



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

September 13, 1982

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 82-201

Allyn O. Lockner
Director, Kansas Water Office
503 Kansas Avenue, Suite 303
Topeka, Kansas 66603

Re: Waters and Watercourses -- State Water Plan --
Releases of Water From Water Quality Storage;
Agreements with Federal Government

Synopsis: Under the terms of the State Water Plan, K.S.A. 82a-927 et seq., authority to enter into agreements with the federal government concerning the release of water from federally-constructed projects is placed with the Kansas Water Office. While the Division of Water Resources of the State Board of Agriculture is empowered to prevent the unauthorized diversion of waters released pursuant to such agreements, it does not possess the authority to enter into such agreements itself. Cited herein: K.S.A. 24-901, K.S.A. 1981 Supp. 74-2615, K.S.A. 82a-706b, 82a-915, 82a-932, 82a-1303, 82a-1305.

*

*

*

Dear Mr. Lockner:

As Director of the Kansas Water Office, you request our opinion on a question concerning the authority of your office to negotiate with the federal government. Specifically, you inquire regarding your ability to negotiate agreements with the Army Corps of Engineers which deal with release of water which have been held in water quality storage. As we understand your opinion request, you are concerned more with the Water Office's authority to so act, as opposed to another state agency, than with the substantive provisions that such agreements should or could contain.

Allyn O. Lockner
Page Two

At the outset, it should be noted that your query again highlights the distinction between two classes of waters held in storage in Kansas reservoirs constructed by the Corps of Engineers. These two classes of stored waters, conservation storage supply and water quality storage supply, are treated in fundamentally different ways both by Kansas statutes and agreements previously negotiated with the Corps. For example, as noted in a prior opinion of this office (No. 81-131) written to your predecessor, the Water Office may obtain rights only in waters held in conservation storage supply. K.S.A. 82a-1303, 82a-1305. The Corps reserves for its own purposes that percent of the reservoir supply designated as water quality storage, and the state has no authority to sell or allocate such quantities.

As we understand your present inquiry, however, you are now concerned with the authority of your office to negotiate agreements concerning releases of water held in quality storage. Currently, when the Corps determines that a need exists to increase stream flow levels below a reservoir, whether because of drought, pollution or otherwise, a release from water quality storage is made. As this additional water becomes part of the stream flow, it is therefore potentially subject to diversion by those holding surface water rights granted by the chief engineer of the Division of Water Resources of the State Board of Agriculture, either before or after it has reached the desired point downstream. In order to deal with this concern and other problems involving water quality releases, an agreement with the federal government through the Corps would be required. You wish to know which state agency is empowered to so act, and whether such authority is exclusively held by one such agency.

In our opinion, the statutes of this state evince a clear intent that your agency, as the successor to the Water Resources Board (K.S.A. 1981 Supp. 74-2615), is empowered to negotiate with the federal government in this area. Two statutes are instructive in this regard, K.S.A. 82a-915 and 82a-932. The first of these was enacted in 1963 as part of the State Water Plan Act, by which guidelines were set for the adoption of the actual plan by the Water Resources Board. There, it is stated:

"The board is hereby authorized to negotiate with the federal government relative to releases of water from projects or reservoirs and to enter into agreements with the federal government with respect to the operation of projects or reservoirs for the releases of water, if such agreements are authorized by the state water plan as enacted by the legislature."

Such agreements were in fact authorized by the state water plan, at K.S.A. 82a-932, to-wit:

"The Kansas water resources board shall enter into negotiations and agreements with the federal government relative to the operation of, or the release of water from, any project that has been 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."

These statutes, while not specifically identifying the problem of water quality releases, do give the Board, and hence the Water Office, broad authority to negotiate with the federal government in this area. In a review of other statutes, we find no such express grant for any other state agency to enter into negotiations in this area with the federal government. While the Division of Water Resources of the Board of Agriculture is empowered to prevent any diversion of water that has not been authorized by agreement between the state and the federal government (K.S.A. 82a-706b), its role under the Water Appropriation Act (K.S.A. 82a-701, et seq.) is administrative in nature, with planning and negotiating left to your agency. In that the Legislature has, when it so desired, specifically given the Division such authority (see K.S.A. 24-901 regarding watershed districts), it must be concluded that the absence of such language in the Water Appropriation Act, together with the express grant of authority to your agency in the State Water Plan, leaves the division without such authority here. [See, e.g., State ex rel., Stephan v. Lane, 228 Kan. 379 (1980).]

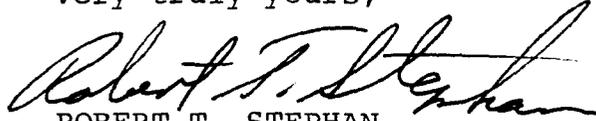
It should be emphasized that our conclusion herein goes only to the procedural aspects of entering into an agreement with the Corps on this issue. The nature of the terms and scope of such an agreement on water quality releases are a much more complex question, and would require the making of policy, as well as legal, determinations. In that it is our understanding that your office is currently conducting research on this question, as it is interrelated to others in the broader area of water planning and use, we express no opinion here on such questions.

In conclusion, under the terms of the State Water Plan, K.S.A. 82a-927 et seq., authority to enter into agreements with the federal government concerning the release of water from federally-constructed projects is placed with the Kansas Water

Allyn O. Lockner
Page Four

Office. While the Division of Water Resources of the State Board of Agriculture is empowered to prevent the unauthorized diversion of waters released pursuant to such agreements, it does not possess the authority to enter into such agreements itself.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Jeffrey S. Southard
Assistant Attorney General

RTS:BJS:JSS:hle