



STATE OF KANSAS

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ATTORNEY GENERAL

ATTORNEY GENERAL OPINION NO. 82-77

The Honorable Jack Steineger
Senate Minority Leader
State Senator, Sixth District
State Capitol Building, Room 347-N
Topeka, Kansas 66612

Re: Finance and Taxation--Internal Improvements--
Construction of Fish Hatchery

Synopsis: The construction of a state-owned fish hatchery, pursuant to the provisions of 1982 House Bill No. 3131, would not violate Article 11, Section 9 of the Kansas Constitution. Cited herein: K.S.A. 32-101, 32-201, 32-202, 32-212, 32-214, Kan. Const., Art. 11, §9.

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Dear Senator Steineger:

You inquire regarding Article 11, Section 9 of the Kansas Constitution. Specifically, you wish to know the application of this section to 1982 House Bill No. 3131 and the expenditures of state moneys authorized thereby.

The bill proposes to authorize the Kansas Fish and Game Commission to issue and sell revenue bonds "for the purpose of paying all or part of the costs of constructing, equipping, stocking and maintaining a fish hatchery, including the acquisition of a site therefor." The bill also provides for payment of principal and interest on the bonds by authorizing the issuance and sale of "hatchery stamps" by the Commission.

Article 11, Section 9 of the Constitution of the State of Kansas provides as follows:

"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; (3) it may, whenever any work of internal improvement not authorized by (1) or (2) is once authorized by a separate bill passed by the affirmative vote of not less than two-thirds of all members then elected (or appointed) and qualified to each house, expend or distribute funds received from the federal government therefor and may participate with the federal government therein by contributing any state funds appropriated in accordance with law for such purpose in any amount not exceeding the amount received from the federal government for such improvement, but no general property tax shall ever be laid nor general obligation bonds be issued by the state therefor; and (4) it may expend funds received from the federal government for any public purpose in accordance with the federal law authorizing the same."

Prior to determining whether any of the listed exceptions, whereby the state may be a party to "works of internal improvement," is applicable, it is necessary to consider whether the construction of a fish hatchery, as proposed by 1982 House Bill No. 3131, would constitute a prohibited work of internal improvement. Although the Kansas Supreme Court has never had occasion to address this specific question, the Court has interpreted and applied the prohibition in numerous other instances which provide guidance as to its scope.

The purpose of Article 11, Section 9 of the Kansas Constitution is to defend the state treasury from insolvency, "logrolling" and involvement in commercial enterprise. See State v. Kelly, 71 Kan. 811 (1905); State ex rel., v. Board of Regents, 167 Kan. 587 (1949).

Yet, in view of Article 11, Section 6 of the Kansas Constitution, which specifically authorizes the state to contract a public

debt for "public improvements," the Kansas courts, from time to time, have been required to classify a given legislative endeavor as either a constitutional "public improvement" or an unconstitutional work of "internal improvement." In so doing, the Court has framed its distinctions around the nature of the project and its relationship to the performance of necessary government functions. In Leavenworth County v. Miller, 7 Kan. 479, 493 (1871), Chief Justice Valentine declared:

"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 statehouse, 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--by any and every private individual who may choose to use it--such as public roads, bridges, etc"

The Court then added, by way of example, that the state, not cities or counties, is "prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharfs, levees, drains, waterworks, gas works, or the like."

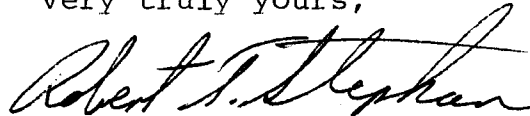
In State ex rel., v. Board of Regents, supra, the Court classified a university dormitory as a "public improvement" because of its obvious connection with a recognized governmental function, namely, education. The legislative action was held to be valid. On the other hand, in State v. Kelly, supra, the Court held that a law attempting to establish, in connection with one another, an oil refinery and a branch penitentiary, was void as an unconstitutional attempt by the state to participate in an "internal improvement."

Applying the judicial determinations herein cited to the facts of the present situation, it is our opinion that a fish hatchery is a "public improvement," rather than an "internal improvement." Conservation of fish and wildlife is an acknowledged state purpose (see K.S.A. 32-212), and, in our judgment, the operation of a fish hatchery in pursuance of such purpose is a governmental function, particularly in light of the declared policy of the state of Kansas to protect and propagate the fish of the state. See K.S.A. 32-201, 32-202, 32-212, 32-214, and 32-101. Thus,

The Honorable Jack Steineger
Page Four

we believe the enactment of 1982 House Bill No. 3131, and construction of a fish hatchery pursuant to the provisions thereof, would not violate the provisions of Article 11, Section 9 of the Kansas Constitution. This conclusion makes it unnecessary to consider the question of whether the issuance of revenue bonds makes the state a "party" to an improvement, for purposes of applying the provisions of said constitutional provision.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm