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ATTORNEY GENERAL OPINION NO. 91- 12

Mr. Joseph F. Harkins
Director, Kansas Water Office
Suite 300, 109 S.W. Ninth
Topeka, Kansas 66612-1249

Re: Waters and Watercourse--Water Storage--State Water
Plan Storage Act; Contracts for Withdrawal and Use;
Effective Date; Filing of Contract with Secretary
of State and Legislature; Disapproval and
Revocation by Legislature

Waters and Watercourses--Water Transfers--Decision
of Panel; Review of Legislature

Synopsis: K.S.A. 82a-1307 and 82a-1504, authorizing the
legislature to disapprove and revoke water transfer
decisions by the adoption of a concurrent
resolution, violate the separation of powers
doctrine and article 2, section 14 of the Kansas
constitution. Cited herein: K.S.A. 82a-1305;
82a-1307; 82a-1503; 82a-1504; Kan. Const., Art.
2, § 14.

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Dear Mr. Harkins:

As director of the Kansas water office you inquire about the
constitutionality of the legislative oversight or "veto"
provisions in the state water plan storage act, K.S.A.
82a-1301 et seq., and the water transfers act, K.S.A.
82a-1501 et seq. Specifically, you inquire whether K.S.A.
82a-1307 and 82a-1504, allowing the legislature to disapprove

and revoke water transfer decisions by adoption of a concurrent resolution, violate the separation of powers doctrine.

The water plan storage act generally authorizes the Kansas water authority to acquire on behalf of the state a water reservation right to divert and store certain waters. K.S.A. 82a-1303. The water authority is empowered to enter into written contracts for withdrawal and use of water held in storage by the state when the authority finds that this withdrawal and use are in the best interest of the people of the state. This determination involves discretion, and the act provides guidelines for exercising the discretion. K.S.A. 82a-1305, 82a-1306. At issue is K.S.A. 82a-1307 which provides in part:

"On or before the 30th calendar day of each regular legislative session, the director shall transmit to the house of representatives and the senate of this state, and to the secretary of state, copies of each contract made and executed under K.S.A. 82a-1305, and amendments thereto,

. . . .

"At any time after the 30th calendar day of the regular legislative session when a contract is transmitted as provided in this section, the legislature may disapprove and revoke such contract by adoption of a concurrent resolution so providing."

The question presented is whether this legislative oversight provision, that essentially revokes the water authority's ability to exercise their discretionary statutory power to enter into contracts, violates the separation of powers doctrine and is thus unconstitutional.

By enacting K.S.A. 82a-1305 (above) and 82a-1504 (requiring water transfers be approved by the legislature as provided for in K.S.A. 82a-1301 et seq.), the legislature made a deliberate choice to delegate to the executive branch and specifically to the water authority the power to authorize water transfers in certain specified circumstances. It is well settled that by enacting legislation the legislature may

delegate to independent agencies the ability to make policy that will bind the state. But, once the legislature has delegated by statute a function to the executive branch (or an executive agency such as the water authority), it may only revoke that authority by proper enactment of another law in accordance with the provisions of article 2, section 14 of our state constitution. A concurrent resolution disapproving or revoking the water transfers made pursuant to K.S.A. 82a-1301 et seq. and K.S.A. 82a-1501 et seq. allows the legislature total and absolute control over decisions delegated to the executive. There is no provision providing for presentment to the governor for approval and thus the executive branch is foreclosed from the shared power of enacting legislation.

The Kansas Supreme Court has found a similar oversight provision unconstitutional in State ex rel. v. Kansas House of Representatives, 236 Kan. 45 (1984). At issue was K.S.A. 77-426(c) which allowed the legislature to adopt, modify or revoke administrative rules and regulations of the executive branch agencies by passing a concurrent resolution. Finding that adopting regulations was executive in nature, the court held that the legislative oversight provision allowed the legislature to impede upon the executive department of its constitutional mandate to execute the laws. Additionally, the court found that the legislature, by passing a concurrent resolution that affected the legal rights, duties and regulation of persons outside the legislative branch, was enacting legislation that did not comply with article 2, section 14 of the Kansas constitution requiring bills enacted by the legislature be presented to the governor. See also INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) cited and discussed in Stephan; Bowsher v. Synar, 478 U.S. 714; 106 S.Ct. 3181; 92 L.Ed.2d 583 (1986).

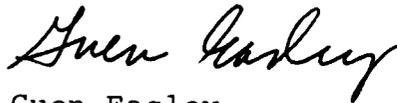
In conclusion we find that a concurrent resolution pursuant to either K.S.A. 82a-1307 or 82a-1504 effectively allows the legislature to direct the exercise of agency discretion in a manner considered unachievable when the enabling statute was first passed. Because laws can be enacted, amended or repealed only in accordance with article 2, section 14 of the Kansas constitution, it is in our opinion that the legislative oversight provision that attempts to make law without the participation of the governor is unconstitutional. Foreclosing the executive branch from the law-making process

offends the separation of powers doctrine and violates article
2, section 14 of the Kansas constitution.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



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