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June 2, 1992

ATTORNEY GENERAL OPINION NO. 92- 73

Jeffery A. Mason
Counsel for Northwest Kansas Groundwater
Management District #4
214 E. 10th Street, Box 767
Goodland, Kansas 67735

Re: Waters and Watercourses--Groundwater Exploration
and Protection--Abandoned Holes; Plugging; Failure
to Properly Seal

Synopsis: Simply stated, the public purpose doctrine permits the spending of public funds only for public purposes. A benefit to specific individuals does not necessarily deprive the expenditure of its public character if the benefit is incidental to the primary purpose of promoting the public welfare. In our opinion, the cost-share program that provides public monies to assist landowners in plugging their abandoned wells serves the public welfare. The program was implemented in response to the federal water pollution control act (commonly referred to as the clean water act) to expeditiously restore and maintain the biological integrity of the nation's waters. Cited herein: K.S.A. 1991 Supp. 65-101; 65-164; K.S.A. 65-171a; 75-5657; 82a-1213; 82a-1214; 33 U.S.C. §§ 1251, 1329, 1362.

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Dear Mr. Mason:

As counsel for Groundwater Management District No. 4 you inquire whether it is legal to use state water plan funds (public monies) to cost-share, with private landowners, the cost of plugging abandoned wells.

You indicate that the abandoned wells are located on private property and are subject to K.S.A. 82a-1213 which makes a landowner responsible for the plugging of abandoned water wells in order to prevent pollution to existing groundwater supplies. The statute exempts abandoned wells in existence on the effective date of the act (1973) if they are not polluting or threatening to pollute a groundwater supply. You add however that the Kansas department of health and environment (KDHE) has taken the position that all abandoned wells are considered pollution threats to groundwater. See K.S.A. 75-5657 (requires KDHE to provide guidance on achieving environmental results). See also K.S.A. 1991 Supp. 65-101, 65-164(d) and K.S.A. 65-171a.

The abandoned water well cost-share program funds, allocated through the non-point source pollution control plan in 1989 (L. 1989, ch. 32, sec. 70), are managed by the Kansas conservation commission through the local one hundred and five conservation districts. See 1992 Senate Bill No. 538 (for the most recent legislative appropriation). The state non-point source pollution management plan was initiated by KDHE, on behalf of the governor, as a result of federal mandate, the federal water pollution control act (commonly referred to as the clean water act) as amended February 4, 1987, P.L. 100-4 Title III, [33 U.S.C. § 1251 *et seq.*, specifically section 319 of the act, (33 U.S.C. § 1329). Section 101 (33 U.S.C. § 1251) states that it is the national policy that programs for the control of non-point sources of pollution be developed and implemented in order to meet the goals of the act through the control of both point and non point sources of pollution. The definition of the term "point source" includes wells. 33 U.S.C. § 1362. In 1989 the state was required to (1) identify the waters of the state which without additional action to control non-point sources of pollution cannot attain or maintain applicable water quality standards, (2) identify categories of non-point sources which are causing or are likely to cause violations of water quality standards, (3) describe a process for identifying the best management practices and measures to control pollutants discharged from the categories of non-point pollution sources, and identify and describe state and local programs for

controlling non-point source pollution. [Note: The water quality act of 1987 amended the federal water pollution control act. Section 316, Title II of the act was amended by adding new section 319 requiring the state non point source management program be developed in an expeditious manner. See 1987 U.S. Code Cong. and Adm. News for legislative history and purpose. See also Implementation Guidelines and Procedures For the Non-Point Source Pollution Control Fund, prepared by State Conservation Commission, January 5, 1990.]

Your question is whether the cost-share program that allocates money to private individuals can be lawfully funded by public funds derived from the state water plan fund. Given that there exists no conflict between the mandates of K.S.A. 82a-1213 making well plugging the landowner's responsibility and the cost-share program that provides for part of the costs of plugging these wells, your question turns on the nature of the appropriations being made. In other words, the issue presented is whether the expenditure of public money is valid as devoted to a public use.

Simply stated, the public purpose doctrine permits the spending of public funds only for public purposes. Despite the absence of a constitutional provision recognizing it, the public purpose doctrine has been recognized by the courts of Kansas since 1871. See Leavenworth County v. Miller, 7 Kan. *479 (1871) (municipal aid to railroads; public purpose of providing access to transportation); Gunkle v. Killingsworth, 118 Kan. 154 (1925) (rural credits exempt from taxation; aiding agriculture and enabling farmers to obtain low-rate loans); Ullrich v. Board of Thomas County Comm'rs, 234 Kan. 4782 (1984) (public funds and assets transferred to private corporation; promoting public health through operation of hospital); State, ex rel. Tomasic v. City of Kansas City, 237 Kan. 572 (1985) (tax exemption for GM plant; promoting overall economic welfare of general public).

In addressing the issue it is particularly important to determine whether the appropriation is coupled with a legislative declaration of a general public purpose evincing a particular evil which demands corrective public action. 63A Am.Jur.2d Public Funds § 64 (1984). What constitutes a public purpose is a legislative question vested with a great deal of discretion. 63A Am.Jur.2d Public Funds §§ 57, 59. The test involves a critical look at the object sought to

be accomplished and the degree to which that object promotes the public welfare.

The object sought to be accomplished by the cost-share program at issue is prevention of contaminants into sources of groundwater via an abandoned or inactive water well. There is no question that the plugging of abandoned wells as a groundwater protection measure promotes the public welfare. We must however address the direct economic benefit to specific individuals, the landowners. Although a benefit to specific individuals does not necessarily deprive the expenditure of its public character, this benefit must be incidental to the primary purpose of promoting the public welfare. 63A Am.Jur.2d Public Funds, § 58. Thus as a general rule, the state legislature may appropriate public money for private individuals so long as the appropriation promotes the public welfare. Duckworth v. City of Kansas City, 243 Kan. 386, 389 (1988) (developmental loans to private businesses; public purpose of revitalizing central business district).

A perusal of K.S.A. 82a-1213 indicates that the legislature intended landowners to bear the responsibility of plugging abandoned wells "to prevent pollution to existing groundwater supplies, . . ." with penalties for violating the act, K.S.A. 82a-1214. The cost-share program provides economic incentive to landowners and one might argue is more expedient. Our analysis however cannot include a judgment as to the wisdom, expediency and necessity for providing an economic incentive. As long as a governmental action is designed to fulfill a public purpose, the wisdom of the governmental action generally is not subject to review by the courts. Duckworth, supra, 243 Kan. at 389.

In conclusion it is our opinion that the cost-share program that allocates money to private individuals can lawfully be funded by public monies because the expenditure promotes the public welfare and only incidentally benefits certain well owners.

Very truly yours,



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