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February 27, 1980

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ATTORNEY GENERAL OPINION NO. 80-55

The Honorable Robert H. Miller
State Representative, Eightieth District
115-S, State Capitol
Topeka, Kansas 66612

Re: State Departments; Public Officers, Employees--
Public Television--Works of Internal Improve-
ment Under Article 11, Section 9

Synopsis: The appropriation of funds for noncommercial
public television pursuant to the provisions
of K.S.A. 75-4901 et seq., as amended, does
not contravene the requirements of Article 11,
Section 9 of the Constitution of the State of
Kansas relating to works of internal improvement.

* * *

Dear Representative Miller:

You request the opinion of this office regarding the
constitutionality of legislative appropriations to public
television stations in Kansas pursuant to K.S.A. 75-4901
et seq., as amended. You inquire whether state funds,
including federal grants appropriated by the legislature,
may be used for construction, equipping and operation of
public television stations across the state. Your question
is whether the funding of such stations makes the state a
party to a work of internal improvement, an activity pro-
hibited by Article 11, Section 9 of the Kansas Constitution.
That section provides:

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"The state shall never be a party in carrying on any work of internal improvement except that: (1) It may adopt, construct, reconstruct and maintain a state system of highways, but no general property tax shall ever be laid nor general obligation bonds issued by the state for such highways; (2) it may be a party to flood control works and works for the conservation or development of water resources."

As originally adopted, the prohibition against internal improvements was absolute, with no exceptions for highways or water control and conservation. The Kansas Supreme Court spoke of the meaning of this prohibition thus in Leavenworth County v. Miller, 7 Kan. 479 (1871):

"The state as a state is absolutely prohibited from engaging in any works of internal improvement. We will concede that this prohibition does not extend to the building of a state-house, penitentiary, state university, and such other public improvements as are used exclusively by and for the State, as a sovereign corporation: but it does extend to every other species of public improvement. It certainly extends to the construction of every species of public improvement which is used, or may be used, by the public generally . . . such as public roads, bridges, etc. . . . [I]t is prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharfs, levees, drains, waterworks, gas-works, or the like" 7 Kan. at 493.

This provision also has been interpreted in Kansas to preclude state participation in railroads, Leavenworth Co. v. Miller, 7 Kan. 298 (1871); oil refineries, State ex rel. Coleman v. Kelly, 71 Kan. 811 (1905); drainage district sand plant, State ex rel. Mellott v. Kaw Valley Drainage District, 126 Kan. 43 (1928); moving picture and road shows, State ex rel. Smith v. City of Hiawatha, 127 Kan. 183 (1928); renovation of private property used for commercial enterprise, Attorney General Opinion No. 79-27; reclamation of abandoned mined land, Attorney General Opinion No. 78-320; municipal and county airports, Attorney General Opinion No. 76-296; residential housing, Attorney General Opinion No. 75-433; sewer construction, Attorney General Opinion No. 75-315.

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The Kansas courts have recognized that our constitutional limitation was taken from the state constitution of Wisconsin and the court has on occasion cited extra-jurisdictional cases for their interpretive value in Kansas cases. For example, in State ex rel. Boynton v. Atherton, 139 Kan. 197 (1934), the Kansas Supreme Court quotes State ex rel. Jones v. Froelich, 115 Wis. 32, 91 N.W. 115, 117 (1902) as follows:

"'In other cases the expression 'works of internal improvement' contained in constitutional prohibitions similar to ours, has been declared to include enterprises as follows: Dredging sand flats from a river (Ryerson v. Utley, 16 Mich. 269) deepening and straightening river (Anderson v. Hill, 54 Mich. 477, 20 N.W. 549); constructing or operating street railways (Attorney-general v. Pingree, 120 Mich. 550, 79 N.W. 814, 46 L.R.A. 407); telephone or telegraph lines (Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. R. Co., 76 Minn. 334, 345, 79 N.W. 315); irrigation reservoirs (In re Senate Resolution Relating to Appropriation of Moneys Belonging to Internal Impr. Fund, 12 Colo. 287, 21 Pac. 484); roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, gas works (obiter, Leavenworth Co. v. Miller, 7 Kan. 479, 493, 12 Am. Rep. 425); levees (Alcorn v. Hamer, 38 Miss. 652); improvement of Fox river (Sloan v. State, 51 Wis. 623, 632, 8 N.W. 393); levees and drains (State v. Hastings, 11 Wis. 448, 453).'" Id. at 209.

In Attorney General Opinion No. 79-27 we summarized the apparent purpose of Article 11, Section 9 as the defense of "the state treasury from insolvency, 'logrolling' and involvement in commercial enterprise." Yet, as frequently noted in Kansas cases, not all activities of the state constitute works of internal improvement prohibited by the constitution.

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The Kansas Supreme Court in State ex rel. Boynton v. State Highway Commission, 138 Kan. 913, 919 (1934), observed thus:

"The term 'public improvements,' as used in section 5 [now contained in article 11, section 6], meant public buildings which the state should need in carrying on its functions, such as the statehouse, state penal, educational and eleemosynary institutions (Wyandotte Constitutional Convention, p. 327), while the term 'internal improvements,' used in section 8 [now contained in article 11, section 9], applied to turnpikes, canals and the like."

Thus, certain projects may be judicially labeled as "public improvements" not proscribed by Article 11, Section 9. For example, student dormitories at state institutions of higher education are "public improvements," and not "internal improvements." State ex rel. Fatzer v. Board of Regents, 167 Kan. 587 (1949).

To apply the reasoning of the above-cited cases to activities of the Kansas Public Television Board, we must ascertain the nature of the activities of public television and compare it with those evils sought to be avoided by the constitutional proscription.

K.S.A. 75-4905 declares the findings and policies of the legislature regarding noncommercial television stating:

"It is hereby found and declared that it is in the public interest of the state to encourage and develop the growth of noncommercial public television broadcasting, including the use of the medium for instructional purposes; that the expansion and development of noncommercial public television broadcasting and its programming diversity depend on freedom, imagination and initiative; that it furthers the general welfare to encourage such programming which will be responsive to the interests of people throughout the state and which will constitute an expression of diversity

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and excellence; that it is necessary and appropriate for the state government to complement, assist and support a policy that will most effectively make noncommercial public television service available to the people of the state." (Emphasis added.)

The act establishes a state board to administer the act and to provide, among other things, coordination and information relating to public television broadcasting among state agencies, institutions of public education and the general public. Likewise, the board may establish statewide compatibility standards and coordination with federal agencies. To the extent that the state supervises, coordinates, regulates or encourages such activities as public television, there is little question that such state participation is outside the scope of the prohibition against internal improvements. See State ex rel. Hopkins v. Raub, 106 Kan. 196 (1920). However, the legislature has also authorized the board, pursuant to K.S.A. 1979 Supp. 75-4907, to:

"determine those educational agencies or institutions, nonprofit corporations, and public television stations which qualify for state financial assistance provided for by this act; . . .

"allocate and distribute state funds to noncommercial public television stations serving Kansas to sustain the operation of such stations; . . .

"receive and administer aid or contributions from any source, public or private, of money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made; . . .

"make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act." (Emphasis added.)

In addition, K.S.A. 1979 Supp. 75-4910 provides:

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"(a) Any qualified educational agency or institution and any qualified nonprofit corporation organized for the purpose of establishing a public television station, as determined by the board, which is located in an area of the state presently unserved by existing public television stations, may be granted state financial assistance, to the extent appropriations are available therefor, for any of the following purposes:

"(1) Planning the activation of public television channels assigned by the federal communications commission in said unserved areas. Moneys granted under authority of this paragraph (1) shall be used to make community ascertainment studies, to update prior engineering studies, to complete other necessary preparations prior to filing, and to file with the federal communications commission for a television station construction permit, and to make application to the appropriate agencies of the federal government to obtain grants for the acquisition and installation of broadcasting equipment.

"(2) Providing for the local share of the cost of capital construction and equipment necessary to obtain federal funds for each new public television station planned.

"(3) Assisting in the initial costs of capital construction and equipment for which federal funds are not available. Said moneys may be used for the construction of buildings, land leases, furniture and fixtures, spare parts for broadcast equipment, and other such items.

"(b) Any qualified public television station, as determined by the board, may be granted state financial assistance, to the extent appropriations are available therefor, for any of the following purposes:

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"(1) Assisting in the costs incurred for the acquisition of new equipment or the modification of existing equipment or in obtaining matching federal funds for such purposes.

"(2) Assisting in annual operating costs of such stations.

"(3) Providing for station interconnection facilities and services." (Emphasis added.)

The statute contemplates two separate schemes of funding. First, funds for equipment, operational expenses and capital expenditures (for the building of stations) are permitted for new stations, and second, existing stations may receive operational and equipment funds but may not receive state moneys for capital improvements.

Since the mid-seventies the Kansas Public Television Board has provided funds for operations and equipment for existing stations in Topeka, Wichita and Kansas City. None of these stations are directly associated with state-supported educational institutions. State moneys have also been expended to plan additional facilities on the campus of Ft. Hays State University and the campus of Garden City Community Junior College. Other sites are also contemplated in the statewide plan developed by the board. The plan calls for these additional stations to be placed on the campuses of state universities, community junior colleges and an area vocational technical school. Consistent with the statutory framework, these plans call for the expenditure of state funds for initial construction, equipment and operations of these new stations.

The Attorney General has opined on previous occasions that the appropriation of the state legislature to any project legally classed as a work of internal improvement makes the state a party to such improvement. See Attorney General Opinion Nos. 75-315; 76-296; 77-341 and 79-27. Accord, State ex rel. Brewster v. Knapp, 99 Kan. 852 (1917). Thus, we are constrained to declare that the state is a party to activities of local public television stations receiving state aid.

Therefore, the remaining questions are: First, whether the construction, equipping and operation of a new noncommercial public television station in connection with state-supported educational institutions is a work of internal improvement, and secondly, is the equipping and operation of an existing non-profit, noncommercial public television station a work of internal improvement.

It is evident that the purpose of the Public Television statute is to encourage educational and intellectual development of Kansas residents. And although many of the programs available on noncommercial television are indeed entertaining, it is the emphasis on the educational format which separates public television from commercial broadcasting. Taxpayer support of education through state appropriation is constitutionally recognized in Kansas. Article 6, Section 1 of the Constitution of the State of Kansas provides:

"The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law."

Thus in construing the constitutional mandates of Article 11, Section 9, we must take into account the broad powers granted the legislature by the constitution in the area of education. These constitutional provisions are of equal weight and must be construed in light of each other. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964). In State ex rel. Fatzer v. Board of Regents, supra, prior to the amendment of Article 6, Section 1, the Court said:

"We have already indicated student dormitories long have been and now are regarded as devoted to the educational purposes of a college. Whether they are necessary, or desirable, in the promotion of an educational program and the advancement of the public welfare are matters for legislative determination. Having determined they are necessary, or desirable, for such a purpose they become a part of the 'public improvements' of the educational institutions. We think no one would seriously contend buildings such as a gymnasium, auditorium, field house, student union building or a student hospital located on the campus and used by the student body do not constitute public buildings, 'public improvements,' or that they are not a recognized part of modern state educational institutions." Id. at 599.

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In view of the foregoing and the presumption of constitutionality to which all legislative acts are entitled [NEA-Fort Scott v. U.S.D. No. 234, 225 Kan. 607, 608 (1979)], we must conclude that public television stations built on the campus of state-supported institutions, paid for with funds appropriated to the university, community junior college or other school, is a permissible public improvement and not an internal improvement prohibited by Article 11, Section 9. We find no support for the proposition that educational and intellectual benefits of taxpayer-supported programs should be limited to only students formally enrolled at institutions of higher learning. Such a notion is a provincial, antiquated and elitist view unsupportable in a modern democracy having ready access to the marvels of the technological classroom. Indeed, the language of Article 6, Section 1 referring to "related activities" suggests that something beyond the construction and operation of public schools and educational institutions is contemplated.

We note also that some question could be raised that even though the public television station is built in connection with a state-supported educational institution, in some cases the operating authority and federal licensee may be a non-profit corporation which may or may not be subject to control by the institution. We find little for concern in this inquiry in light of the decision in State ex rel. Fatzer v. Board of Regents, supra. In that case an act authorizing the issuance of revenue bonds by the Kansas Board of Regents for the construction of student dormitories on the campuses of state colleges and universities, was held to be constitutional. The Court stated in the syllabus:

"Student dormitories, contemplated by chapter 435 of the Laws 1947, and operated on a nonprofit basis, constitute public buildings or 'public improvements' of the educational institutions of which they become a part and are not 'internal improvements' within the contemplated meaning of our constitution." (Emphasis added.)

In addition, the nonprofit character of public television licensees calls attention to the noncommercial nature of the activities of such stations and adds to the view just expressed that such activities are not "internal improvements." As previously noted, one of the purposes of the constitutional prohibitions against state participation in works of internal improvement was the protection of the private commercial sector. Even though noncommercial educational television programming may compete with commercial stations for the viewing audience,

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such programming does not compete for the available advertising dollars which sustain the commercial stations. In short, the protections afforded private enterprise by Article 11, Section 9 are not offended by state participation in non-profit, noncommercial educational activities.

We turn now to the second question, namely, whether operational and equipment expenses for a nonprofit, noncommercial public television station may be paid from funds granted by the state without contravention of Article 11, Section 9. Again, we conclude that such an expenditure of public funds is not unconstitutional as a prohibited work of internal improvement. We base this conclusion on the broad powers given the Kansas legislature pursuant to Article 6, Section 1 as previously discussed and further, in reliance upon the reasoning of the Wisconsin Supreme Court in State ex rel. Warren v. Reuter, 44 Wis. 2d. 201, 170 N.W.2d 790 (1969).

As previously noted, the Kansas constitutional prohibition regarding works of internal improvement was founded on the Wisconsin constitution. In Reuter, supra, the Court held that the state legislature may provide public money to a "private nonprofit medical school for medical education, teaching and research purposes" without violating the internal improvements provision of the Wisconsin Constitution. The Court, although suggesting that capital improvements to a private nonprofit medical school might not violate the constitutional restraints upon the state government regarding works of internal improvement, avoided that issue stating:

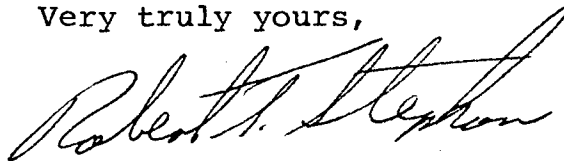
"We need not now decide whether the construction of a building for Marquette School of Medicine is a work of internal improvement, because all that is involved here is an appropriation for operating expenses. The state funds are appropriated for medical education, teaching, and research; and promotion, research and educational activities we have held are not internal improvements. State ex rel. Wisconsin Dev. Authority v. Dammann, supra, 228 Wis. p. 191, 280 N.W. P. 698." Id. at 800.

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We concur in the reasoning of the Wisconsin Supreme Court and believe the Kansas courts would do likewise.

In summary, it is our opinion that K.S.A. 75-4901 et seq., as amended, and appropriations made pursuant thereto, for grants to support the construction, equipping and operation of new noncommercial public television stations in connection with various state-supported educational institutions does not violate the Kansas Constitution, Article 11, Section 9, which prohibits the state from being a party to any work of internal improvement. Likewise, grants to nonprofit, non-commercial stations for the equipping and operation of such public educational stations, pursuant to K.S.A. 1979 Supp. 75-4910(b), are not violative of Article 11, Section 9, as such activities are not works of internal improvement.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert T. Stephan", written in a cursive style.

ROBERT T. STEPHAN
Attorney General of Kansas

A handwritten signature in dark ink, appearing to read "Bradley J. Smoot", written in a cursive style.

Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk