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May 24, 2012

ATTORNEY GENERAL OPINION NO. 2012- 16

Thomas A. Adrian
Adrian & Pankratz
301 N. Main, Suite 400
Newton, Kansas 67114

Re: Waters and Watercourses—Appropriation of Water for Beneficial Uses—
Kansas Water Appropriation Act; Unlawful Acts; Penalties; Water Well
Contractor; Duties

Waters and Watercourses—Groundwater Exploration and Protection—
Licensure of Water Well Contractors; Log of Drilling, Boring or Digging;
Duty to Obtain Permit

Synopsis: A water well contractor is not obligated under the Kansas Water
Appropriation Act or the Kansas Groundwater Exploration and Protection
Act to apply for and obtain a permit to appropriate water or operate a
public water supply system prior to commencing water well construction or
reconstruction. Cited herein: K.S.A. 82a-701; 82a-702; 82a-705; 82a-
727; 82a-728; 82a-729; 82a-730; 82a-1201; 82a-1202; 82a-1203; 82a-
1205; K.S.A. 2011 Supp. 82a-1206; K.S.A. 82a-1207; 82a-1213; K.S.A.
2011 Supp. 82a-1214; 82a-1216; K.A.R. 28-15-16; 28-30-2; 28-30-3; 28-
30-4; 28-30-5; 28-30-6; 28-30-7; 28-30-8; 28-30-10.

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Dear Mr. Adrian:

As legal counsel for the Board of Directors of Equus Beds Groundwater Management
District No. 2, you request our opinion regarding whether a water well contractor is
obligated under the Kansas Water Appropriation Act or the Kansas Groundwater
Exploration and Protection Act to apply for and obtain a permit to appropriate water or
ensure that a landowner has applied for and obtained a permit to appropriate water prior

to commencing drilling activities. For purposes of this opinion, it is presumed that the water well contractor¹ is an entity separate from the landowner and has no interest in nor will derive any benefit from the land upon which the well is drilled or upon which water obtained from the well is distributed.

Kansas Water Appropriation Act

In 1945, the Legislature enacted the Kansas Water Appropriation Act (WAA),² "provid[ing] an effective procedure for acquiring water appropriation rights."³ Under the WAA, "[a]ll water within the state of Kansas is hereby dedicated to the use of the people of the state, subject to the control and regulation of the state in the manner [prescribed in the WAA]."⁴ "[N]o water rights, except for domestic use, may be established in Kansas without complying with the statutory procedure."⁵ "No person shall have the power or authority to acquire an appropriation right to the use of water for other than domestic use without first obtaining the approval of the chief engineer [of the division of water resources of the Kansas Department of Agriculture]."⁶ K.S.A. 82a-728 provides penalties for diversion of water in excess of the maximum allowed under either a vested right or an appropriation permit.

(a) Except for the appropriation of water for the purpose of domestic use [and other designated purposes], it shall be unlawful for *any person* to *appropriate or threaten to appropriate* water from any source without first applying for and obtaining a permit to appropriate water in accordance with the provisions of chapter 7 of article 82a of the Kansas Statutes Annotated and acts amendatory thereto or, for *any person* to *violate any condition* of a vested right, appropriation right or an approved application for a permit to appropriate water *for beneficial use*. . . .

(b)(1) The violation of any provision of this section by any person is a class C misdemeanor.

(2) Each day that any such violation occurs after notice of the original violation is given by the chief engineer to any such violator by restricted mail shall constitute a separate offense.⁷

"Person" is defined in the WAA as including "a natural person, a partnership, an organization, a corporation, a municipality and any agency of the state or federal government."⁸

¹ A water well contractor is a person who constructs, reconstructs, or treats a water well. K.S.A. 82a-1203(g).

² K.S.A. 82a-701 *et seq.* See K.S.A. 82a-730. The provisions of K.S.A. 82a-727 and 82a-728 are part of and supplemental to the Kansas Water Appropriation Act. K.S.A. 82a-729.

³ *F. Arthur Stone & Sons v. Gibson*, 230 Kan. 224, 229-30 (1981).

⁴ K.S.A. 82a-702.

⁵ *F. Arthur Stone*, 230 Kan. at 230.

⁶ K.S.A. 82a-705. See K.S.A. 82a-701(b).

⁷ K.S.A. 82a-728 (emphasis added).

In determining whether a water well contractor is required to obtain a permit before commencing drilling activities, a review of the applicable rules of statutory construction is necessary.

When courts are called upon to interpret statutes, the fundamental rule governing our interpretation is that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. For this reason, when the language of a statute is plain and unambiguous, an appellate court is bound to implement the expressed intent.⁹

"When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it."¹⁰ In addition:

As a general rule, criminal statutes must be strictly construed in favor of the accused. Any reasonable doubt as to the meaning of the statute is decided in favor of the accused. Nevertheless, this rule of strict construction is subordinate to the rule that judicial interpretation must be reasonable and sensible to achieve legislative design and intent.¹¹

Under the plain language of K.S.A. 82a-728, it is the duty of the person who is attempting to appropriate or threatening to appropriate water to obtain the permit. "Appropriate" is "[t]o make a thing one's own; to make a thing the subject of property; to exercise dominion over an object to the extent, and for the purpose, of making it subserve one's own proper use or pleasure."¹²

An appropriation of water flowing on the public domain consists in the capture, impounding, or diversion of it from its natural course or channel and its actual application to some beneficial use private or personal to the appropriator, to the entire exclusion (or exclusion to the extent of the water appropriated) of all other persons.¹³

A water well contractor may fall within the definition of a "person" under the WAA. The well contractor, however, is not attempting to make the water his own, nor will the well contractor derive some beneficial use from the water. The clear language of the statute

⁸ K.S.A. 82a-701(a).

⁹ *Herrell v. Nat'l Beef Packing Co., LLC*, 292 Kan. 730, 745 (2011) (internal citations and quotation marks omitted).

¹⁰ *State v. Comprehensive Health of Planned Parenthood*, 291 Kan. 322, 357 (2010).

¹¹ *State v. Foster*, 46 Kan.App.2d 233, 238 (2011) (internal citations omitted). See *State v. Cash*, 293 Kan. 326, 328 (2011).

¹² Black's Law Dictionary 93 (5th Ed., 1979).

¹³ *Id.*

requires the potential appropriator¹⁴ obtain the permit from the chief engineer. The WAA contains no language that confers upon a party who is not actually appropriating or threatening to appropriate a duty to ensure that such a permit is in place prior to commencing drilling activities. Strictly construing the provisions precludes extending this obligation to a well contractor who has no interest in nor will derive any benefit from the land upon which the well is drilled or upon which water obtained from the well will be distributed. The well contractor, therefore, is not required under K.S.A. 82a-728(a) to apply for and obtain a permit to appropriate water or ensure that such a permit is in place before drilling. The responsibility for applying for and obtaining the permit falls upon the party who is attempting to appropriate water for his own use, presumptively the landowner.

Kansas Groundwater Exploration and Protection Act

In order to protect the health and general welfare of the citizens of the State and to protect groundwater resources from waste and potential pollution, the Kansas Groundwater Exploration and Protection Act (GEPA):¹⁵ requires that water well contractors be licensed; provides for the establishment of regulations and standards for well construction, reconstruction, treatment, and plugging; requires that water well contractors keep and transmit to the State, upon request, a log of certain data; and provides penalties, both criminal and civil, for violations.¹⁶ The Legislature has conferred upon the Secretary of Health and Environment: responsibility for administering the GEPA and authority to inspect the construction, reconstruction, treatment or plugging of water wells;¹⁷ authority to establish standards for plugging holes;¹⁸ authority to "investigate by examination or otherwise, the qualifications of all applicants for initial licenses as water well contractors;"¹⁹ and authority to provide for continuing educational requirements and renewal of licenses.²⁰ A person seeking licensure as a water well contractor must demonstrate "[f]amiliarity with Kansas water laws, sanitary standards for water well drilling and construction of water wells and rules and regulations relating to water well construction, reconstruction, treatment and plugging as adopted by the secretary."²¹

Any person who shall willfully violate any lawful rule or regulation of the secretary relating to water well contracting, or who shall engage in the business of constructing, reconstructing or treating water wells without first having obtained a license as in this act required [sic], or who shall

¹⁴ "Appropriator" is defined as "a person who has an appropriation right that has been perfected in conformity with article 7 of chapter 82a of the Kansas Statutes Annotated and acts amendatory thereof and supplemental thereto." K.S.A. 82a-701(e).

¹⁵ K.S.A. 82a-1201 *et seq.*

¹⁶ *Peterson v. Kansas Dept. of Health & Environ.*, 31 Kan.App.2d 13, 14 (2002). See K.S.A. 82a-1202; 82a-1205; K.S.A. 2011 Supp. 82a-1206; 82a-1214; 82a-1216.

¹⁷ K.S.A. 82a-1205(a), (c).

¹⁸ K.S.A. 82a-1213.

¹⁹ K.S.A. 82a-1207.

²⁰ K.S.A. 82a-1205(e).

²¹ K.S.A. 82a-1207(a).

knowingly violate any provisions of this act, shall be guilty of a class B misdemeanor and subject to penalties therefor as provided by law. In addition the secretary of health and environment is hereby authorized to apply to the district court for enforcement of this act or rules and regulations adopted under this act in accordance with the provisions of the Kansas judicial review act.²²

In addition, "[a]ny person who violates any provision of the [GEPA], any rules and regulations adopted thereunder or any order issued by the secretary thereunder" is subject to a civil penalty of not to exceed \$5,000 for each violation,²³ regardless whether such violation is willful.²⁴

Regulations adopted by the Secretary under authority of the GEPA are located at K.A.R. 28-30-2 through 28-30-10. K.A.R. 28-30-3 sets licensure fees and provides that, to be eligible for a water well contractor's license, an applicant must pass an examination conducted by the Kansas Department of Health and Environment (KDHE) or be licensed in another state and meet the minimum requirements for licensing as prescribed in K.S.A. 82a-1207. Other regulations address when reports are to be submitted by a water well contractor²⁵ and provide standards for the location of wells²⁶ and grouting, sealing, casing,²⁷ disinfecting,²⁸ and plugging of wells.²⁹ K.A.R. 28-30-5 states that "[a]ll activities involving public water supply wells and wells located in reservoir sanitation zones shall conform to existing statutes, and rules and regulations, of [KDHE], including K.A.R. 28-10-100,³⁰ 28-10-101,³¹ and 28-15-16."³²

The plain language of the GEPA requires that a water well contractor demonstrate "familiarity with Kansas water laws," abide by any lawful rule or regulation of the Secretary of KDHE relating to water well contracting, and obtain the proper license prior to engaging in the business of constructing, reconstructing, or treating water wells. Under the WAA, the obligation to obtain a permit from the chief engineer of the Division of Water Resources of the Kansas Department of Agriculture to appropriate water is placed upon the party who is attempting to appropriate water. K.A.R. 28-15-16 obligates the person who is operating a public water supply system to have a permit issued by the Secretary of KDHE. Because failure to abide by the GEPA subjects the violator to criminal penalties, its provisions should be strictly construed in favor of the accused. The language of the GEPA is not sufficiently clear to shift to a water well

²² K.S.A. 2011 Supp. 82a-1214.

²³ K.S.A. 2011 Supp. 82a-1216(a).

²⁴ *Peterson*, 31 Kan.App.2d at 19-20.

²⁵ K.A.R. 28-30-4.

²⁶ K.A.R. 28-30-4; 28-30-8.

²⁷ K.A.R. 28-30-6.

²⁸ K.A.R. 28-30-10.

²⁹ K.A.R. 28-30-7.

³⁰ Revoked March 23, 2001.

³¹ Revoked March 23, 2001.

³² K.A.R. 28-15-16(a) provides that "[e]ach person who operates a public water supply system shall be required to have a permit issued by the secretary [of health and environment]."

contractor the obligation to obtain a permit to appropriate water or operate a public water supply system. Likewise, the GEPA does not include any language that confers upon another party a duty to ensure that a permit to appropriate water is in place prior to constructing, reconstructing, or treating water wells. The duty to obtain the permit remains with the person who is attempting to appropriate water or operate a public water supply system.

Sincerely,

Derek Schmidt
Kansas Attorney General

Richard D. Smith
Assistant Attorney General

DS:AA:RDS: