



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 84- 102

Joseph F. Harkins  
Director, Kansas Water Office  
109 SW 9th, Suite 200  
Topeka, Kansas 66612

Re: Constitution of the State of Kansas -- Finance and  
Taxation -- Internal Improvements; Development of  
Water Resources

Synopsis: Article 11, Section 9 of the Kansas Constitution prohibits the state from being a "party" in carrying on works of "internal improvement," apart from four specific exceptions. One of these exceptions permits the state to be a party in flood control works and works for the "conservation or development of water resources," with no limit on the amount of general obligation bonds which may be issued and no prohibition on the use of property tax revenues. Revenue bonds are not covered by the language of Article 11, Section 9, and may be issued regardless of any limits contained therein, in that the state is not a "party" which has incurred any indebtedness. Cited herein: Kansas Constitution, Article 11, §§6, 7, 8, 9; Oklahoma Constitution, Article X, §§14, 15.

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Dear Mr. Harkins:

As Director of the Kansas Water Office, you request our opinion on the interpretation of several provisions found in the Kansas Constitution which deal with the creation of public debt. Specifically, you inquire whether any of the limitations found in Article 11, Sections 6 through 9 of the state constitution would

prohibit the issuance of general obligation bonds or revenue bonds to finance development of water supply projects. You also inquire concerning the possible impact of a recent decision by the Oklahoma Supreme Court which found that the water resources board in that state could not use state moneys as collateral for a bond issue.

The four sections of the Kansas Constitution which you mention deal with different types of debt which the state may incur, subject to certain limitations. Sections 6 and 7 are to be read together as imposing limits upon debt which the state may incur for "extraordinary expenses" and "public improvements." Those sections provide respectively:

"§6. For the purpose of defraying extraordinary expenses and making public improvements, the state may contract public debts; but such debts shall never, in the aggregate, exceed one million dollars, except as hereinafter provided. Every such debt shall be authorized by law for some purpose specified therein, and the vote of a majority of all the members elected to each house, to be taken by the yeas and nays, shall be necessary to the passage of such law; and every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt, and the principal thereof, when it shall become due; and shall specifically appropriate the proceeds of such taxes to the payment of such principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished, until the interest and principal of such debt shall have been wholly paid.

§7. No debt shall be contracted by the state except as herein provided, unless the proposed law for creating such debt shall first be submitted to a direct vote of the electors of the state at some general election; and if such proposed laws shall be ratified by a majority of all the votes cast at such general election, then it shall be the duty of the legislature next after such election to enact such law and create such debt, subject to all the provisions and restrictions provided in the preceding section of this article."

Section 8 gives authority to the state to borrow money, without limit as to amount, in order "to repel invasion, suppress insurrection, or defend the state in time of war." The money so

borrowed must "be applied exclusively to the object for which it was authorized, or to the repayment of the debt thereby created." While the need for such language was apparent in 1859, when the threat of civil war was very real, section 8 is now archaic, and may be disregarded for the purposes of this opinion.

Section 9 is considerably more relevant, and following the most recent amendments in 1980 reads 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 every 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."

Subsection (2) authorizes the state to become a party to flood control projects and conservation or water resources projects, and was added in 1958. Prior to that time, only what is now subsection (1) was included, and still earlier, the section entirely prohibited the state from being "a party in carrying on any works of internal improvement." In 1980, subsections (3) and (4) were added to bring the section to its present form.

State, ex rel., v. State Highway Comm., 138 Kan. 913, 919 (1934), had this to say about what are now sections 6 and 9 of Article 11.

"It is clear the framers of our constitution used the term 'public improvement' in section 5 [now 6] as meaning something entirely distinct from what was meant by 'internal improvements' used in section 8 [now 9], for the one was permitted, the other prohibited . . . . The term 'public improvements' used in section [6], meant public buildings which the state should need in carrying on its functions, such as the state-house, state penal, educational and eleemosynary institutions (Wyandotte Constitutional Convention, p. 327), while the term 'internal improvements,' used in section [9], applied to turnpikes, canals and the like. (Wyandotte Constitutional Convention, p. 329; State v. Kelly, 71 Kan. 811, 833, 81 Pac. 450.)"

The case distinguishes between the provisions limiting debt which may be incurred for public improvements under current sections 6 and 7 and the provisions for incurring debt for internal improvements under what is now section 9. As sections 6 and 7 do not apply to internal improvements, the limit of \$1,000,000 total indebtedness for projects arising under the authority of section 6, unless voted upon and elected by the voters under the provisions of section 7, is not applicable. See also Attorney General Opinions No. 83-21, 84-13 and Leavenworth County v. Miller, 7 Kan. 479 (1871), where Chief Justice Valentine drew a distinction between improvements which are used exclusively by the state as a sovereign corporation ("public improvements") and those which are open to use by every private individual who desires to do so ("internal improvements").

At the time of the Miller opinion, the state was absolutely prohibited from engaging as a party in works of internal improvement. This ban was based on the experiences of other states, which had faced financial disaster as a result of debts for internal improvements. State ex rel. Atherton, 139 Kan. 197 (1934), State ex rel. v. Kelly, 71 Kan. 811 (1905). The changing needs of the people of Kansas led to amendments in 1919 and 1928 which modified the original prohibition to allow internal improvements in the form of a state system of highways, provided that no general property tax should be imposed nor general obligation bonds issued for such highways. The language of what is now subsection (2) was added in 1957 by the legislature and ratified by the people in the general election of 1958. Unlike subsection 1, subsection 2 contains no limits as to the use of a general property tax to pay for projects related to flood control or water resource development, nor are general obligation bonds prohibited. This difference is significant, particularly in

light of the subsequent amendment of the section in 1980, in which subsections (3) and (4) were added. While the latter merely authorizes the state to expend funds which are received from the federal government, the former allows state moneys to be matched with federal funds, provided certain steps are taken. The prohibitions of subsection (1) are repeated as to the use of property taxes or general obligation bonds.

It therefore may be presumed that general obligation bonds could be issued by the state for the purposes of subsection (2) (including the construction of new reservoirs for water supply storage), since the legislature has not seen fit to include therein the specific prohibition against such issuance which predated the subsection [in subsection (1)] and which was added at a later date [in subsection (3)]. This is in line with a well-known rule of statutory construction, by which the specific mention of one item or method excludes by implication all others (expressio unius est exclusio alterius). In Re Olander, 213 Kan. 282, Syl. ¶1 (1973), State v. Wood, 231 Kan. 699 (1982).

Furthermore, even if the language of Article 11, Section 9 were interpreted so as to prohibit the issuance of general obligation bonds for water development projects, it is our opinion that, based on previous court decisions, revenue bonds could still be issued. In that revenue bonds are paid for entirely by the rents, profits or revenue of the contemplated project, they are not defined as constituting obligations of the state. State ex rel. v. State Highway Commission, 139 Kan. 391 (1934), State ex rel. v. Kansas Armory Board, 174 Kan. 369 (1953), Southeast Kansas Landowners Ass'n v. Kansas Turnpike Authority, 224 Kan. 357 (1978). In State ex rel. v. Board of Regents, 167 Kan. 587 (1949), the court approved the use of revenue bonds to construct dormitories at state universities, holding that "funds are neither deposited in nor withdrawn from the state treasury by means of legislative appropriation or in any other manner." 167 Kan. at 593.

It has also been held that, for Article 11, Section 9 to apply, it is necessary that the state be a "party" to an internal improvement project. The decision of State ex rel. v. Raub, 106 Kan. 196 (1920), indicates that the state must have more than a supervisory role over a project to invoke the provisions of the section. The state must itself be engaged in carrying on the work; it must expend state moneys in a role more substantial than that of a coordinator, supervisor or regulator. Accordingly, where the expenditure of funds occurs at the county or city level (which entities are not bound by the limits of Article 11, Section 9), with the state's role confined to that of inspector or coordinator, the sections's provisions are never triggered. In

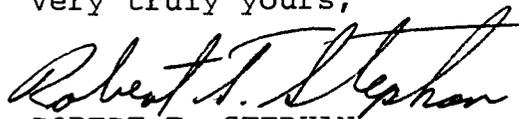
Joseph F. Harkins  
Page Six

any event, given the broad grant of authority to construct and fund water resource development projects under subsection (2), the question of whether a project constitutes an actual internal improvement exists is now largely moot.

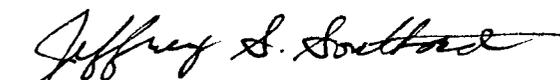
You also inquire about the effect of a recent decision by the Supreme Court of Oklahoma on any possible action by this state in the area of water resource development. At issue in the case [Reherman v. Oklahoma Water Resources Board, 679 P.2d 1296 (Okla. 1984)] was an enactment of the Oklahoma Legislature which established a revolving fund to guarantee revenue bonds, proceeds of which were to be used for the construction of water storage facilities. The fund, which contained seven and one-half million dollars, was intended to serve as a guarantee against default by the municipalities which would, through their payments, generate the revenue used to pay off the bonds. The Oklahoma Supreme Court, in a decision rendered in April of this year, determined that such a plan violated provisions of the state's constitution which absolutely prohibited the state from assuming the debt of any political subdivision or in any way pledging its credit for such subdivisions' debts. Okla. Const., Art. X, §§14, 15. Given the difference in the language of the constitutions of Oklahoma and Kansas, in our opinion the Reherman case is limited strictly to questions arising in Oklahoma, and has no application to water resource development projects in this state, especially where specific language exists in Article 11, Section 9 which authorizes such projects.

In conclusion, Article 11, Section 9 of the Kansas Constitution prohibits the state from being a "party" in carrying on works of "internal improvement," apart from four specific exceptions. One of these exceptions permits the state to be a party in flood control works and works for the "conservation or development of water resources," with no limit on the amount of general obligation bonds which may be issued and no prohibition on the use of property tax revenues. Revenue bonds are not covered by the language of Article 11, Section 9, and may be issued regardless of any limits contained therein, in that the state is not a "party" which has incurred any indebtedness.

Very truly yours,



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ATTORNEY GENERAL OF KANSAS



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