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May 30, 1985

ATTORNEY GENERAL OPINION NO. 85- 58

The Honorable Gayle Mollenkamp
State Representative, 118th District
HC 2, Box 5
Russell Springs, Kansas 66612

Re: Waters and Watercourses--Groundwater Management Districts--Definitions; Eligible Voters, Water Users, Tract

Synopsis: The term "tract" as used in K.S.A. 82a-1021(e) means a single unit of land which is described in a deed or other recorded instrument. The term "water user" defined in K.S.A. 82a-1021(k) includes those persons who use one or more acre foot of water per year for domestic purposes. A groundwater management district may require an individual to show that his or her domestic use does not reach this amount in order to qualify for the exemption from user charges authorized by K.S.A. 82a-1030, and which apply to all water users, including domestic ones. Individuals who live within the limits of a city which is a water user are represented in the affairs of the district by the city, unless they themselves use one or more acre foot of water a year and so qualify as water users. Here, the presumption is one of non-use, so that an individual must show that his or her water use equals one or more acre foot per year in order to qualify as an eligible voter in the district. Cited herein: K.S.A. 12-519, 82a-1021, 82a-1028, 82a-1029, 82a-1030, 82a-1203.

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Dear Representative Mollenkamp:

As State Representative for the 118th District, you request our opinion on several questions concerning the Groundwater Management District Act, K.S.A. 82a-1020 et seq., which have been sent to you from the Northwest Kansas Groundwater Management District No. 4. Specifically, you ask on the district's behalf:

(1) Is it consistent with the Groundwater Management District Act to consider a "tract" to be a portion of land as it is legally described by county records?

(2) Is it consistent with the Act to consider owners of pumping domestic wells as water users?

(3) Is it consistent with the Act to require owners of domestic wells to prove water use in an amount less than 1 acre foot per year if they do not want to be considered as water users?

(4) It is consistent with the Act to consider persons who are residents of a municipality that is a water user within the district as individual water users, provided they show records indicating annual water use from the municipal water system in excess of 1 acre foot per year?

(5) Referencing questions 3 and 4, does an inconsistency exist in the fact that owners of pumping domestic wells are considered to be water users unless they prove they use less than 1 acre foot, while residents of a municipality are not considered as individual water users unless they prove use in excess of 1 acre foot?

(6) Is it consistent with the Act to not assess water user charges on water used pursuant to a domestic right?

I.

You first ask if the district may legally consider a "tract" of land as "a portion of land as it is legally described in county records." While the Act uses the term in several places (K.S.A. 82a-1021(e), for example, speaks of "the owner of a tract or tracts of land comprising not less than six hundred forty acres (640) in area" and "[e]ach tract of land of forty (40) or more contiguous acres"), nowhere is the term defined. However, definitions found elsewhere indicate that the district's use of the term is consistent with the commonly-understood and applied meaning of the term. See K.S.A. 12-519(a), which defines "tract" as a single unit of real property under one ownership,

with the owner being of record. Black's Law Dictionary, 5th ed. (1979), defines the term as meaning a contiguous parcel of land of significant size, while 42 Words and Phrases, p. 210 (1952) states that the term as ordinarily used means a contiguous piece of land described in one deed. Accordingly, in our opinion the term "tract" may properly have the definition which the district has given to it.

II.

Your next inquiry concerns a policy of the district which includes persons who have domestic wells as water users. K.S.A. 82a-1021(k) defines a water user as any person who withdraws or uses groundwater within the boundaries of a district in an amount of not less than 1 acre foot per year. No distinction is made as to the uses to which the water is put or as to the source, as long as it comes from groundwater, as opposed to surface water such as rivers and ponds. Wells are by definition the means by which subterranean water is brought to the surface (Black's Law Dictionary, supra), and so would logically be included in any program to conserve and regulate the use of groundwater. Further, while the legislature has in other acts excluded domestic use from regulation (K.S.A. 82a-1203), it has not done so here, and such an exclusion should not be read into the Act by implication, given the legislative intent expressed in K.S.A. 82a-1020. The district should therefore include domestic users within the class of "water users" established by K.S.A. 82a-1021(k).

III.

The third question is a follow-up to the second, and involves a district policy by which domestic well owners would be automatically considered as water users under K.S.A. 82a-1021(k) unless they could demonstrate that their use of groundwater was less than the one acre foot per year threshold amount. As water users, they would be allowed to vote and participate in the district's affairs, but would also be subject to the water user charges authorized by K.S.A. 82a-1030(a). The exclusion procedure would be similar to that set forth by K.S.A. 82a-1030, in which persons who actually use less water than the amount permitted them by an appropriation right may, upon submitting a verified claim and supporting data, be assessed a lesser amount.

In reviewing policies regarding the use of water, Kansas courts have required municipalities to show a reasonable basis for their actions, and upon such a showing, have declined to overturn rates or policies unless they are clearly arbitrary, capricious or unreasonable. Shawnee Hills Mobile Homes, Inc. v. Rural Water

District No. 6, 217 Kan. 421 (1975); City of Strong v. Rural Water District No. 1, 6 Kan.App.2d 859 (1981). Here, the district is seeking to impose a policy which would further its purposes of conserving and regulating groundwater. While the legislature has determined that some users, domestic or otherwise, will not be subject to the Act (i.e. those who use less than one acre foot a year), all others are, and it does not seem unreasonable to place the responsibility for seeking this limited exemption upon the person who is using the water and who will benefit by being excluded. This is especially true in the case of domestic users who obtain their water from a well which may or may not be metered. (See, however, K.S.A. 82a-1028(1), which empowers the district to require water users to install meters to record usage.) Given the purposes of the Act and the nature of the exemption, in our opinion the district has a reasonable basis for its position.

IV.

The next question involves those individuals who reside within the limits of the city which itself is defined as a water user by K.S.A. 82a-1021(k). Therein, the subsection provides that the city shall "represent all persons within its corporate limits who are not water users" as defined by the subsection. (Emphasis added.)

Clearly, a person who lives in a city and yet has his or her own domestic well from which one-acre foot of water or more is withdrawn in a year would be classed as a separate water user for the purposes of the Act. However, given the wording of the subsection, which speaks of "any person who is withdrawing or using groundwater," the Act would also appear to include any person who uses one or more acre foot of water a year from the municipal water supply system, if that system in turn is supplied by groundwater.

In this situation, the district wishes to assume that all residents and businesses located within a city are not water users under the Act, with the duty placed on the individual to show differently. While this may initially appear to be at odds with the position taken by the district regarding domestic users, in our opinion the two are reconcilable. Here, the water which is initially withdrawn or obtained by the city is subject to assessment under K.S.A. 82a-1030 and to any management program which may be adopted pursuant to K.S.A. 82a-1029. If an individual who uses city water qualifies as a water user in his or her own right, the overall amount of the assessment will remain the same. In fact, given the wording of K.S.A. 82-1030(a) ["the board may assess an annual water user charge

against every person who withdraws groundwater from within the boundaries of the district" (Emphasis added)], a person who qualifies as a water user by virtue of using one or more acre foot obtained through a municipal system would not be subject to the assessment, in that he or she would not withdraw the water directly. Of course, such a user will pay the assessment indirectly, through the charges assessed by the city.

However, in the case of a domestic well owner, the water used would not be subject to any assessment or regulation unless the person qualified as water user. As noted above, in such cases it is reasonable to place the burden upon the well owner to be excluded, in that each such exclusion, even though permitted by law, will reduce the effectiveness of the district. No such concern exists in the case of a water user who obtains his or her water from a municipality which is a water user under the Act, for such water is already subject to assessment and regulation under the district's management program. It is therefore reasonable, as well as more workable, to assume that city residents are not users unless evidence to the contrary is present.

V.

Your fifth inquiry (whether any inconsistency exists in the treatment of domestic user, who are presumed to be water users, and city residents, who are presumed not to be) is dealt with in our response to the fourth inquiry, supra.

VI.

The final inquiry concerns the district's policy concerning the assessment of domestic water users who qualify as "water users" under K.S.A. 82a-1021(k). At present, the district does not intend to subject such users to the assessments of K.S.A. 82a-1030(a). We can find no justification for such an exclusion, for the provisions of the latter statute indicate that "every person who withdraws groundwater from within the boundaries of the district" is subject to the assessment. (Emphasis added.) As noted above (in part II), while domestic use could have been excluded from assessment, to date it has not. Any action by the district to automatically exclude domestic users from the assessment could be found to be arbitrary and so invalid. See City of Strong v. Rural Water District No. 1, supra, 6 Kan.App.2d at 8.

In conclusion, the term "tract" as used in K.S.A. 82a-1021(e) means a single unit of land which is described in a deed or other recorded instrument. The term "water user" defined in K.S.A. 82a-1021(k) includes those persons who use one or more acre foot

of water per year for domestic purposes. A groundwater management district may require an individual to show that his or her domestic use does not reach this amount in order to qualify for the exemption from user charges authorized by K.S.A. 82a-1030, and which apply to all water users, including domestic ones. Individuals who live within the limits of a city which is a water user are represented in the affairs of the district by the city, unless they themselves use one or more acre foot of water a year and so qualify as water users. Here, the presumption is one of non-use, so that an individual must show that his or her water use equals one or more acre-foot per year in order to qualify as an eligible voter in the district.

Very truly yours,

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