



STATE OF KANSAS

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February 1, 1983

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ATTORNEY GENERAL OPINION NO. 83- 13

The Honorable Charlie L. Angell
Vice-President of the Senate
Senate Chamber, State Capitol
Topeka, Kansas 66612

Re: Waters and Watercourses -- Water Plan Storage --
Contracts for Withdrawal and Use of Water Held by
State; Adjustment of Terms

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 Waters so withdrawn and used by a purchaser are subject to a charge fixed by the respective state agency not less than 5 cents nor more than 10 cents per one thousand gallons of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. Such contracts, which may have a term of up to 40 years, must contain a provision by which such charges are reviewed at least every ten years, although the parties to the contract can agree to a more frequent review. Although the Water Office may establish on an annual basis the rate used for all contracts entered into during that year (K.S.A. 82a-1308), such rate may not be altered thereafter, except as provided by the contract. Accordingly, the provisions of 1983 Senate Bill No. 61 which provide for annual adjustments of the water charge may not be applied to contracts entered into and approved by the legislature prior to the effective date of the bill. Cited herein: K.S.A. 1982 Supp. 74-2615, K.S.A. 82a-1305, 82a-1306, 82a-1308, 82a-1316, 1983 Senate Bill No. 61.

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Dear Senator Angell:

As Vice-President of the Kansas Senate, you request our opinion as to the effect of 1983 Senate Bill No. 61 upon water purchase contracts now in effect. Specifically, you inquire whether certain provisions of the bill, which call for annual adjustment of the charges paid by purchasers of water from the state, are effective as to contracts entered into under existing statutes. At issue is the price to be paid by municipal and industrial users of water that is stored by the state in reservoirs constructed by the U.S. Corps of Engineers.

The authority to make such contracts is currently vested in the Kansas Water Office, the successor agency to the Kansas Water Resources Board (K.S.A. 1982 Supp. 74-2615), and is derived from the State Water Plan Storage Act, K.S.A. 82a-1301 et seq. At K.S.A. 82a-1305, 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."

Required 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. In particular, subsection (a) of the statute allows the water office to set the charge per one thousand gallons at a level between 5 and 10 cents, while subsection (c) provides for adjustments in price at intervals of every 10 years during the life of the contract. However, this latter language is directory rather than mandatory, and has been construed by this office to allow for more frequent adjustments if the parties so contract. Attorney General Opinion No. 82-34. For example, several contracts presented to the 1982 Legislature provided for review and possible adjustment at five year intervals. These contracts were not disapproved by the legislature pursuant to K.S.A. 82a-1307, and therefore are in effect at this time.

Each of these contracts, as well as numerous others made in preceding years, was made subject to the Water Plan Storage Act, K.S.A. 82a-1301 et seq. In addition to K.S.A. 82a-1305 and 82a-1306, another provision so included in the contracts by reference is K.S.A. 82a-1308, which states in pertinent part:

"For each calendar year, the board shall fix the rate provided for in paragraph (a) of K.S.A. 82a-1306 within the limits there provided. The rate so fixed for each year shall be the same for each contract under K.S.A. 82a-1305 for withdrawal from every reservoir. The rate so fixed for each year shall be the same for every contract under K.S.A. 82a-1305 executed in that calendar year. The rate in effect at the time of execution of any contract under K.S.A. 82a-1305, as adjusted under paragraph (c) of K.S.A. 82a-1306, shall be the rate applicable for such contract during the entire term thereof." (Emphasis added.)

Further, while the terms of these contracts can, if desired, be amended by the parties, no such amendment can change the rate per thousand gallons set by the original contract or as subsequently amended. (K.S.A. 82a-1316.) Provisions to this effect are specifically set forth in the contracts which have previously been agreed to by the Water Office (and the Water Resources Board), and reviewed by the legislature.

In light of the above, it would be our opinion that any changes made in the provisions of the Water Plan Storage Act by 1983 Senate Bill No. 61 could not affect water purchase contracts heretofore made. Specifically, the language contained therein in Sections 5, 6 and 7 would be of no effect on water rates set by contracts made prior to the measure's effective date which were not disapproved by the legislature. In limiting the power of either party to make unilateral amendments, these contracts accurately reflect the statutes in existence at the time of their inception. As was recognized in Newlon v. Allen, 106 Kan. 526, 527 (1920):

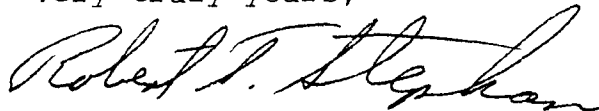
"As already seen, a state may, in the absence of constitutional restrictions, dispose of its property like any other owner, and when acting not in its capacity as a sovereign, but in its proprietary capacity as the owner of the lands, it is bound by the same rules as those which it applies to its citizens.

"A state entering into contracts lays aside its attributes of sovereignty, and binds itself substantially as one of its citizens does when he enters into a contract, and, in general, its contracts are interpreted as the contracts of individuals are, and controlled by the same laws."

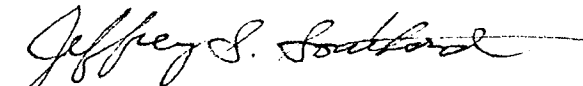
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In conclusion, pursuant to the State Water Plan Storage Act, K.S.A. 82a-1301 et seq., the Kansas Water Resources Board and its successor, the Kansas Water Office, are empowered to enter into contracts for the withdrawal and use of waters held in storage 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. Such contracts, which may have a term of up to 40 years, must contain a provision by which such charges are reviewed at least every ten years, although the parties to the contract can agree to a more frequent review. Although the Water Office may establish on an annual basis the rate used for all contracts entered into during that year (K.S.A. 82a-1308), such rate may not be altered thereafter, except as provided by the contract. Accordingly, the provisions of 1983 Senate Bill No. 61 which provide for annual adjustments of the water charge may not be applied to contracts entered into and approved by the legislature prior to the effective date of the bill.

Very truly yours,



ROBERT T. STEPHAN
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Jeffrey S. Southard
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