STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

September 7, 1982

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

ATTORNEY GENERAL OPINION NO. 82-191

Dennis E. Shay
Attorney at Law
Eighth Floor, Olive W. Garvey Bldg.
200 West Douglas
Wichita, Kansas 67202

Re: Agriculture -- Conservation Districts -- Authority to Engage in Commercial Activities

Synopsis: A soil conservation district, established pursuant to K.S.A. 2-1901 et seq., may sell irrigation equipment for profit to land occupiers within the bounds of the district. Such commercial activity is not violative of either the constitutional prohibition regarding internal improvements or the public purpose doctrine. Cited herein: K.S.A. 2-1901, K.S.A. 1981 Supp. 2-1902, 2-1907b, 2-1907c, 2-1908, Kan. Const., Art. 11 §9.

* * *

Dear Mr. Shay:

As counsel for the Sedgwick County Soil Conservation District (district), you inquire whether K.S.A. 1981 Supp. 2-1908(6) authorizes the district to purchase irrigation equipment for resale at profit to land occupiers within the bounds of the district. You note that profits from such sales would be utilized to further the district's various conservation programs.

The conservation districts law, K.S.A. 2-1901 et seq., is a comprehensive act which governs the establishment and function of soil conservation districts. Enacted in 1937, it represents legislative recognition that in order to maintain a viable agricultural economy, soil conservation must be encouraged and facilitated. Paragraph A of K.S.A. 1981 Supp.

2-1902 is a legislative determination that improper land use and the breaking of natural ground cover cause "a progressively more serious erosion of the farm and grazing lands of this state by wind and water." It states further

> "[t]hat failure by any land occupier to conserve the soil and control erosion upon said person's lands causes a washing and blowing of soil and water from said person's lands onto other lands and makes the conservation of soil, control of erosion, prevention of floods and management, control and protection of water and water quality on such other lands difficult or impossible."

Paragraph B of that statute is a legislative recognition of the consequences of the conditions described in paragraph A. The listed consequences include silting and sedimentation of water resources, dust storms, loss of soil productivity, destruction of food and cover for wildlife, crop loss, an increase in rainfall runoff which causes floods, impoverishment of farm families, damage to roads, highways and buildings from floods and dust storms, and losses in municipal water supplies, etc.

Paragraph C of K.S.A. 1981 Supp. 2-1902 lists the "appropriate corrective methods" the legislature has determined will conserve soil resources, minimize flood damage and conserve and develop water resources. One of the corrective methods listed is land irrigation.

Finally, in paragraph D of K.S.A. 1981 Supp. 2-1902 is the legislative declaration of policy regarding soil conservation, which states:

> "It is hereby declared to be the policy of the legislature to provide for the conservation, use and development of the soil and water resources of this state, and for the control and prevention of soil erosion, flood damages and injury to the quality of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wild life, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this state."

K.S.A. 1981 Supp. 2-1907b and 2-1907c set out the funding provisions for local soil conservation districts. In sum,

each soil conservation district is commonly funded by an appropriation from the county general fund. Further, the board of county commissioners may levy a tax to provide additional moneys for conservation district operations. The amount appropriated by the county is certified to the State Conservation Commission. The Commission then matches said amount up to $7,500 per conservation district per fiscal year.

K.S.A. 1981 Supp. 2-1908 outlines the corporate powers of the district and states in part:

> "A conservation district organized under the provisions of this act shall constitute a governmental subdivision of this state, and a public body corporate and politic, exercising public powers, and such district, and the supervisors thereof, shall have the following powers, in addition to others granted in other sections of this act . . . ."

You cite subsection (6) of K.S.A. 1981 Supp. 2-1908 as authority for the proposed commercial activity. This subsection authorizes the district's governing body

> "[t]o make available, on such terms as it shall prescribe, to land occupiers within the district, agricultural and engineering machinery and equipment, fertilizers, seeds, and seedlings, and such other material or equipment, as will assist such land occupiers to carry on operations upon their lands for the conservation of soil resources and for the prevention and control of soil erosion . . . ."

Here, the district's governing body proposes to make irrigation equipment available for purchase by land occupiers in the district. The analysis of your inquiry requires a determination of whether Article 11, Section 9 of the Kansas Constitution or the public purpose doctrine precludes the proposed commercial activity by the district. Each potential prohibition will be discussed separately.

Article 11, Section 9 of the Kansas Constitution states in part:

> "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 not 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 . . . ." (Emphasis added.)

In reviewing the case law of this state considering Article 11, Section 9, the Court has taken two opposing views as to the applicability of the provision to governmental subdivisions. In Leavenworth County v. Miller, 7 Kan. 479 (1871), and recently in State ex rel., Tomasic v. Kansas City, Kansas Port Authority, 230 Kan. 404 (1981), the Court strictly construed the provision as applying only to the State of Kansas, as a state, and not applying to municipalities or other governmental subdivisions of the state. This construction is apparently contrary to the reasoning of the Court in State ex rel., v. Kaw Valley Drainage District, 126 Kan. 43 (1928) and State ex rel., v. City of Hiawatha, 127 Kan. 187 (1928) where the Court applied the constitutional proscriptions to a drainage district and a city, respectively.

However, we find such contrasting views, although interesting, to be irrelevant in the instant case. The constitutional provision prohibits the state from being a "party" to a work of internal improvement. We think that the statute (K.S.A. 1981 Supp. 2-1907c), which requires the State to match county contributions to the district up to $7,500, makes the State of Kansas a "party" to this activity whether it is carried on directly by the state or by a governmental subdivision. However, we think it unnecessary to determine if this activity constitutes a work of internal improvement. Even assuming arguendo it is a work of internal improvement, it is not precluded by our constitution, since Article 11, Section 9 provides exceptions to its proscription, one of which is for "flood control works."

Generally, the term "flood control works" connotes a system of dams, levees, dikes, embankments and other structures constructed to protect lands from inundation. See 52A C.J.S. Levees and Flood Control, §1, p. 775. However, it is widely accepted that land irrigation in certain areas is also an effective method of preventing or reducing soil erosion and flood damage. Indeed, K.S.A. 1981 Supp. 2-1902 specifically recognizes irrigation as one of the appropriate corrective methods to control and prevent soil erosion and reduce flood damages. Therefore, applying the legislative finding that irrigation equipment has flood control properties or capabilities, the state, either as a state, or through the soil conservation district, is allowed to participate in the retailing of such equipment pursuant to K.S.A. 1981 Supp. 2-1908(6), even if such activity is characterized as participation in an internal improvement. We are mindful that some

increased irrigation will tend to deplete water resources with potentially harmful results. However, we must defer to the legislative finding that increased irrigation will tend to facilitate rather than hinder soil conservation and flood control. See State ex rel., Stephan v. Lane, 228 Kan. 379, 390 (1980).

The second potential prohibition that may preclude the proposed commercial activity is the "public purpose" doctrine which, in substance, precludes the use of public funds for private purposes. 64 C.J.S. Municipal Corporations, §1835 (1950). The doctrine is not well-defined but is relied upon in various jurisdictions to preclude a wide range of activities. Id., 16 McQuillin, Mun. Corp., §44.35 (3rd Ed. 1979), and Rhyne, The Law of Local Government Operations §31.4 (1980). The "public purpose" doctrine was recognized early in Kansas law, (Leavenworth Co. v. Miller, supra), and has been applied in a number of subsequent cases. See, State ex rel., Griffith v. Osawkee Township, 14 Kan. 322 (1874); Savings and Loan Assoc. v. Topeka, 87 U.S. 655, 22 L.Ed. 455 (1875); and State ex rel., Ferguson v. City of Pittsburg, 188 Kan. 612 (1961). See, also, Kan. Att'y Gen. Op. No. 81-208. In 64 C.J.S. Municipal Corporations, §1835 (1950), the general law governing judicial scrutiny in the application of the "public purpose" doctrine is stated thus:

> "Each case must be decided in the light of the existing conditions, with respect to the objects sought to be accomplished, the degree and manner in which that object affects the public welfare, and the nature and character of the thing to be done; but the court will give weight to a legislative determination of what is a municipal purpose, as well as widespread opinion and general practice which regard as city purposes some things which may not be such by absolute necessity, or on a narrow interpretation of constitutional provisions. Where an appropriation of public funds is primarily for public purposes, it is not necessarily rendered violative of constitutional provisions against gifts and loans of public credit by an incidental result which may be of private benefit. On the other hand, if the result is chiefly that of private benefit, an incidental or even ostensible public purpose will not save its constitutionality. A purpose may be a public one so as to be within a municipal power to appropriate funds therefor, even though it is not a necessary purpose. It has been laid down as a general rule that the question whether the performance

> of an act or the accomplishment of a specific purpose constitutes a 'public purpose' for which municipal funds may be lawfully disbursed rests in the judgment of the municipal authorities, and the courts will not assume to substitute their judgment for that of the authorities unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused." (Footnotes omitted.) Id. at 334-335. [Excerpt relied upon by the Supreme Court of Ohio in State ex rel., McClure v. Hagerman, 155 Ohio St. 320, 98 N.E.2d 835 (1951).]

Again, we are constrained to observe the legislative policy determination that land irrigation serves a public purpose by, inter alia, conservation of soil resources, control and prevention of soil erosion, and reduction of flood damages and development of water resources. K.S.A. 1981 Supp. 2-1902. See, Savings and Loan Assoc. v. Topeka, supra at 664-665. In this instance, the district apparently has concluded that its proposed activity is in furtherance of this legislative policy, and that the private purpose is incidental to the public benefit. Thus, since we cannot say as a matter of law that such determination represents an abuse of the district's discretion, it is our opinion that the public purpose doctrine would not preclude the proposed activity.

In conclusion, it is our opinion that the district may sell irrigation equipment for profit to land occupiers within the bounds of the district, because such activity does not violate either the constitutional prohibition regarding internal improvements or the public purpose doctrine.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Robert V. Eye

Robert V. Eye
Assistant Attorney General

RTS:BJS:RVE:jm