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June 11, 1981

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ATTORNEY GENERAL OPINION NO. 81- 131

Francine Neubauer, Executive Director
Kansas Water Resources Board
503 Kansas, Suite 203
Topeka, Kansas 66603

Re: Waters -- State Water Plan Storage Act -- Water
Reservation Rights; Procedure for Acquiring

Synopsis: Pursuant to K.S.A. 82a-1304, the Kansas Water Resources Board is empowered to acquire water reservation rights in Kansas reservoirs by filing a written notice with the Chief Engineer of the Division of Water Resources of the State Board of Agriculture. If the Chief Engineer finds that the notice contains the information required by the statute [at subsections (a) through (f)], he must transmit his written acceptance thereof to the Board, and is without the power to modify or refuse to accept the notice at his discretion. However, he does possess the more limited power to require the notice to fully and accurately provide the information required by statute, and may require that it be modified to provide such prior to his acceptance. Cited herein: K.S.A. 1980 Supp. 82a-934, K.S.A. 82a-1302, 82a-1303, 82a-1304, 82a-1305, 1980 Senate Bill No. 194.

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Dear Ms. Neubauer:

As Executive Director of the Kansas Water Resources Board, you request our opinion on a matter involving the State Water Plan Storage Act, K.S.A. 82a-1301 et seq. Specifically, you wish us to delineate the powers of the Chief Engineer, Division of Water Resources, State Board of Agriculture, to disapprove water reservation rights filed by the Board pursuant to K.S.A. 82a-1304.

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The State Water Plan Storage Act was enacted in 1974, and declares at K.S.A. 82a-1302 that:

"Notwithstanding any other provision in the statutes of this state, water[s] in conservation storage water supply capacity in any reservoir named in the state water plan on the effective date of this act on which the state has given a commitment are hereby recognized as waters belonging to the state subject to the provisions of this act." (Emphasis added.)

In the following statute, K.S.A. 82a-1303, the Board is empowered to acquire, on behalf of the state,

"the right to divert and store the waters of all streams flowing into the conservation storage water supply capacity of the reservoirs named in the state water plan sufficient to insure a yield of water from the reservoir for beneficial use through a drought having a two percent (2%) chance of occurrence in any one year with the reservoir in operation."
(Emphasis added.)

Acquisition of such rights is covered by K.S.A. 82a-1304. Therein, the Board is directed to file with the Chief Engineer a written notice, which is to include the following:

"(a) The name of the stream on which the reservoir is located,

"(b) the reservoir on which a water reservation right is sought,

"(c) the legal description of the point of diversion for the reservoir,

"(d) the storage space in the reservoir described in terms of elevation and design capacity,

"(e) hydrologic calculations for a drought having a two percent (2%) chance of occurrence in any one year with the reservoir in operation specifying the rate of flow of streams into the reservoir and the volume of waters impounded in the reservoir that will be necessary to insure a yield of water from the reservoir for beneficial use, and

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"(f) such other information which the chief engineer may request in carrying out provisions of this act."

Once he receives such a notice, the Chief Engineer may proceed in two ways. If he finds the notice to comply with the statutory requirements, written notice of this acceptance to the Board ends the review process. However, if the notice is deficient, it may be returned for revision, with the areas of non-compliance specifically identified. Once the proper modifications are made, the notice is returned for the acceptance of the Chief Engineer, as before. K.S.A. 82a-1304.

In our opinion, the above review process does not vest the Chief Engineer with unlimited discretion over notices filed by the Board. Rather, his authority is limited to either accepting the notice as is for filing, or to specify the ways in which the information provided needs to be corrected. For example, it is our understanding that several of the filings made by the Board in the past incorrectly identified the legal description of the diversion point for the reservoir in question, and so were properly returned for modification, as provided by K.S.A. 82a-1304(c). However, the Chief Engineer would not be empowered to reduce the water right simply because, in his opinion, the amount reserved was too large. Nor would he be able to require the notice to meet the requirements of K.S.A. 82a-701 et seq. (relating to appropriation rights), in that K.S.A. 82a-1304 specifically exempts the Board from having to do so. In addition, while the Chief Engineer may require the submission of additional information [pursuant to subsection (f)], it must bear a reasonable relationship to the purposes of "this act", i.e. K.S.A. 82a-1301 et seq., and not other water-related statutes.

Having thus expressed our opinion as to the limits which exist on the Chief Engineer's powers under the State Water Plan Storage Act, we should also note that he does in fact possess the implied power to require water reservation rights filed by the Board to comply with the scope of the Act. As noted above, the Act is defined (at K.S.A. 82a-1302) so as to include those waters "in conservation storage water supply capacity in any reservoir named in the state water plan on the effective date of this act on which the state has given a commitment." (Emphasis added.)

In addition, the water rights which are obtained by the Board are defined as including "the waters of all streams flowing into the conservation storage water supply capacity" of such reservoirs. K.S.A. 82a-1303. Finally, in dealing with water

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users, the Board is limited to entering into written contracts "for withdrawal and use of waters from conservation water supply capacity committed to the state." K.S.A. 82a-1305.

Accordingly, it would appear that the Board's control is limited to those waters which are in "conservation water supply." While this term is not defined in the Act, it is our understanding that the phrase is a term of art, and is used to describe one of the components of the waters held in the conservation pool of a reservoir. For example, the Board is empowered by K.S.A. 1980 Supp. 82a-934 to

"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." (Emphasis added.)

One such contract, dated March 12, 1976, concerns the waters contained in Marion Lake, and allows the State, upon payment of a set yearly amount for 50 years, to have the right to an undivided 46.2% of the conservation pool, which is defined as being those waters between two elevations above mean sea level. Allocation of this percentage, referred to in Exhibit A attached thereto as "Conservation Storage -- Water Supply," leaves the use of the remaining 53.8% ("Conservation Storage -- Water Quality") to be retained by the United States for its own purposes. The same distinction, it may be noted, is drawn in the contracts made for several other reservoirs constructed in Kansas by the Corps of Engineers.

A further indication of the existence of this water supply/water quality distinction is provided by 1981 Senate Bill No. 194, which passed the upper house but failed in the lower. That measure would have amended K.S.A. 82a-1303 (quoted above) to expand the Board's power to include "the right to divert and store the waters of all streams flowing into the water quality supply capacity of the reservoirs named in the state water plan." (Emphasis added.) For whatever reasons, the measure was not enacted, leaving the Board's authority limited to the acquisition of rights in those waters contained in the conservation storage water supply capacity of Kansas reservoirs. As a result, if a notice submitted to the Chief Engineer described the storage space in the reservoir in

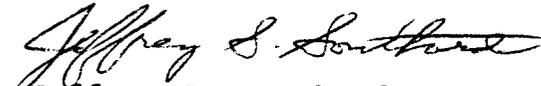
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terms of the entire conservation capacity, the latter official would be correct in requesting the notice be modified to accurately reflect the limits imposed by statute on the Board's authority.

In conclusion, pursuant to K.S.A. 82a-1304, the Kansas Water Resources Board is empowered to acquire water reservation rights in Kansas reservoirs by filing a written notice with the Chief Engineer of the Division of Water Resources of the State Board of Agriculture. If the Chief Engineer finds that the notice contains the information required by the statute [at subsections (a) through (f)], he must transmit his written acceptance thereof to the Board, and is without the power to modify or refuse to accept the notice at his discretion. However, he does possess the more limited power to require the notice to fully and accurately provide the information required by statute, and may require that it be modified to provide such prior to his acceptance.

Very truly yours,


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