



STATE OF KANSAS

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February 14, 1980

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ATTORNEY GENERAL OPINION NO. 80- 45

Francine Neubauer, Executive Director
Kansas Water Resources Board
503 Kansas Avenue, Suite 303
Topeka, Kansas 66603

Re: State Water Resources Board--Powers--
Operation of Projects; Incurring of
Debt and Repayment of Loans

Synopsis: 1) Under the provisions of K.S.A.
74-2609(4) and (5), the State Water
Resources Board may enter into
contracts which involve the opera-
tion and maintenance of projects
only if such projects are connected
with Middle Creek Watershed District
No. 50. The legislature has not
granted the Board power to contract
concerning any additional projects.

2) While the Board may enter into
contracts with the Federal govern-
ment for the storage of water which
is to be used in future years, pur-
suant to K.S.A. 1979 Supp. 82a-934,
such contracts are binding only to
the extent that future appropriations
are made in support thereof. The
Board is prevented by statute from
giving any further assurances regard-
ing repayment. See K.S.A. 1979 Supp.
46-155 and K.S.A. 75-3025.

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Dear Ms. Neubauer:

As executive Director of the Kansas Water Resources Board, you have requested the opinion of this office concerning the powers of the board in two different areas: 1) the operation and maintenance of water projects, and 2) the ability of the board to borrow money and repay loans. You inform us that such clarifications of the board's authority is necessary in order to work with the Farmers Home Administration (FmHA), which has expressed doubts concerning the board's ability to undertake works of improvement in watershed districts and to pay the local share of the costs.

The Federal act involved in this inquiry is the Watershed Protection and Flood Prevention Act, 16 U.S.C.A. §§1001 et seq. The provisions of that act concern measures which may be taken jointly by the United States Secretary of Agriculture and a "local organization," which is defined by 16 U.S.C.A. §1002 as being

"any State, political subdivision thereof, soil or water conservation district, flood prevention or control district, or combinations thereof, or any other agency having authority under State law to carry out, maintain and operate the works of improvement". . . .
(Emphasis added.)

In addition to possessing this kind of authority, a local organization also is required by 16 U.S.C.A. §1004 to meet several conditions. Those of concern here involve the acquisition of necessary land and easements for the project, and the assumption of a share of the costs of the project. Each will be addressed below.

The first condition is contained in 16 U.S.C.A. §1004(1), and requires that a local organization has the power to "acquire" the land, easements or rights-of-way as will be needed in connection with the works of improvement. The local organization also is responsible for making arrangements concerning the operation and maintenance of the facility. 16 U.S.C.A. §1004(3). Under Kansas law, does the board have such power, or must it, as suggested by the FmHA, cooperate with a local unit of government in the creation of such projects?

In our opinion an answer, albeit a qualified one, is provided by K.S.A. 74-2609. That statute sets forth the powers of the board, as opposed to its duties, which are covered in K.S.A. 74-2608. Among the specific grants of authority provided by the legislature to the board are those found in subsections (4) and (5), where the board is empowered to:

"(4) For the purpose of implementing the watershed program in Middle Creek watershed district No. 50 as designated under the provisions of K.S.A. 82a-939, purchase, hold, sell, and convey real and personal property, and execute such contracts as the board may deem necessary or convenient to enable it to carry out properly the purposes of article 9 of chapter 82a of the Kansas Statutes Annotated, and acts amendatory thereof or supplemental thereto, and such other duties it may have as prescribed by law within such watershed district."

"(5) For the purpose of implementing the watershed program in Middle Creek watershed district No. 50 as designated under the provisions of K.S.A. 82a-939, acquire by purchase, lease, agreement, or condemnation or accept donations, bequests, devises, or gifts of any and all water rights, lands, easements, rights-of-way, or other real property. and personal property and moneys, necessary or convenient to the exercise of powers, rights, and duties now or hereafter conferred upon it by law within such watershed district. Title to all property acquired by the board shall be taken in the name of the board on behalf of the state. The power of condemnation herein granted shall be exercised in the manner provided in K.S.A. 26-501 to 26-516, inclusive, and acts amendatory thereof or supplemental thereto. Upon the request of the board, the attorney general shall proceed to acquire for it by condemnation the property that it designates."
(Emphasis added.)

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Several things may be noted from the above. First, the Legislature has clearly granted the board the power to purchase, hold and convey both real and personal property, to acquire necessary water rights, easements and rights-of-way, and to "execute such contracts" as may be deemed necessary to carry out the purposes of K.S.A. 82a-901 et seq. (i.e., the State Water Plan). These powers would appear to meet the requirements of the Federal act, in that the board may actually execute contracts for the purchase of property and rights and hold the property in its own name. Second, the broader grant of power given by subsection (4) (regarding "such contracts as the board may deem necessary or convenient") could include contracts for operation and maintenance since the board is given such control over watershed projects by the State Water Plan. K.S.A. 82a-938.

However, it must be noted that the grant of these various powers is conditioned upon their exercise only "for the purpose of implementing the watershed program in Middle Creek Watershed district No. 50." The presence of such qualifying language is clear evidence of a legislative intent to restrict the use of these powers by the board to only this particular project. While we see nothing in the statute which would proscribe other districts or projects from being accorded similar treatment in the future, at the present time only the one watershed district has been so singled out. While we are not informed whether your request dealt with this district or the powers of the board in general, the statutory meaning is clear, leaving the authority of the board in other projects limited to that found in subsections (1) through (3) of K.S.A. 74-2609. Accordingly, the board does not, by implication, have the power at this time to acquire real property or to make contracts for the maintenance or operation of water-related projects other than those connected with Middle Creek Watershed District No. 50.

Your second inquiry deals with the authority of the board to take on financial obligations in connection with water-related projects, i.e., may it incur and then repay loans? You indicate that the FMHA has taken the preliminary position that the board is so limited by statute as to preclude it from receiving loans and advances from the United States Secretary of Agriculture under the Watershed Prevention and Flood Prevention Act. However, they have indicated a willingness to consider an opinion of this office if such reaches a contrary result, hence your request.

The making of loans or advances under the Watershed Protection and Flood Prevention Act is authorized by 16 U.S.C.A. §1004, wherein a "local organization" must be able to give "adequate assurances" that the Secretary of Agriculture will be reimbursed for his payment of the cost of water supply storage for anticipated future demands. Such payment may be extended over the life of the reservoir, but in no case longer than 50 years, and need not be started until use of the additional water supply is actually begun. The question then becomes one of whether the board is statutorily able to give such "adequate assurances."

As noted above, the board is given broad powers under Kansas statutes to take actions regarding water projects. In addition to those powers set out at K.S.A. 74-2609, K.S.A. 1979 Supp. 82a-934 specifies the power of the board to contract with the Federal government, stating in part:

"The Kansas water resources board, on behalf of the state, shall 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 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.)

It is the above underscored language of K.S.A. 1979 Supp. 82a-934 which is of concern to the FmHA. Specifically, it is felt that loans cannot be justified where the repayment capability of the applicant (i.e., the board) is dependent upon the Legislature continuing to make yearly appropriations. While they are technically correct on this point, it is our opinion that a refusal to make loans at all would be unfair and unwarranted.

The language contained in K.S.A. 1979 Supp. 82a-934 is by no means unique to the Water Resources Board. K.S.A. 1979 Supp. 46-155 limits all items of appropriation for capital improvements to three fiscal years above and beyond the current one. No exception is made there for water projects, despite the fact that the type of agreements contemplated with the FmHA could be for terms as long as 50 years. Additionally, K.S.A. 75-3025 expressly prohibits any officer or agent of the state from making any contracts for longer than is authorized by statute, i.e., K.S.A. 1979 Supp. 46-155.

In order to deal with these restrictions, language has been developed for state contracts to the effect that the contract's continuation for more than the statutory period of time is contingent upon the appropriation by the Legislature of the necessary moneys. The need for such language here has been obviated by K.S.A. 1979 Supp. 82a-934, which has the same effect. In either event, any contract entered into by the board has behind it the resources of the State of Kansas, a fiscally-sound entity with an annual budget of well over two billion dollars.

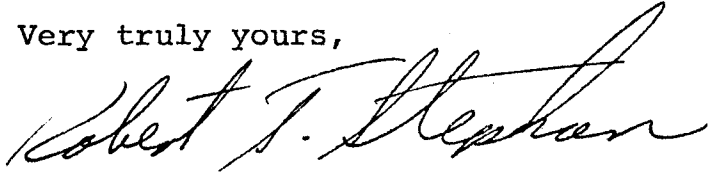
We note particularly that the presence of such a restriction has been no problem for the Corps of Engineers, who have entered into a number of contracts with the State (represented by the board) for precisely the same kind of long-term water storage that is envisaged here. Indeed, when one agency of the Federal government can approve a contract with the board for repayment of almost fifteen million dollars over a period of fifty years (as was done in the case of Clinton Reservoir), it is difficult to understand why another such agency balks at contracts which would involve far smaller projects, for less money and a shorter period of time. The "assurances" given by the board on behalf of the State in the one instance are no less binding than in the second, and it would be unfortunate if the FmHA were to adopt its present position as permanent policy, especially in light of 16 U.S.C.A. §1001, in which Congress expressed its desire that the Federal government "cooperate" with states for the common goals of preserving and protecting the nation's resources. If it should do so, the only relief available would be through the Congress, insofar as Kansas law on this point is clear and of long-standing.

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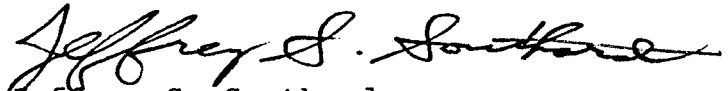
In conclusion, under the provisions of K.S.A. 74-2609(4) and (5), the State Water Resources Board may enter into contracts which involve the operation and maintenance of projects only if such projects are connected with Middle Creek Watershed District No. 50. While the legislature could grant the Board power to contract concerning any additional project, such authority does not appear in the statutes at this time.

While the Board may enter into contracts with the Federal government for the storage of water which is to be used in future years, pursuant to K.S.A. 1979 Supp. 82a-934, such contracts are binding only to the extent that future appropriations are made in support thereof. The Board is prevented by statute from giving any further assurances regarding repayment. See K.S.A. 1979 Supp. 46-155 and K.S.A. 75-3025.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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