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ATTORNEY GENERAL OPINION NO. 89- 110

Joseph F. Harkins, Director  
Kansas Water Office  
109 SW 9th Street, Suite 200  
Topeka, Kansas 66612

Re: Waters and Watercourses -- Water Transfers --  
Applicability of Water Transfers Act to Water  
Assurance Districts

Synopsis: Release by the state of assurance waters out of the  
conservation storage water supply capacity of a  
federal reservoir does not constitute a transfer of  
water subject to the water transfers act. Cited  
herein: K.S.A. 1988 Supp. 82a-1330; 82a-1331;  
82a-1332; 82a-1335; 82a-1345; K.S.A. 82a-1501;  
82a-1502; K.S.A. 1988 Supp. 82a-1503, as amended by  
L. 1988, Ch. 356, § 351.

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Dear Mr. Harkins:

As Director of the Kansas Water Office, you request our  
opinion regarding the relationship of the water transfers act  
to the water assurance program act. Specifically, you ask  
whether a release by the state of assurance waters out of the  
conservation storage water supply capacity of a federal  
reservoir is also a transfer of water subject to the water  
transfers act.

The water transfers act, K.S.A. 82a-1501 et seq., was  
enacted by the legislature in 1983. (L. 1983, ch. 341).  
The purpose of the act was to give the state approval

authority before large amounts of water could be moved in order to avoid the allocation of water to one area of the state at the expense of another area. The law provides that "no person shall make a water transfer in this state unless and until the transfer is approved. . . ." K.S.A. 82a-1502(a). "Water transfer" is defined as

"the diversion and transportation of water in a quantity of 1,000 acre feet or more per year for beneficial use outside a ten-mile radius from the point of diversion of such water." K.S.A. 82a-1501(a). (Emphasis added).

Any person wishing to make a water transfer must file an application with the chief engineer of the Division of Water Resources, State Board of Agriculture. K.S.A. 1988 Supp. 82a-1503(a), as amended by L. 1988, ch. 356, § 351. A hearing is then held to determine whether the proposed water transfer is in the best interests of the state as a whole. The hearing panel must "determine whether the benefits to the state for approving the transfer outweigh the benefits to the state for not approving the transfer. . . ." K.S.A. 1988 Supp. 82a-1503(c) and (e), as amended.

In 1986 the legislature enacted the water assurance program act, K.S.A. 1988 Supp. 82a-1330 et seq. This act authorizes the Kansas Water Office, with approval from the Kansas Water Authority, to contract for assurance storage from federal reservoirs to be used for water assurance. K.S.A. 1988 Supp. 82a-1332. Included among the definitions contained in the act are the following:

"(a) 'Assurance storage' means that part of the conservation storage water supply capacity of any reservoir devoted to the storage water for the water assurance program;

(b) 'assurance water' means water stored in assurance storage of a reservoir under a water reservation right and provided as supplemental water to eligible water right holders;

. . .

(e) 'eligible water right holder' means any entity holding a water right or permit, pursuant to K.S.A. 82a-701 et seq., and amendments thereto, to appropriate water from a stream or water from the alluvium of the stream downstream from an assurance reservoir for municipal or industrial purposes as determined by the chief engineer. . . ." K.S.A. 1988 Supp. 82a-1331.

K.S.A. 1988 Supp. 82a-1335 provides the procedure for establishing a water assurance district. The assurance district reimburses the state for the cost of acquiring the assurance storage from the federal government. Releases of assurance water from the reservoir are made upon request of the director of the Kansas Water Office in accordance with the contract with the federal government. K.S.A. 1988 Supp. 82a-1345(a) and (b). The statute provides that no member of the district who is below a reservoir may divert water from releases unless the member has an approved conservation plan. K.S.A. 1988 Supp. 82a-1345(c). In addition, "an entity which becomes a holder of a water right in a river basin after an assurance program is in place for that basin shall become a member if the chief engineer determines that sufficient additional water may be yielded from assurance reservoirs to benefit the potential new member." K.S.A. 1988 Supp. 82a-1345(d).

The question before us is whether releases of assurance waters from federal reservoirs constitute transfers of water, subject to the water transfers act, which would require that a hearing be held before water is released. To be a "water transfer" under the transfers act there must be a "diversion and transportation of water." K.S.A. 82a-1501(c). We do not believe the release of assurance waters meets this definition. There is no transfer of water. Water is stored and released. The purpose of assurance waters is to supplement and benefit the basin of origin. K.S.A. 1988 Supp. 82a-1331(f); K.S.A. 1988 Supp. 82a-1345(d). Assurance water storage does not constitute diversion. Storage and release of water are for the benefit of the existing water right holders. These water right holders, downstream from an assurance reservoir, divert, or make use of the water according to their appropriation rights.

Since assurance water storage and release do not meet the definition of water transfer, the hearing requirements of the

transfers act are not applicable. If the legislature had intended for the creation of assurance districts to be subject to hearing procedures, it would have provided. Indeed, there is no indication from the legislative history of the water assurance program act there was ever any intent that the act was subject to hearing requirements. Minutes, House Committee on Energy and Natural Resources, January 16, 28, 30, 1986; Minutes, Senate Committee on Energy and Natural Resources, April 3, 1986. However, the legislative history of the transfers act shows that a key feature of the act advanced to encourage passage of the act was the hearing process. Minutes, Senate Committee on Energy and Natural Resources, February 10, 11, March 1, 2, 1963; Minutes, House Committee on Energy and Natural Resources, March 15, 21, 24, 1963. The transfers act provides that no transfers can be approved which would cause a present or reasonably foreseeable harm to users in the area from which the water is to be taken. K.S.A. 82a-1502(a). The water assurance program act is an intrabasin program designed to improve the reliability of water supplies in the basin. The act provides safeguards to prevent harm to the basin.

In summary, it is our opinion that the provisions of the transfers act do not apply to the release of assurance waters.

Very truly yours,



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