



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

March 12, 1982

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

ROBERT T. STEPHAN  
ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 82- 66

Patrick J. Regan  
Chairman, Kansas Water Authority  
503 Kansas Avenue, Suite 303  
Topeka, Kansas 66603

Re: Waters and Watercourses -- State Water Plan --  
Agreements with Federal Government for Water  
Storage; Permissible Uses

Synopsis: The Kansas Water Authority is empowered to consider and approve contracts for the purchase of water held in storage by the state in various reservoirs. One factor to be considered is whether the contract advances the purposes of the State Water Plan, K.S.A. 82a-927 et seq. Included in the Plan are policy determinations as to the purposes of major reservoirs in Kansas (at K.S.A. 82a-938), with industrial and municipal uses considered distinct from irrigation. A sale of water for irrigation purposes from a reservoir which has only the former purposes identified would be inconsistent with the Plan, as well as being in potential conflict with federal statutes authorizing the initial sale of water to the state. Cited herein: K.S.A. 82a-927, 82a-928, 82a-932, 82a-933, K.S.A. 1981 Supp. 82a-934, K.S.A. 82a-938, L. 1981, ch. 398, 1961 House Concurrent Resolution No. 5, K.A.R. 1981 Supp. 98-5-1, 98-5-3, Kansas Constitution, Article 11, Section 9, 43 U.S.C.A. 390b.

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Dear Mr. Regan:

As Chairman of the Kansas Water Authority, you request our opinion on a question which concerns the ability of the Authority to approve contracts for the sale of water for irrigation purposes. Specifically, you inquire whether such

a contract may be entered into for the sale of water from Marion Reservoir which is held in water supply storage by the state. Questions have been raised whether the contract, which has been entered into between a private landowner and the Kansas Water Office, is permissible under state and federal statutes.

Prior to an analysis of the particular situation involved, a brief historical summary of applicable federal and state legislation would be helpful. A good starting point is 1958, a year in which Kansas voters approved an amendment to the state constitution, specifically Article 11, Section 9. This change amended the internal improvements prohibition so as to allow the state to be a party to "flood control works and works for the conservation or development of water resources." This change opened the door for agreements with the Federal government for such projects.

Of no less importance was the congressional enactment in the same year of Public Law 85-500, Section 301, which is cited as the Water Supply Act of 1958. Under this section (now at 43 U.S.C.A. §390b), a policy statement is made [at subsection (a)]:

"It is hereby declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

Other relevant language in the section states:

"(b) In carrying out the policy set forth in this section, it is hereby provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: Provided, That the cost of any construction or modification

authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: Provided further, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: And provided further, That not to exceed 30 per centum of the total estimated cost of any project may be allocated to anticipated future demands where State or local interests give reasonable assurances, and there is reasonable evidence, that such demands for the use of such storage will be made within a period of time which will permit paying out the costs allocated to water supply within the life of the project. . . .

. . . .

"(d) Modifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided in subsection (b), which would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or which would involve major structural or operational changes shall be made only upon the approval of Congress as now provided by law." (Emphasis added.)

In 1961, the Legislature took another step to develop such water supply storage by the state. In enacting House Concurrent Resolution No. 5, it stated in part:

"Be it resolved by the House of Representatives of the State of Kansas, the Senate concurring therein: That the legislature concurs in the recommendations made by the Kansas water resources board for inclusion of water supply storage in Milford, Perry, and John Redmond reservoirs, and concurs in the requests made by the cities named in the preamble hereof, which requests have been supported by the Kansas water resources board, for inclusion of water supply in the Elk City and Council Grove projects.

"Be it further resolved, That the legislature recognizes the nonfederal repayment obligations required relative to the development of water supply features in federally financed projects and does hereby assure the chief of engineers that the state or its political subdivision will fulfill such obligations, prior to the use of the water, as they relate to the above-named projects and as the obligations are described in Public Law 534, 78th Congress (the flood control act of 1944), Title III of Public Law 85-500 (the water supply act of 1958), and such acts as may be supplemental or amendatory thereto."

The Legislature also directed that a study be prepared to further assist in developing programs of state participation in water conservation storage projects.

As a result of this study, which was prepared by the Legislative Council with the assistance of the Water Resources Board, the 1963 Legislature enacted what is now K.S.A. 82a-901, et seq. A major portion of this act was devoted to setting forth principles which were followed by the Board in preparing the actual state water plan, which was enacted in 1965. (K.S.A. 82a-927, et seq.) In its original form, K.S.A. 82a-927 set forth certain long-range goals and objectives of the state, among which was

"(1) [t]he development, to meet the anticipated future needs of the people of the state, of sufficient supplies of water for beneficial purposes, including but not limited to purposes that are domestic, stockwater, municipal, irrigation, agricultural, industrial, streamflow regulation, public recreational and fish and wildlife, water power, and navigation purposes . . . ." (Emphasis added.)

Additionally, K.S.A. 82a-928 (as originally enacted) listed among general goals and objectives the following:

"(6) the development by 1975 of at least an additional 185,000 acre-feet of water to meet the increasing annual needs of Kansas municipalities;

"(7) the development by 1975 of at least an additional 750,000 acre-feet of water to meet the increasing annual needs of Kansas industries;

"(8) the development by 1975 of at least an additional 1,900,000 acre-feet of water to meet the increased annual needs of Kansas irrigators . . . ." (Emphasis added.)

Both statutes, it should be noted, were amended by Chapter 398 of the 1981 Session Laws to substitute broader language for the detailed subsections quoted above.

Also contained in the plan were sections which authorize the Board to: (1) enter into negotiations with the federal government (K.S.A. 82a-932); (2) demonstrate a need for conservation water storage features in any federally-authorized water project (K.S.A. 82a-933); and (3) enter into agreements with the federal government for the storage of water in such projects and payment by the state therefor (K.S.A. 1981 Supp. 82a-934). As a result of the implementation of the plan, agreements have been entered into by the Board and the federal government which cover 13 reservoirs constructed by the Army Corps of Engineers. Five of the projects were those initially listed in the 1961 House Concurrent Resolution, with 4 more subsequently constructed and the remainder still in the planning stage. Marion Reservoir, it may be noted, falls into the second category, having been completed in 1968.

Yet another component of the plan which should be mentioned is the table which appears at K.S.A. 82a-938, entitled "Major Reservoirs of Kansas." In addition to detailing the location, completion date, storage features and yield capability of 33 Kansas reservoirs (both existing and planned), the table also sets forth the long-range purposes of the projects. While all of the projects have flood control, recreation and fish and wildlife management as purposes, only a portion are designated for municipal and industrial storage. All of the nine existing reservoirs noted above fall into this group, including Marion. At the same time, however, none of the nine are designated as having irrigation as one of their goals. As a footnote, the table indicates that reservoirs with irrigation as one of their purposes (Wilson, Kanopolis, Kirwin, etc.) are all located in the drier, northwestern portion of the state.

A final component of the statutory framework is found at K.S.A. 82a-1301 et seq., the state water plan storage act. The statutes contained therein give the "board" (now the Kansas Water Authority) to acquire water storage capacity in the reservoirs named in the Plan. At K.S.A. 82a-1305, the board is empowered to enter into written contracts for the sale of such water, provided it find that such sale will advance the purposes of the Plan. The act was fleshed-out in 1979 by the adoption of K.A.R. 1981 Supp. 98-5-1 et seq.

Included in the definition section, K.A.R. 1981 Supp. 98-5-1, are the following terms:

"(b) 'Agricultural use' means any use of water by a person primarily for production of food or fiber and including any incidental uses.

. . . .

"(m) 'Industrial use' means any use of water by a person primarily for the production of goods, food, or fiber, or rendering a service of providing utility services and including any incidental uses."

. . . .

"(o) 'Municipal use' means the various uses of water . . . by a municipality, rural water district, other water supply district, or group of householders where water is . . . used for domestic, commercial, trade, industrial, and any other related incidental uses for any beneficial purposes."

At K.A.R. 98-5-3(n), such contracts are required to be submitted to the board for its consideration and approval. One of the factors to be considered is whether

"[t]he annual withdrawal and use of the quantity of water contracted [for] by the person will advance the purposes set forth in articles 7 and 9 of chapter 82a of Kansas Statutes Annotated." [K.A.R. 1981 Supp. 98-5-3 (o)(7)]

In examining the instant case, it is our opinion that the proposed sale of water from Marion Reservoir for irrigation purposes does not fit within the above statutory framework. It is common knowledge that irrigation is an application of water which is designed to increase dry-land yields or make possible the initial cultivation of a crop used for food or fiber, i.e. an "agricultural use" as defined by the regulations adopted by the board in 1979. While it is true that the definition of "industrial use" also makes reference to the production of food or fiber, we find no justification in the existing regulations for ignoring the common meaning of the term irrigation so as to conclude it is an "industrial use."

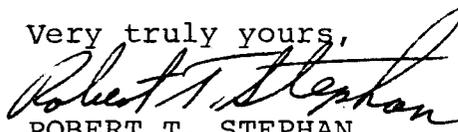
Such a result would also be in conflict with statutory uses of the terms "irrigation" and "industrial use." As indicated

above, one factor used in evaluating such contracts is whether the use will advance the purposes of article 9 of chapter 82a, including the State Water Plan. While the use of its water for industrial purposes is specified, Marion does not have irrigation listed as one of its purposes by the table contained at K.S.A. 82a-938. (We note that this table was reproduced unchanged in the board's 1980 Report to the Legislature.) This omission is doubtless due in part to language contained in the Water Supply Act of 1958 quoted hereinabove, namely that reservoirs constructed by the Corps of Engineers store water "for present or anticipated future demand or need for municipal or industrial water." Marion is such a reservoir, and a use of its water for irrigation purposes would be inconsistent with the Plan as it now reads. Nor can "irrigation" be reasonably considered to be included within the term "industrial use", given the numerous distinctions which the statutes make between the two, as well as the difference in the commonly-understood meanings of the terms. Grey v. Schmidt, 224 Kan. 375 (1978).

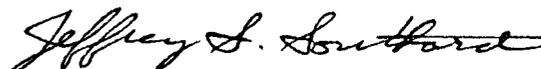
Furthermore, in reading the agreement which was signed between the Corps and the Board in 1976 that deals with Marion, we note that the storage space contracted for "is to be used to impound water for municipal and industrial water supply purposes." [Article 1, Clause (a).] Additionally, Article 4 of the agreement requires the state to utilize the storage space in a manner consistent with federal and state laws. In our opinion, this language is yet another indication that the water stored in this reservoir is intended to be used for certain enumerated purposes only, and that irrigation is not among them.

In conclusion, the Kansas Water Authority is empowered to consider and approve contracts for the purchase of water held in storage by the state in various reservoirs. One factor to be considered is whether the contract advances the purposes of the State Water Plan, K.S.A. 82a-927 et seq. Included in the Plan are policy determinations as to the purposes of major reservoirs in Kansas (at K.S.A. 82a-938), with industrial and municipal uses considered distinct from irrigation. A sale of water for irrigation purposes from a reservoir which has only the former purposes identified would be inconsistent with the Plan, as well as being in potential conflict with federal statutes authorizing the initial sale of water to the state.

Very truly yours,



ROBERT T. STEPHAN  
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard  
Assistant Attorney General