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ATTORNEY GENERAL OPINION NO. 90- 34

The Honorable John D. McClure
State Representative, One Hundred Sixth District
State Capitol, Room 272-W
Topeka, Kansas 66612

Re: Public Health--Central Interstate Low-Level
Radioactive Waste Compact--Central Interstate
Low-Level Radioactive Waste Compact; State Liability

Synopsis: The construction of an interstate compact approved by Congress is a federal question. In determining whether a state has waived its constitutional protection from liability under the Eleventh Amendment of the United States Constitution, waiver will be found only where stated by the most express language or by such overwhelming implications from the text of the compact that no room is left for any other reasonable construction. Such a waiver is not indicated within the provisions of the central interstate low-level radioactive waste compact (Compact). However, because the central interstate low-level radioactive waste commission established under the Compact is not a state agency for Eleventh Amendment purposes, the Eleventh Amendment protection will not be extended to the commission. If a judgment is awarded against the commission, the only state money obtainable would be the \$25,000 each member state pays annually to fund the commission until it becomes self-sustaining. Cited herein: K.S.A. 65-34a01; 75-6101; U.S. Constitution, Art. I, § 10; Amendment XI.

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Dear Representative McClure:

As representative for the one hundred sixth district, you request our opinion regarding liability under the central interstate low-level radioactive waste compact (Compact). Specifically, you ask whether the State of Kansas is potentially liable for damages which could be caused through the operation of the low-level radioactive waste facility in Nebraska. You also inquire as to whether the Kansas tort claims act or the Compact could be amended to provide for such liability.

Article I, § 10, cl. 3, of the Constitution of the United States states in part that:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

The states who are parties to a compact sanctioned by Congress under Article I, § 10, cl. 3, of the Constitution by accepting it and acting under it assume any conditions Congress may attach. Petty v. Tennessee-Missouri Comm'n, 359 U.S. 275, 281, 79 S.Ct. 785, 3 L.Ed.2d 804 (1958). The construction of an interstate compact approved by Congress presents a federal question. Id. at 275; Yancoskie v. Delaware River Port Authority, 385 F.Supp. 1170, 1172 (D.C. New Jersey, 1974).

The Eleventh Amendment to the Constitution states:

"The Judicial power of the United States shall not be construed to extend to any suit in law on equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

While the Eleventh Amendment by its terms does not bar suits against a state by its own citizens, the Supreme Court of the United States has consistently held that an unconsenting state is immune from suits brought in federal courts by her

own citizens as well as by citizens of another state. Edelman v. Jordan, 415 U.S. 651, 662, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). A suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Id. at 663.

A state may waive the immunity conferred upon it by the Eleventh Amendment. Such waiver must be found within the terms of the compact. Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights. Edelman, 415 U.S. at 673. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, waiver will be found only where stated by the most express language or by such overwhelming implications from the text of the compact as no room is left for any other reasonable construction. Id.

Thus, in determining if the State of Kansas by becoming a member of the central interstate low-level radioactive waste compact, K.S.A. 65-34a01 et seq., has waived the immunity conferred upon the state by the Eleventh Amendment, the terms of the Compact must be considered. Of the nine articles forming the Compact, only two appear to address potential liability of the party states. Article III establishes that it is the responsibility of each member state to enforce any applicable federal and state laws and regulations pertaining to the packaging and transportation of waste generated within or transported through its borders. Article IV states that "the [Central Interstate Low-Level Radioactive Waste] Commission herein established is a legal entity separate and distinct from the party states and shall be so liable for its actions. Liabilities of the Commission shall not be deemed liabilities of the party states." Apart from these provisions, there is little indication as to the potential liability of the party states in connection with the operation of the regional facility. Because waiver of the immunity conferred upon the states by the Eleventh Amendment will be found only through express language or overwhelming implication of the Compact, these provisions are insufficient to waive the immunity of the member states.

While the states may continue to be able to invoke the immunity conferred upon them by the Eleventh Amendment, such protection may not be extended to a separate entity, as the protection afforded by the Eleventh Amendment is only available to "one of the United States."

"It is true, of course, that some agencies exercising state power have been permitted to invoke that Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'

"If an interstate compact discloses that the compacting states created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of that Amendment."
Lake County Estates v. Tahoe Planning Agency, 440 U.S. 391, 400, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

To determine whether the immunity afforded the states under the Eleventh Amendment should be extended to the entity created through an interstate compact, the Court will focus on six factors: (1) How is the agency characterized by the language of the creating statutes? (2) From what governmental entity does the agency derive its funding? (3) Is the state financially responsible for the liabilities and obligations incurred by the agency? (4) Are the officers or members of the agency appointed by the state, or by county or municipal governments? (5) Is the function performed by the agency traditionally state or municipal? and (6) Are the actions of the agency subject to the state government's veto? Port Authority Police Benevolent Association v. Port Authority of New York and New Jersey, 819 F.2d 413, 414 (3rd Cir. 1987). The single most important factor may be whether liability will place the state treasury at risk. Edelman,

415 U.S. at 663; Feeney v. Port Authority Trans-Hudson Corporation, 873 F.2d 628, 631 (2d Cir. 1989).

The commission is to consist of one voting member from each party state to be appointed according to the laws of each state. The party states are to provide funding for the commission on an annual basis until sufficient surcharges are available for the budget of the commission. Also, the party states recognize that the management of non-federal low-level radioactive wastes is a function of the states. These factors weigh in favor of application of the states' Eleventh Amendment immunity to the commission.

However, application of the Eleventh Amendment to the commission is heavily outweighed. The Compact explicitly states that the commission is "a legal entity separate and distinct from the party states." The party states, rather than having veto power over the commission, must pursue in the United States District Court judicial review of the commission's decisions. While the states are to initially provide funding for the commission, the commission is to become self-sustaining financially. Under the Compact, the party states are obligated to provide funding for the commission; however, that obligation is limited to an annual expenditure not to exceed \$25,000, thus preventing a depletion of state treasuries without gubernatorial consent. Accompanied by the fact that the commission has the authority to initiate any legal proceedings or appear as an intervenor, and exercises extensive authority over the termination of membership status of a party state and admission of new party states to the commission, the commission should not be deemed a state agency for Eleventh Amendment purposes.

Because the state treasury remains protected from depletion without gubernatorial consent, and the commission is liable for its actions under the Compact, we see no reason for amending either the Kansas tort claims act, K.S.A. 75-6101 et seq., or the Compact.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard B. Smith
Assistant Attorney General