



STATE OF KANSAS

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February 25, 1983

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ATTORNEY GENERAL OPINION NO. 83- 21

Joseph F. Harkins, Director
Kansas Water Office
503 Kansas Avenue, Suite 303
Topeka, Kansas 66603

Re: Waters and Watercourses -- State Water Plan --
Agreement with Federal Government for Water
Storage; Payment Dependent on Appropriations.

Synopsis: The Kansas Water Office, as the successor to the authority of the Kansas Water Resources Board, may enter into agreements with the federal government by which water may be held in storage by the state in projects constructed by agencies of the federal government. As provided by K.S.A. 1982 Supp. 82a-934, such agreements are binding upon the state to the extent that future appropriations are made in support thereof. While no applicable sections of the Kansas Constitution limit the period of time an appropriation may extend, K.S.A. 46-155 imposes a limit of at most four years for capitol improvement appropriations. As no exception has been made for water storage agreements, the Kansas Water Office is without authority to make agreements which do not contain the limiting language provided by K.S.A. 1982 Supp. 82a-934. However, as this statute does authorize the Water Office to reimburse the federal government for damages resulting from the use of, or a release from, water storage, it may agree to language which states this in a contract. Cited herein:

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K.S.A. 40-3405, 46-155, K.S.A. 1982 Supp. 75-4704b,
82a-934, Kan. Const., Art. 2, §24, Art. 11, §§6,7,
9, 42 U.S.C.A. §1962d-5b.

* * *

Dear Mr. Harkins:

As Director of the Kansas Water Office, you have requested our opinion on a question concerning certain language contained in agreements made between your office and the federal government. Specifically, you inquire whether your office may legally sign agreements for the storage of water in conservation supply that do not contain language to the effect that future payments are contingent upon appropriations being made therefor. This type of clause appears in past contracts between the State of Kansas, represented by your office and, prior to that, the Water Resources Board, and the federal government, acting through the Corps of Engineers. However, as may be seen from the lengthy materials attached to the opinion request, the issue of the need for such a clause has been present for a number of years and remains open.

Acting pursuant to K.S.A. 1982 Supp. 82a-934, your office is empowered to:

"enter into negotiations and agreements with the federal government relative to the inclusion of, and the payment for, conservation storage features for water supply in any project that has been planned, authorized or constructed by the federal government when the board [office] shall deem such negotiations and agreements to be necessary for the achievement of the policies of the state of Kansas relative to the water resources thereof. Such agreements shall be binding upon the state to the extent that future appropriations are made in support thereof." (Emphasis added.)

The underscored language in the statute is reflected in the agreements themselves, wherein is contained a clause which states:

"Nothing herein shall be construed as legally obligating the Kansas legislature to make any appropriation of funds. Nothing herein shall

be deemed to pledge the credit of any person acting or purporting to act on behalf of the State."

The terms of this "Kansas clause" have been called into question by the Corps of Engineers, which believes they create a conflict with the language of 42 U.S.C.A. §1962d-5b. There, the Corps is not authorized to contract with a "non-federal interest" until the latter has agreed in writing to provide its share of cooperation for the project. A non-federal interest is by definition a "public body with full authority and capability to perform the terms" of the agreement and, if necessary, pay damages in the event of failure to perform. In that the language of the "Kansas clause" limits the ability of the state to pay to those circumstances where money has been appropriated, an argument can, at least in theory, be made that the two are incompatible. However, as there never has been even a suggestion that the state will default, such a situation remains very much a theoretical one.

In view of the Corps' position, you wish to know whether your office may legally sign agreements in the future without such limiting language being present. If not, you further inquire whether the problem lies with statutory or constitutional language. While in the former case action can be taken, if desired, by the legislature, the latter scenario poses a major obstacle, and would probably leave amendment of the federal law a more feasible course of action.

The contracts in question are long-term in nature, as they "obligate" the state to pay for a portion of the construction costs of the project over a 50 year period. By its terms, K.S.A. 1982 Supp. 82a-934 does not, in and of itself, prevent your office from entering such an agreement that does not contain the limiting language, for it merely limits the binding effect of the agreement "to the extent that future appropriations are made." However, if recourse is had to other statutes which are in pari materia with this one, the practical limits imposed are soon apparent.

For example, K.S.A. 46-155 states as follows:

"Except as provided in K.S.A. 40-3405 and K.S.A. 1981 Supp. 75-4704b, no item of appropriation, or combination of items of appropriation for the same purpose, shall be for a period greater than one (1) ensuing fiscal year in addition to the current fiscal year, except that in the case of capital improvements an item of appropriation, or combination

of items of appropriation for the purpose of completing construction of a project may be for any period not exceeding the three (3) ensuing fiscal years in addition to the current fiscal year."

While it is perhaps arguable that the longer period for capital improvement projects could be applied here, where reservoirs are being built for the retention of the state's water, even that period is far short of the life of the agreements which are at issue. As a result, your office is limited at present to guaranteeing the presence of appropriations for at most the three fiscal years following the current one. Accordingly, it is our opinion that neither this office nor an attorney for the water office should certify an agreement of this type that did not contain qualifying language which reflected the terms of K.S.A. 46-155 and K.S.A. 1982 Supp. 82a-934. As the limitations imposed by statute would, as a matter of general law, be included in the contract by inference, a failure to expressly state them could lead to misunderstandings in the future between the contracting parties as to the exact nature of the state's obligations.

However, it is important to note that, as this is a statutory rather than constitutional limitation, amendments can be made by the legislature in the same manner as for any statute. So far, exceptions to the general limits have been made for transfers to the health care stabilization fund (K.S.A. 40-3405) and for computer lease or acquisition contracts. (K.S.A. 1982 Supp. 75-4704b.)

Our research has not found any provisions of the Kansas Constitution which would prevent the water office from signing such contracts, should K.S.A. 46-155 be amended. While previously Article 2, Section 24 contained explicit language that "no appropriation shall be for a longer term than two years," an amendment in 1974 removed this restriction, with the similarly-worded K.S.A. 46-155 enacted in the next session. The effect of other provisions regarding the inability of the state to contract debt (Article 11, Sections 6 and 7) has been limited by court decisions to only situations where debts payable by a general property tax are created. State ex rel. v. Board of Regents, 167 Kan. 587 (1949). Further, the courts have limited the effect of these sections to "extraordinary expenses" and "public improvements," not "internal improvements." State ex rel. v. State Highway Comm., 138 Kan. 913 (1934). As works for the conservation and development of the state's water resources are specifically defined as internal improvements by Article 11, Section 9, the debt provisions cited above do not apply.

As a second portion of your inquiry, you ask whether the state, acting through your office, can agree to a "hold harmless" clause of the kind being proposed by the Corps. The draft agreement you enclose with your request contains the following language ("User" being the State of Kansas):

"Release of Claims. The User shall hold and save the Government, including its officers, agents and employees harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage in the Project, or withdrawal or release of water from the Project, made or ordered by the User or as a result of the construction, operation, or maintenance of the water supply facilities and appurtenances thereto owned and operated by the User except for damages due to the fault or negligence of the Government or its contractors."

In our opinion, your office is authorized to accept such language by the terms of K.S.A. 82a-934, wherein it is provided that:

"Subject to the foregoing proviso, any agreement made under this section may provide that a portion of the reimbursement cost shall include any payment made by the United States to third parties as a result of the finding of liability by a court of competent jurisdiction or by settlement arising out of the use of the water storage space and the release therefrom, except that no reimbursement shall be made to the extent that the liability arises from the sole fault of the United States."

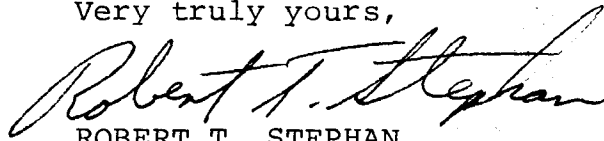
In that the admission of liability contained in the statute includes the same types of liabilities which are assumed by the state under the above clause, your office would not be acting beyond the scope of its authority in agreeing to this clause.

In conclusion, the Kansas Water Office, as the successor to the authority of the Kansas Water Resources Board, may enter into agreements with the federal government by which water may be held in storage by the state in projects constructed by agencies of the federal government. As provided by K.S.A. 1982 Supp. 82a-934, such agreements are binding upon the state to the extent that future appropriations are made in support thereof. While no applicable sections of the Kansas

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Constitution limit the period of time an appropriation may extend, K.S.A. 46-155 imposes a limit of at most four years for capitol improvement appropriations. As no exception has been made for water storage agreements, the Kansas Water Office is without authority to make agreements which do not contain the limiting language provided by K.S.A. 1982 Supp. 82a-934. However, as this statute does authorize the Water Office to reimburse the federal government for damages resulting from the use of, or a release from, water storage, it may agree to language which states this in a contract.

Very truly yours,



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RTS:BJS:JSS:hle