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February 14, 1984

ATTORNEY GENERAL OPINION NO. 84- 13

John B. Kemp
Secretary of Transportation
Seventh Floor, State Office Building
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees --
Department of Transportation -- Expenditures From
Railroad Rehabilitation Loan Guarantee Fund

Kansas Constitution -- Finance and Taxation --
Internal Improvements; Public Improvements; Debts

Synopsis: Expenditures made from the Railroad Rehabilitation
Loan Guarantee Fund, created pursuant to K.S.A. 1983
Supp. 75-5029, may be made only to the federal rail-
road administration following a default on any fed-
eral loan to the Mid-States Port Authority. Federal
loan moneys received by the state for transfer to
the Mid-States Port Authority shall be deposited in
the State Railroad Planning and Assistance Federal
Fund and expended as authorized by 1984 Senate Bill
No. 506, if enacted.

Participation by the state pursuant to the Railroad
Rehabilitation Loan Guarantee Fund in a work of
internal improvement properly authorized under Art-
icle 11, Section 9 of the Kansas Constitution is not
subject to the conditions and restrictions of Sections
6 and 7 of Article 11 regarding the contracting of
debts for extraordinary expenses and public improve-
ments.

Cited herein: K.S.A. 12-3401, K.S.A. 1983 Supp. 75-
5029, 75-5030, L. 1981, ch. 13, L. 1983, ch. 25, 1981

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House Bill 2560, 1983 House Bill 2583, 1983 Senate
Bill 506, Kansas Constitution Art. 2 §24, Art.
11, §§6, 7 and 9.

* * *

Dear Secretary Kemp:

You ask three questions regarding the Railroad Rehabilitation Loan Guarantee Fund (K.S.A. 1983 Supp. 75-5029, 5030) created by the 1983 Kansas Legislature. L. 1983, Ch. 25.

By way of background we note that this is the third in a series of formal opinions regarding this transaction. In 1982, we advised that if the State of Kansas was going to participate with the Mid-States Port Authority (MSPA) created pursuant to K.S.A. 12-3401 et seq., and the federal government in the acquisition of the now-defunct Chicago, Rock Island and Pacific Railroad Company, the federal funds contributed to the transaction "must be made available to the state for expenditure or distribution." Kansas Attorney General Opinion No. 82-257.

Late in the 1983 legislative session, 1983 House Bill 2583 was introduced to create the Railroad Rehabilitation Loan Guarantee Fund (hereinafter, Fund), and permitting the state to become a party to the transaction which includes a proposed \$18 million federal loan for purchase and rehabilitation of the bankrupt Rock Island line. In substance, the proposed bill would have permitted the state to pay "to the federal railroad administration" any loss on the federal loan to the Mid-States Port Authority.

Immediately following its introduction, the Honorable Mike Hayden, Speaker of the House of Representatives, urgently requested an opinion regarding the constitutionality of this bill in light of Article 11, Section 9 of the Kansas Constitution which restricts participation by state government in works of internal improvement. We advised Speaker Hayden that the bill as proposed was unconstitutional but that the bill could be amended to be constitutionally permissible if the state contribution to the project, namely its obligation to the federal government in the event of default on the federal loan to MSPA, was limited to "an amount not to exceed one-half of the loss assumed by the federal government." Kansas Attorney General Opinion No. 83-61. Nearly identical language was added to section 2 of the bill (now at K.S.A. 1983 Supp. 75-5030) and the bill was passed by the two-thirds majority vote of both houses of the legislature as required by Article 11, Section 9 of the Kansas Constitution.

Nearly nine months later we are asked to resolve questions of statutory interpretation concerning use of the term "expenditures" in sections 1 and 3 of HB 2583; constitutional questions not raised by prior opinion requests; and procedural problems con-

cerning the authority of the state finance council during the 1984 legislative session.

First, regarding the use of the term "expenditures" in sections 1 and 3 of 1983 HB 2583, you suggest that the language of the bill is confusing. Indeed, we so concluded in our 1983 opinion, and we would agree that the 1983 amendments may not have totally eliminated the confusion. However, we do not see the problem as you do. While you suggest that the language would impair the ability of the state to contribute in the event of default, we think the language and intent of the act is consistent in this regard, namely, that the state can only contribute less than or equal to one-half of any loss suffered by the federal railroad administration on the Mid-States Port Authority Loan. On the contrary, the confusion seems to arise from the assumption that this act, and this fund, may be used for the pass through of federal loan moneys. Without such assumption there is no confusion and we believe such assumption to be clearly erroneous.

As the title to the act and the fund itself suggest, this is a loan guarantee fund. Nothing in the language of the act mentions the receipt or expenditure of federal funds by the state, except that expenditures from this fund shall not exceed federal "participation." The language of section 2 specifically authorizes the expenditures from the fund only to the federal railroad administration. There is no authorization to pay moneys from the fund to the Mid-States Port Authority or any other person or agency.

If the legislature desires to authorize the pass through of federal funds as required by Article 11, Section 9, and noted in Attorney General Opinion No. 82-257, a "specific" appropriation is required by law. See Kan. Const., Art. 2, §24. We believe the legislature has provided for the receipt and expenditure of federal railroad moneys since 1981 by the enactment of 1981 House Bill 2560. That appropriations bill created the State Railroad Planning and Assistance Federal Fund and authorized the expenditure of all federal grants and "other federal receipts" for the purposes set forth in such grants or other receipts. See L. 1981, ch. 13, §4. Unlike, the Railroad Rehabilitation Loan Guarantee Fund, this appropriation clearly authorizes the receipt and disbursement of federal funds. See bill title. Although that year's appropriation to this fund was passed by a more than two-thirds majority vote of the legislature [see 1983 House Journal 443 (125 yeas - 0 nays), 1983 Senate Journal 460 (35 yeas - 3 nays)], such is not required for internal improvement activities involving the expenditure of federal funds only. See Kan. Const., Art. 11, §9(4). The fund is to be continued pursuant to the governor's 1985 budget and contains a "no limit" appropriation. See 1984 Senate Bill No. 506.

In sum, it is our opinion that federal loan moneys for the Mid-

States Port Authority will be deposited in the State Railroad Planning and Assistance Federal Fund and expended pursuant 1984 Senate Bill No. 506, if passed. Expenditures from the Railroad Rehabilitation Loan Guarantee Fund will be limited to payments to the federal railroad administration in the event of default by MSPA on the federal loan.

Our answer to your first question makes your third question moot. You had inquired as to how the procedural requirements for finance council approval of expenditures from the Railroad Rehabilitation Loan Guarantee Fund could be met while the legislature is in session, i.e. until April 24, 1984. As expenditures from this Fund can only be made to the federal government in the event of default on the MSPA loan there is no conceivable way that such expenditures can be necessitated in the next ninety days. Indeed, the loan itself has not yet been approved by the federal government, received by the state or transferred to MSPA. Until MSPA defaults on the federal loan and suffers a loss (after sale of MSPA assets, etc.) the state obligation to expend money under the Guarantee Fund does not arise. Naturally, the Railroad Rehabilitation Loan Guarantee Fund should continue to receive the annual "no limit" appropriation, although we understand that such an appropriation has not yet been introduced in the 1984 Legislature. In order that the loan would be guaranteed for the 1985 fiscal year, such an appropriation needs to be made.

We turn now to your second question. You inquire as to whether Article 11, Sections 6 and 7 of the Kansas Constitution, concerning state "debts," are applicable to this situation. Those sections provide respectively:

"§6. For the purpose of defraying extraordinary expenses and making public improvements, the state may contract public debts; but such debts shall never, in the aggregate, exceed one million dollars, except as hereinafter provided. Every such debt shall be authorized by law for some purpose specified therein, and the vote of a majority of all the members elected to each house, to be taken by the yeas and nays, shall be necessary to the passage of such law; and every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt, and the principal thereof, when it shall become due; and shall specifically appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished, until the interest and principal of such debt shall have been wholly paid.

§7. No debt shall be contracted by the state except as herein provided, unless the proposed law for

creating such debt shall first be submitted to a direct vote of the electors of the state at some general election; and if such proposed laws shall be ratified by a majority of all the votes cast at such general election, then it shall be the duty of the legislature next after such election to enact such law and create such debt, subject to all the provisions and restrictions provided in the preceding section of this article."

In our judgement, debts contracted by the state pursuant to participation in works of internal improvement authorized by Article 11, Section 9 of the Kansas Constitution are not subject to the restrictions imposed by Sections 6 and 7 of Article 11. This issue was resolved by the Kansas Supreme Court in State ex rel v. State Highway Commission, 138 Kan. 913, 920, 921 (1934) and reaffirmed in State ex rel. v. State Highway Commission, 139 Kan. 391, 395 (1934).

In these cases, the state proposed to accept a loan from the federal government for highway purposes without specifying the source of repayment. There, the Court limited the effect of Article 11, Sections 6 and 7 (then Sections 5 and 6) on two basis relevant here.

First, the loan for highway purposes arose under the authority and within the bounds of the internal improvements section (Article 11, §9, then §8) which (then and now) permits state participation in a state system of highways so long as no general obligation bonds or property taxes are used to finance the activity. Article 11, Sections 6 and 7 were limited to "debts to be paid by a general property tax." 138 Kan. at 918. Thus, the internal improvements involving highways, which could not be funded by general obligation bonds or a property tax (per Art. 11, §9) were not within the scope of Sections 6 and 7.

Second, Sections 6 and 7 of Article 11 refer to "public improvements" not "internal improvements" governed by the terms of Section 9. Referring to the 1919 amendment by the voters of Article 11, Section 9 to permit state participation in highway construction, the court noted

"that the state could not carry on the work of constructing and maintaining state highways, even to the limited extent then provided, if the restrictions and limitations of Article 11, section 5 and 6 [now 6 and 7], of the constitution should apply to its operations, and it was specifically provided that such sections should not apply."
138 Kan. 919, 920.

As in the case of highway projects considered in these earlier cases, the state participation in the internal improvement project regarding railroads is restricted by the terms of Article 11,

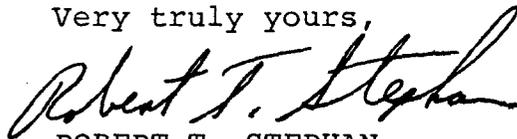
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Section 9 to funding from sources other than the issuance of general obligation bonds or a general property tax. Hence, based on prior Kansas Supreme Court decisions, we readily conclude that the limitations contained in Article 11, Sections 6 and 7 are inapplicable to a project of internal improvement permitted by Article 11, Section 9. The creation and administration of the Railroad Rehabilitation Loan Guarantee Fund constitutes state participation in a work of internal improvement and has been properly authorized pursuant to 1983 House Bill 2583 and the requirements of Article 11, Section 9.

Therefore, it is our opinion that expenditures made from the Railroad Rehabilitation Loan Guarantee Fund, created pursuant to K.S.A. 1983 Supp 75-5029, may be made only to the federal railroad administration following a default on any federal loan to the Mid-States Port Authority. Federal loan moneys received by the state for transfer to the Mid-States Port Authority shall be deposited in the State Railroad Planning and Assistance Federal Fund and expended as authorized by 1984 Senate Bill 506, if enacted.

Participation by the state pursuant to the Railroad Rehabilitation Loan Guarantee Fund in a work of internal improvement properly authorized under Article 11, Section 9 of the Kansas Constitution is not subject to the conditions and restrictions of Sections 6 and 7 of Article 11 regarding the contracting of debts for extraordinary expenses and public improvements.

Very truly yours,



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Bradley J. Smoot
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RTS:BJS:crw