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June 11, 1980

ATTORNEY GENERAL OPINION NO. 80-130

Mr. Fred Warders
Assistant Director
Kansas Fish and Game Commission
Box 54A, Rural Route #2
Pratt, Kansas 67124

Re: Waters and Watercourses--Appropriation of Water for Beneficial Use--Application for Permits; Duties of Chief Engineer as to Applications

Synopsis: Pursuant to K.S.A. 74-3308, it is appropriate for the Kansas Fish and Game Commission to examine applications for water appropriation permits and other documents filed with the Division of Water Resources of the Kansas State Board of Agriculture, and the Commission may comment upon and make recommendations relative thereto, where the issuance of such permits will have a negative impact upon the wildlife resources of the state. However, the ultimate authority to approve or deny applications for water appropriation permits rests with the chief engineer of the Division of Water Resources of the Kansas State Board of Agriculture, and the approval of the Kansas Fish and Game Commission is not required as a prerequisite to the issuance of such permits, nor may the Commission intercede to prevent the issuance of permits. Cited herein: K.S.A. 74-3308, K.S.A. 82a-701, 82a-709, and 82a-711.

* * *

Dear Mr. Warders:

You request our opinion as to the authority of the Kansas Fish and Game Commission to become involved in the process of granting water appropriation rights and permits pursuant to the Kansas Water Appropriation Act, K.S.A. 82a-701 et seq. Specifically, you pose the following questions:

> "Does K.S.A. 74-3308 give the Fish and Game Commission authority to demand review of all water right and stream modification applications for their potential impacts on fish and wildlife resources?
>
> "Further, if the review process finds that granting further water right appropriations or specific stream alteration permits, would have negative impacts on fish and wildlife resources, does K.S.A. 74-3308 allow the Commission to intercede on behalf of the public's vested interest in those wildlife resources to prevent issuance of permits?
>
> "Still further, if the Division of Water Resources, in reviewing water right applications, cannot prove that there is sufficient water available without adversely affecting other prior rights and wildlife resources, can the Commission intercede?"

K.S.A. 74-3308, which statute was enacted in 1933 [L.1933, ch. 108, §1 (Special Session)] and was last amended in 1935 [L.1935, ch. 268, §1] provides as follows:

> "The state forestry, fish and game commission is hereby designated as the agency of the state of Kansas (for the purpose of making application for and procuring aid from the federal government in all matters pertaining to the development of natural resources insofar as it pertains to the control and utilization of waters, prevention of soil erosion, and flood control) and is authorized and empowered to act for and represent the state of Kansas in making application for and securing civilian conservation corps camps, transient unemployment camps and labor, and such other labor, aid and projects as may

> be offered, designated, required or made available by the federal government.
>
> And further, the forestry, fish and game commission shall have authority, control and jurisdiction over all matters pertaining to the development of conservation of the natural resources of the state, insofar as the same pertains to forests, woodlands, public lands, submarginal lands, prevention of soil erosion, game reserves, nesting grounds, and the control and utilization of waters, including all lakes, streams, reservoirs and dams; and further, the forestry, fish and game commission shall have charge of all funds which may be procured for the purposes herein specified and shall have charge of all projects constructed therewith: Provided, That nothing in this act shall prohibit any political subdivision of the state of Kansas now qualified to obtain loans and/or grants from the federal government from making applications for and receiving such loans and/or grants: Provided further, That nothing in this act shall prohibit any political subdivision of the state of Kansas or private corporation from having full control of any lake now constructed and owned by them." (Emphasis added.)

In 1945, the Legislature enacted the Kansas Water Appropriation Act, K.S.A. 82a-701 et seq. Said Act provides, generally, for the establishment of the "appropriation doctrine" in Kansas, Williams v. City of Wichita, 190 Kan. 317, 333 (1962), and grants broad regulatory authority over water appropriation to the Chief Engineer of the Division of Water Resources of the Kansas State Board of Agriculture. K.S.A. 82a-709 states, in part, that "[n]o person may acquire an appropriation right to the use of waters of the state for other than domestic purposes without making application to the chief engineer for a permit to make such appropriation." (Emphasis added.) K.S.A. 82a-711 prescribes the standards to be applied by the Chief Engineer in approving or denying applications for water appropriation permits, and provides as follows:

> "If a proposed use neither will impair a use under an existing water right nor prejudicially and unreasonably affect the

> public interest, the chief engineer shall approve all applications for such use made in good faith in proper form which contemplate the utilization of water for beneficial purpose, within reasonable limitations except that the chief engineer shall not approve any application submitted on or after January 1, 1978, for the proposed use of fresh water in any case where other waters are available for such proposed use and the use thereof is technologically and economically feasible. Otherwise the chief engineer shall make an order rejecting such application or requiring its modification to conform to the public interest to the end that the highest public benefit and maximum economical development may result from the use of such water. In ascertaining whether a proposed use will prejudically and unreasonably affect the public interest, the chief engineer shall take into consideration the area, safe yield and recharge rate of the appropriate water supply, the priority of existing claims of all persons to use the water of the appropriate water supply, the amount of each such claim to use water from the appropriate water supply, and all other matters pertaining to such question. With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit. Any person considering himself or herself aggrieved by any order or decision by the chief engineer relating to that person's application for a permit to appropriate water may appeal to the district court in the manner prescribed by K.S.A. 82a-724. (Emphasis added.)

As is apparent from the above-quoted statutory provisions, the Kansas Water Appropriation Act specifically prescribes the manner in which water appropriation rights may be acquired in this state. On the other hand, K.S.A. 74-3308 was enacted prior to the establishment of the appropriation doctrine, and is a very general grant of authority over the control and utilization of water. It is well established that general and special statutes should be read together and harmonized where possible,

but to the extent of repugnancy between them the special statutes will prevail over the general unless it appears the legislature intended otherwise. Seltmann v. Board of County Commissioners, 212 Kan. 805, 810 (1973). In our judgment, the above-cited statutory provisions can be harmonized to the extent that the Fish and Game Commission should be allowed to examine applications for water appropriation permits and other documents filed with the Division of Water Resources of the Kansas State Board of Agriculture. However, since it is clear that the legislature intended that only one state agency, the Division of Water Resources of the Kansas State Board of Agriculture, should have authority to approve or deny applications for water appropriation permits, the provisions of the Kansas Water Appropriation Act must prevail over K.S.A. 74-3308 with regard to the power to grant permits. Such a construction recognizes that the Kansas Fish and Game Commission is not a party to the application process prescribed by the Kansas Water Appropriation Act, and may not appeal an order or decision of the chief engineer relating to a third person's application for a permit. See K.S.A. 82a-711, supra. Also, it should be noted that where the Kansas Fish and Game Commission is the holder of an appropriation right, it is has the right to injunctive relief, under K.S.A. 82a-716, to protect its "prior right of beneficial use as against use by an appropriator with a later priority of right."

In summary, it is our opinion that it is appropriate for the Kansas Fish and Game Commission to examine applications for water appropriation permits and other documents filed with the Division of Water Resources of the Kansas State Board of Agriculture, and the Commission may comment upon and make recommendations relative thereto, where the issuance of such permits will have a negative impact upon the wildlife resources of the state. However, the ultimate authority to approve or deny applications for water appropriation permits rests with the chief engineer of the Division of Water Resources of the Kansas State Board of Agriculture, and the approval of the Kansas Fish and Game Commission is not required as a prerequisite to the issuance of such permits, nor may the Commission intercede to prevent the issuance of permits.

Very truly yours,

Robert T. Stephan

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Attorney General of Kansas

Terrence R. Hearshman

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