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April 26, 1985

ATTORNEY GENERAL OPINION NO. 85-43

Leland E. Rolfs
Counsel
Kansas State Board of Agriculture
109 SW 9th Street
Topeka, Kansas 66612-1280

Re: Waters and Watercourses -- Collection, Storage and
Impounding of Waters -- Construction and Maintenance
of Dams; Donation of Easements; Tax Exemption

Taxation -- Property Exempt From Taxation -- Land
Donated in Connection with Erection or Maintenance of
Dam or Reservoir

Synopsis: K.S.A. 82a-409 permits a landowner who donates an
easement to the state or a governmental subdivision,
such as a watershed district, to receive an exemption
from property taxes levied upon the contiguous
acreage, as provided by K.S.A. 79-201g. That statute
in turn allows an exemption for the contiguous acreage
which is lower than the top of the dam, and applies
for 20 years after the dam is certified by the chief
engineer of the division of water resources of the
department of agriculture. In the case of the land
occupied by the dam and reservoir itself, K.S.A.
79-201a, Second, could result in a complete exemption
for such property if it is exclusively used by the
state or a governmental subdivision. However, such a
determination is administrative in nature and is left
by statute to the State Board of Tax Appeals. Cited
herein: K.S.A. 79-201a, Second; 79-201g; 79-213;
82a-407; Kan. Const., Art. 11, §1.

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Dear Mr. Rolfs:

As counsel for the Kansas State Board of Agriculture, you request our opinion on a question concerning property tax exemptions for private property which contains a dam and reservoir constructed by the state or by a governmental subdivision such as a watershed district. Specifically, you inquire as follows:

"1. Whether a reduction in assessed valuation granted for 20 years pursuant to K.S.A. 82a-409 applies to the land on which the dam is physically located and to the land on which the dam actually impounds water?

"2. If so, how is the land upon which the dam is physically located and the land on which the dam actually impounds water to be valued for tax purposes after the reduction in assessed valuation expires at the end of the 20 year period if the holder of the fee title to that land originally granted the following easement to a watershed district:

"'For the permanent storage and temporary detention, either or both, of any waters that are impounded, stored or detained by the detention dam to be constructed on (insert legal description) . . .' (Emphasis supplied)"

When reductions in assessed valuation were first granted by the legislature, the statutes used wording such as "piece of land upon which the reservoir is located" (emphasis added), to describe the property entitled to the exemption. G.S. 1923 42-601, G.S. 1935 82a-401. In 1941, the legislature enacted what became K.S.A. 82a-409, which entitled landowners who donated easements for dams and reservoirs to receive "for 20 years a reduction in the assessed valuation of the entire contiguous acreage owned by each such landowner." (Emphasis added.) This language was in effect until 1965, although the statute was amended in other respects, and was the language under which many of the current easements were donated. Following the enactment in 1975 of K.S.A. 79-201g, K.S.A. 82a-409 was amended to reference that statute, which now contains the specific limitations on the terms of such exemptions.

K.S.A. 79-201g provides that certain types of property shall be exempt from all property taxes levied under the laws of Kansas, including [at subsection (b)]:

"All real property which is contiguous to and a part of the same tract of land upon which a dam or reservoir has been constructed and certified by the chief engineer of the division of water resources in compliance with requirements and specifications prescribed by K.S.A. 82a-405 et seq., and amendments thereto, the owner of which at the time of such certification donated to the state or to any of its agencies or subdivisions land or easements of right-of-way for such erection or maintenance of such dam or reservoir in an amount equal to twice the assessed value of the land or easements or right-of-way donated. Such exemption shall be based upon a specific description of the land donated, excluding any land the elevation of which is higher than the top of the dam, as prepared and provided by the chief engineer and the assessed value thereof, as determined by the county assessor, for the year in which the exemption is first granted.

. . . .

"Such exemption shall be applicable to such property for a period of twenty (20) years after the original certification of such dam or reservoir by the chief engineer except that if the landowner shall apply for such exemption more than two (2) years after the actual completion of the dam or reservoir and such exemption shall be applicable to such property for a period of twenty (20) years after the date of the actual completion of the dam or reservoir.

"The provisions of this section shall apply to all taxable years commencing after December 31, 1974." (Emphasis added.)

It is noteworthy that in both the existing statutes which govern this area (K.S.A. 82a-409 and 79-201g) and in prior statutes dating back to 1941, the land included in the exemption is defined as that which is "contiguous" to the land upon which the reservoir and dam sit. No express mention is made of the land occupied by the retaining structure or by the water which is impounded. Rather, a limited tax break is given for a portion of the entire tract contiguous to the dam and reservoir, with K.S.A.

79-201g restricting the benefits of the reduction to that land below a prescribed elevation (i.e. below the top of the dam) and for a specific time period (20 years). After the elapse of that time, the contiguous land will be fully taxed once again, for statutes which create an exemption or a reduction in property taxes are to be strictly construed. National Collegiate Realty Corp. v. Board of Johnson County Commissioners, 236 Kan. 394 (1984).

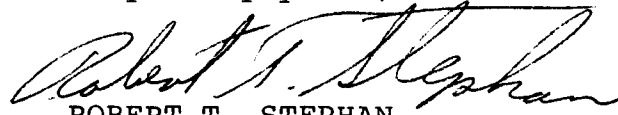
You inform us that the language used in most, if not all, of the easements which landowners have granted to the state and to governmental subdivisions such as watershed districts allows "the permanent storage and temporary detention" of water impounded by the dam. This is the same language which was involved in the cases of Huser v. Duck Creek Watershed District No. 59, 234 Kan. 1, 5-6 (1983) and Roberts v. Upper Verdigris Watershed Joint District No. 24, 193 Kan. 151, 152 (1964). These cases give a wide scope to the easements taken by the watershed districts, and found that it is the nature of the right given, rather than the actual or current use, which indicates the legal extent of the control possessed by the grantee. Therefore, if a grantor of an easement possessed only a bare legal title, with a permanent right to maintain the dam and retain water given to the state or watershed district, a total exemption from taxation could be proper under Article 11, Section 1 of the Kansas Constitution and K.S.A. 79-201a, Second. These authorities allow a complete exemption for property used exclusively by the state or any political subdivision. Actual ownership is not required, only the right to exclusive use. Board of Trustees of Kansas East Conference of United Methodist Church v. Cogswell, 205 Kan. 847, 855 (1970).

Any determination of the exclusive nature of the easement which was granted to the state or political subdivision would have to be made on a case-by-case basis. Pursuant to K.S.A. 79-213, the initial recommendation on an exemption from taxation is made by the county appraiser, with a final determination made by the State Board of Tax Appeals. Accordingly, it is impossible for use to say whether any or all property occupied by a dam and reservoir constructed pursuant to an easement would be exempt from taxation under K.S.A. 79-201a, Second. We are therefore unable to give a definitive answer to either of your questions, as the result will vary depending on the exclusivity of the use. Clearly, the land occupied by the dam and reservoir would be eligible for the limited reduction under K.S.A. 79-201g, should it be determined that the exclusive use test of K.S.A. 79-201a, Second, could not be met. Whether the land occupied by a particular dam and reservoir would be entitled to the full

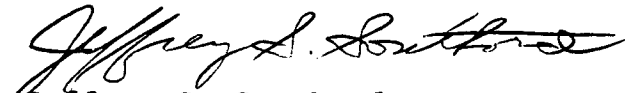
exemption would hinge on facts which may be determined only administratively. See Attorney General Opinion No. 82-252.

In conclusion, K.S.A. 82a-409 permits a landowner who donates an easement to the state or a governmental subdivision, such as a watershed district, to receive an exemption from property taxes levied upon the contiguous acreage, as provided by K.S.A. 79-201g. That statute in turn allows an exemption for the contiguous acreage which is lower than the top of the dam, and applies for 20 years after the dam is certified by the chief engineer of the division of water resources of the department of agriculture. In the case of the land occupied by the dam and reservoir itself, K.S.A. 79-201a, Second, could result in a complete exemption for such property if it is exclusively used by the state or a governmental subdivision. However, such a determination is administrative in nature and is left by statute to the State Board of Tax Appeals.

Very truly yours,



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RTS:JSS:crw