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October 5, 1983

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ATTORNEY GENERAL OPINION NO. 83- 151

Joseph F. Harkins, Director
Kansas Water Office
109 S.W. Ninth, Suite 210
Topeka, Kansas 66612

Re: Waters and Water Courses -- Water Plan Storage --
Receipt of Applications to Contract for Withdrawals;
Consideration in Chronological Order

Synopsis: Prior to the 1983 session of the Kansas Legislature, K.S.A. 82a-1311 set forth the procedure for processing applications to contract for withdrawal of water held by the state in conservation storage. Each application was dated when received, with the Kansas Water Office required to negotiate contracts in the chronological order the applications were received. However, this duty was a limited one, and was to be observed to the extent consistent with efficient management. K.S.A. 82a-1311 was replaced by Section 10 of 1983 Senate Bill No. 61, which continues the requirement that applications be dated when received. However, the requirement that contracts be negotiated in chronological order has been deleted, with the date of receipt of the application only one factor to be considered by the Kansas Water Authority in its review and approval of the contracts negotiated by the Water Office. In that the change made by the 1983 amendment affects only a matter of procedure as to the handling of applications to begin negotiations, no vested right is affected, and the change may be retroactively applied to those applications on file before the effective date of the new act. Cited herein: K.S.A. 1982 Supp. 74-2615, K.S.A. 77-201, First, 82a-707, 82a-1305, 82a-1307, 82a-1311, L. 1983, ch. 343, §10.

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Dear Mr. Harkins:

As Director of the Kansas Water Office, you request the opinion of this office on a question concerning the effect of 1983 Senate Bill No. 61 (L. 1983, ch. 343) on the procedures which were in effect under a statute prior to the effective date of the act, March 17, 1983. Specifically, you inquire concerning K.S.A. 82a-1311 (which was repealed by 1983 Senate Bill No. 61) which set forth a procedure by which applications were made to begin negotiations for water purchase contracts under K.S.A. 82a-1305. Your questions go to the procedure which will now be used to process such applications, and the continuing effect of K.S.A. 82a-1311 on applications received before March 17, 1983.

As in effect from 1974 to 1983, K.S.A. 82a-1311 stated:

"The date of receipt of each application shall be stamped thereon and authenticated as directed by the executive director. To the extent consistent with efficient management, the board shall negotiate contracts under K.S.A. 82a-1305 in the chronological order that the executive director receives applications under K.S.A. 82a-1310 for each reservoir."

The effect of this statute was to institute a priority system for the negotiation of contracts by the water resources board, which was headed by an executive director. The board, acting pursuant to K.S.A. 82a-1305, approved all contracts for sale of water held by the state in conservation storage water supply capacity in reservoirs constructed by the federal government. The contracts were then subject to review by the state legislature under K.S.A. 82a-1307. The system of negotiating contracts in the order applications are received resembles the priority system used by the division of water resources of the board of agriculture for allocation of groundwater permits [K.S.A. 82a-707(c)], and in our opinion gives the applicant a right, albeit only a contingent one, as to the order the application is considered and not to any certain amount of water. See Attorney General Opinion No. 79-276, where a similar conclusion was reached for the procedure used by the chief engineer of the division of water resources. The right is further qualified by the phrase "to the extent consistent with efficient management," and so is less than absolute from the outset.

K.S.A. 82a-1311 was repealed by 1983 Senate Bill No. 61 (now at L. 1983, ch. 343). The portion of the act which replaces it, section 10, in pertinent part states:

"(a) The date of receipt of each application submitted pursuant to section 9 shall be stamped thereon and authenticated as directed by the director. Applicants shall notify the director in writing that they wish to commence negotiations for a contract to withdraw and use water. Within 10 days after the completion of negotiations for a contract to withdraw and use water, the director shall transmit to the chairperson of the authority a copy of the proposed contract.

"(b) In order to determine whether a proposed contract for the sale of water from the state's conservation water supply capacity is in the interest of the people of the state of Kansas and whether the benefits to the state for approving the contract outweigh the benefits to the state for not approving the contract, the authority shall consider all matters pertaining to such questions, including:

. . . .

"(8) the date of receipt of the application to contract for withdrawal and use of water;"

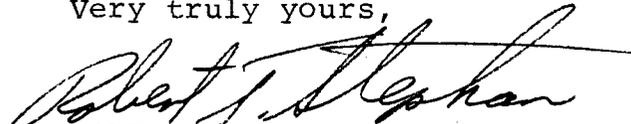
Two things may be noted about the new system. First, any hint of a priority system has been removed, for while applications are stamped with the date of receipt, there is no requirement that they be handled in any order thereafter. The decision of when to proceed is left with the applicant, who must submit a written request to the director in order to begin negotiations. In addition, while negotiations are handled by the director of the Kansas Water Office, which is the successor agency to the water resources board, (K.S.A. 1982 Supp. 74-2615), the ultimate decision as to ratification lies with the Kansas Water Authority. [L. 1983, ch. 343, §10(c).] The date of receipt of any application is but one of nine enumerated factors which the authority is authorized to consider in its review of a particular contract. As the statute is silent as to the weight to be given to an early date of receipt, we may presume that this consideration is merely one of several, and may be offset by other matters which are listed therein.

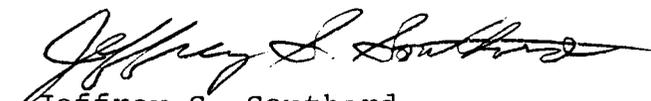
In determining the effect of the 1983 changes upon those applications which had been submitted under the prior law, general principles of statutory construction may be applied. Initially, it is clear that the mere repeal of K.S.A. 82a-1311 does not affect any right which accrued under the statute prior to the effective date of the repealer. (K.S.A. 77-201,

First). Further, the replacement statute will operate prospectively only, unless the legislature clearly and unequivocally intends the application to be retrospective. Nitchals v. Williams, 225 Kan. 285, 290 (1979), Chamberlain v. Schmutz Manufacturing Co., Inc., 532 F.Supp. 588 (D. Kan. 1982). This general rule is applied in such a way, however, as to make the determinative question one of whether the change affects a procedure or remedy in which there can be no vested right, or a substantive right which is vested. Crow v. City of Wichita, 222 Kan. 322 (1977), Jones v. Garrett, 192 Kan. 109 (1963). In that the grant of an application number under K.S.A. 82a-1311 is merely part of the procedure by which negotiations are undertaken, and in no way concerns the grant of any right to water, in our opinion the amendment contained in 1983 Senate Bill No. 61 is procedural in nature, and may be retroactively applied. Accordingly, remaining applications which pre-date the effective date of the 1983 amendments may be considered in the same manner as new applications, and do not have to be given any priority in negotiations with the water office.

In conclusion, prior to the 1983 session of the Kansas Legislature, K.S.A. 82a-1311 set forth the procedure for processing applications to contract for withdrawal of water held by the state in conservation storage. Each application was dated when received, with the Kansas Water Office required to negotiate contracts in the chronological order the applications were received. However, this duty was a limited one, and was to be observed to the extent consistent with efficient management. K.S.A. 82a-1311 was replaced by Section 10 of 1983 Senate Bill No. 61, which continues the requirement that applications be dated when received. However, the requirement that contracts be negotiated in chronological order has been deleted, with the date of receipt of the application only one factor to be considered by the Kansas Water Authority in its review and approval of the contracts negotiated by the Water Office. In that the change made by the 1983 amendment affects only a matter of procedure as to the handling of applications to begin negotiations, no vested right is affected, and the change may be retroactively applied to those applications on file before the effective date of the new act.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Jeffrey S. Southard
Assistant Attorney General