to review, and so does not preclude a more frequent adjustment of the rate in light of changed conditions. Cited herein: K.S.A. 82a-901, 82a-1301, 82a-1305, 82a-1306, L. 1981, ch. 303.

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Dear Representative Miller:

As Chairman of the House Energy and Natural Resources Committee, you request our opinion as to two provisions contained in contracts for the sale of water stored by the state in various

reservoirs constructed by the United States, acting through the Corps of Engineers. Five such contracts have been submitted to the Legislature this session, with that body having the power to disapprove and revoke any or all of the contracts. [K.S.A. 82a-1307(a).] As this power must be exercised during the first sixty calendar days of the session, we have endeavored to expedite the issuance of this opinion.

Initially, it should be noted that the authority to make such contracts is derived from the State Water Plan Storage Act, K.S.A. 82a-1301 et seq. While the Act states [at K.S.A. 82a-1301(c)] that the state agency empowered to enter into these contracts is the Kansas Water Resources Board, such language must be read in light of 1981 Senate Bill No. 303. That measure, enacted as L. 1981, ch. 302, transferred all functions, duties and powers of the water resources board to the Kansas Water Office as of July 1, 1981. Accordingly, the contracts presently before the Legislature are made between the water office and various municipal purchasers, despite the language of the Act which was not amended in 1981.

The authority of the water office to enter into contracts of the type at issue here is set forth by K.S.A. 82a-1305, wherein it is provided:

"Whenever the board [water office] finds that a proposed withdrawal and use of water will advance the purposes set forth in article 9 of chapter 82a of Kansas Statutes Annotated, it may enter into written contracts with any persons for withdrawal and use of waters from conservation water supply capacity committed to the state."

Specific provisions of such contracts are set forth by the succeeding section, K.S.A. 82a-1306, and concern such items as the rate charged per one thousand gallons, minimum charges, periodic adjusting of rates and provisions for the apportionment of water if total demand exceeds the available supply in a particular year. Your inquiry concerns two of these provisions and the way in which they are expressed in the language of the contracts, i.e. are the contracts compatible with state law?

The first such subsection is K.S.A. 82a-1306(b), which states that the contract shall include

"provisions for a minimum charge to be paid in equal annual installments during the term of the contract, the sum of which shall be fifty percent (50%) of the total amount of water contracted for during the term of the contract

multiplied by the rate fixed under paragraph (a), and that such minimum charge is to be paid each calendar year whether or not such amount of water is withdrawn during the calendar year"

As written, you inform us that the contracts themselves provide (quoting Article 6 of Water Purchase Contract 81-6 as an example):

"In determining the amount of water to be included in this contract, allowances have been made to provide water for anticipated needs of the Purchaser.

"The State specifically retains the right to review the quantity and purpose for which water is used throughout the term of this contract. Whenever the State determines the water is not being used for beneficial purposes or the quantity contracted is in excess of actual needs of the Purchaser, the State shall have the option to reduce the contract quantity and reduce the amount of the State's obligation to furnish raw water in any year.

"Any reduction in the annual quantity of water to be supplied under the terms of this contract shall be accompanied by a reduction of the minimum annual payment specified in Article 9.

"The following shall in part constitute satisfactory evidence that the Purchaser is developing a need for the total quantity of water as specified in this contract:

"(a) Annual use of fifty percent (50%) or more of the total annual contract quantity during the five years of the term of this contract as defined in Article 2, and

"(b) Annual use of an additional ten percent (10%) or more of the total annual contract quantity by the end of each subsequent five-year period during the term of this contract up to a maximum of one hundred percent (100%) of the total contract quantity by the thirtieth (30th) year of the term of this contract."
(Emphasis added.)

The minimum annual payment itself is addressed at Article 9 of this contract, to wit:

"On the first day of commencement of the term of this contract as defined in Article 2 or within thirty (30) days thereafter, and on each succeeding anniversary date or within thirty (30) days thereafter, the Purchaser shall pay to the State the minimum annual payment. This shall entitle the Purchaser, during the year, to receive one-half (1/2) of the maximum annual quantity of 87.0 million gallons as set forth in Article 6. The minimum annual payment shall be calculated by multiplying one-half (1/2) the annual quantity in thousands of gallons of raw water times the rate for each one thousand (1,000) gallons of raw water. The initial minimum annual payment shall be \$3,219.87 and thereafter the Purchaser shall be notified in accordance with Article 7 of any adjustment in the minimum annual payment. Failure to furnish such notification shall not relieve the Purchaser of the obligation to pay such adjusted minimum annual payment." (Emphasis added.)

In our opinion, no conflict exists between these two provisions and K.S.A. 82a-1306(b). The underscored language of Article 9 quoted above is an accurate restatement of the subsection, providing that a minimum charge representing 50% of the water contracted for annually must be paid. For its part, Article 6 speaks to an area not covered by the statute, namely a purchaser who, over a period of years, does not demonstrate a need for the entire amount of water it has contracted for. In the event such a situation exists, the state reserves the right to reduce the appropriated amount of water under the contract. If this is done, the minimum amount due under Article 9 is also adjusted. Nothing present therein provides for a revision upward of the minimum amount.

As we read them, the criteria set forth at subsections (a) and (b) of Article 6 provide notice to a purchaser that an excess amount has been contracted for. Furthermore, the inclusion of this clause benefits both the purchaser, who is not permanently obligated to buy more water than it may need, and the state, which can then reallocate the excess to other potential users. This result is consistent with one of the goals of the state water plan set out at K.S.A. 82a-901, i.e. the maximum beneficial use of the state's water resources.

The second issue you raise concerns K.S.A. 82a-1306(c). That subsection requires contracts for the sale of stored water to include

"provisions that the board shall adjust the rate provided under paragraph (a) on the tenth anniversary of the execution of the contract and each tenth anniversary thereafter, to reflect any change in experience by substituting the adjusted rate for the rate then stated in the contract"

Article 7 of the contract used as an example states that:

"The State shall review the rate provided in this article in compliance with 82a-1306(c), as amended, and shall determine the new rate which will become effective on the fifth (5th) anniversary of the execution of this contract and remain effective for the ensuing five (5) year period. This procedure shall be repeated at the end of each five (5) year period throughout the term of the contract."

In view of the obvious fact that five years is not the same as ten years, you ask whether the contract provision can be reconciled with the language of the statute.

At the outset, it should be noted that the mere use of the word "shall" in the statute ("Every contract made . . . shall include the following") is not dispositive of the question. Numerous Kansas decisions have construed statutes containing "shall" as being directory, rather than mandatory, when the context requires it. City of Kansas City v. Wyandotte County Commissioners, 213 Kan. 777 (1974), Spalding v. Price, 210 Kan. 337 (1972), Paul v. City of Manhattan, 212 Kan. 381 (1973). In Paul, the Court stated:

"In determining whether a legislative provision is mandatory or directory, it is a general rule that where strict compliance with the provision is essential to the preservation of the rights of parties affected and to the validity of the proceeding, the provision is mandatory, but where the provision fixes a mode of proceeding and a time within which an official act is to be done, and is intended to secure order, system and dispatch of the public business, the provision is directory." Syl. ¶1.

"Factors which would indicate that a statute or ordinance is mandatory are: (1) the presence of negative words requiring that an act shall be done in no other manner or at no other time than that designated, or (2) a provision for a penalty or other consequence of noncompliance." Syl. ¶2. (Emphasis added.)

In the present situation, there exist no "negative words" which would preclude the use of a lesser time span before the rate may be adjusted, i.e. the subsection does not limit adjustments only to ten year intervals, nor are lesser periods prescribed. In our opinion, if the contracts required an adjustment only after twenty years or made no such provision at all, a different question would be presented. However, a five year review does comply with the standard established by the Legislature, for a review and possible adjustment of the rate will in fact occur on the tenth anniversary of the contract and every ten years thereafter.

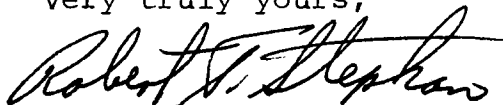
We also note that the ability of the water office to employ a shorter time period is in accord with their duty under K.S.A. 82a-1305, i.e. water sale contracts may be made when the purposes of the State Water Plan, K.S.A. 82a-901 et seq., will be advanced. In addition to the policy of securing maximum beneficial water use cited earlier, under the plan the water office must also consider how to obtain "reasonable payment" from purchasers receiving water. K.S.A. 82a-901. The use of a five year, as opposed to a ten year, rate adjustment period evidently reflects a determination by the water office that reasonable payment cannot be made where rates are fixed for so long a period of time. Accordingly, the water office may be said to necessarily possess the authority to determine the period after which rates can be adjusted in order to meet the policy goals of the plan, as long as the minimum standards of the statutes are met. State ex rel. v. Davis, 114 Kan. 270 (1923), Edwards County Commr's v. Simmons, 159 Kan. 41 (1944).

In conclusion, pursuant to the State Water Plan Storage Act, K.S.A. 82a-1301 et seq., the Kansas Water Resources Board and its successor, the Kansas Water Office, are empowered to enter into contracts for the withdrawal and use of waters held in storage by the state. Waters so withdrawn and used by a purchaser are subject to a charge fixed by the respective state agency not less than 5 cents nor more than 10 cents per one thousand gallons of water. Regardless of the amount actually used in any one year, the purchaser is subject to a minimum charge equal to 50% of the annual amount contracted for multiplied by the rate fixed by the agency. While K.S.A. 82a-1306(c)

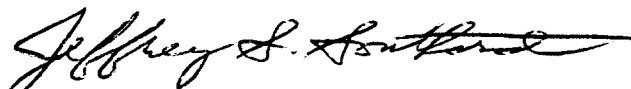
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Very truly yours,



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RTS:BJS:JSS:hle