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ATTORNEY GENERAL OPINION NO. 92-148

The Honorable Don Rezac
State Representative, 61st District
12350 Ranch Rd.
Emmett, Kansas 66422

The Honorable Bob Mead
State Representative, 112th District
509 Houck
P.O. Box 224
Pawnee Rock, Kansas 67567

The Honorable Janis Lee
State Senator, 36th District
Rt. 1, Box 145
Kensington, Kansas 66951

Re: Corporations -- Agricultural Corporations --
 Agricultural Corporations; Limitations; Exceptions

Synopsis: The agricultural corporations act restricts corporations from directly or indirectly owning, acquiring or otherwise obtaining or leasing agricultural land, subject to fourteen enumerated exceptions. In our opinion, The Nature Conservancy, a duly registered foreign nonprofit corporation, is engaged in business of a nonfarming nature in Kansas. Accordingly, agricultural land in Cheyenne Bottoms which is owned by The Nature Conservancy falls within the statutory exception which allows a corporation to acquire such acreage as is necessary for the operation of a nonfarming business. The Nature

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Conservancy may own such agricultural land as is useful, convenient, suitable and needful for the accomplishment of its legitimate corporate purposes. Cited herein: K.S.A. 17-506 (repealed L. 1972, ch. 52, § 153); K.S.A 17-5902; K.S.A. 1991 Supp. 17-5903; 17-5904; K.S.A. 17-7301; 17-7303; K.S.A. 1991 Supp. 60-308.

* * *

Dear Representative Rezac, Representative Mead and Senator Lee:

As legislators for the state of Kansas you ask our opinion regarding the Kansas agricultural corporations act, K.S.A. 17-5902 et seq. and amendments thereto, in relation to agricultural land located in the Cheyenne Bottoms areas of Barton county which are owned by The Nature Conservancy. Specifically, you ask:

"1. Would any of the exceptions included in K.S.A. 17-5902 et seq., or elsewhere in statute allow the Nature Conservancy to acquire agricultural land in Kansas?

"2. If one or more of the exceptions in the Corporate Farming Law are applicable, would you please describe how these statutory provisions permit the Nature Conservancy to acquire agricultural land?

"3. If the Nature Conservancy is permitted to acquire agricultural land, has it filed the proper reports with the Secretary of State's Office as to the acquisition of agricultural land?

"4. If the Nature Conservancy does fall into one of the exceptions that permit a corporation to acquire land, then is there any limit to the amount of agricultural land that it may acquire?"

The agricultural corporations act, K.S.A. 17-5902 et seq., and amendments thereto, also known as the corporate farming act, restricts corporations from either directly or indirectly owning, acquiring or otherwise obtaining or leasing any agricultural land in this state. K.S.A. 1991 Supp. 17-5904. Corporations include both domestic and foreign corporations whether organized for profit or nonprofit purposes. K.S.A. 1991 Supp. 17-5903(a). Agricultural land is defined as land suitable for use in farming. K.S.A. 1991

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Supp. 17-5903(g). For purposes of this opinion we will assume, without determining, that the Cheyenne Bottoms land owned by The Nature Conservancy is agricultural land. The prohibition against corporate ownership of agricultural land is not applicable to fourteen enumerated exceptions. K.S.A. 1991 Supp. 17-5904(a)(1) through (a)(14). Your first and second questions pertain to whether any of these exceptions may be applicable to The Nature Conservancy's Cheyenne Bottoms land.

According to the organization's attorney, The Nature Conservancy is an international nonprofit conservation organization which was incorporated in 1951 under the laws of the District of Columbia for scientific and educational purposes. It maintains a principal office in Arlington, Virginia and state offices throughout the country, including a professionally staffed office in Topeka, Kansas. Of The Nature Conservancy's 662,400 national membership, 4,458 were members of the Kansas chapter as of June 1992. The Kansas chapter board of trustees is composed of residents of the state of Kansas.

The Nature Conservancy's articles of incorporation set forth its purpose as follows:

"The particular business and objects of said corporation shall be (a) to preserve or aid in the preservation of all types of wild nature, including natural areas, features, objects, flora and fauna, and biotic communities; (b) to establish nature reserves or other protected areas to be used for scientific, educational, and esthetic purposes; (c) to promote the conservation and proper use of our natural resources; (d) to engage in or promote the study of plant and animal communities and other phases of ecology, natural history, and conservation; and (e) to promote education in the fields of nature preservation and conservation."

The bylaws of The Nature Conservancy which were revised in April 1990 set forth its objectives as follows:

"Recognizing a dependence on natural lands for environmental stability, for essential scientific inquiry, for wholesome human

life, and in fact for the survival of abundant and varied life on earth, the objectives of The Nature Conservancy are (a) to preserve natural areas for biological diversity, for the uses of science, and for the wilderness experience; (b) to preserve open land for conservation of natural feature, for pleasure or recreation, and for education; (c) to restore land; (d) to improve techniques of land preservation by demonstrating to others how to do it well, by studying and trying out new ways to do it better, and by devising standards and priorities for the preservation of natural areas; (e) to advance the cause of natural area preservation in the schools, in private enterprise, in government, and in other countries; (f) to advance the foregoing objectives in cooperation with other organizations having similar and related objectives."

In 1971, pursuant to the requirement of K.S.A. 17-7301, The Nature Conservancy filed an application with the secretary of state for authority to engage in business in the state of Kansas as a foreign corporation. The nature and character of the business in which The Nature Conservancy proposed to engage within the state of Kansas was "to preserve and assist in the preservation of natural lands and wilderness for charitable, scientific and educational purposes." On October 20, 1991 the secretary of state issued a certification authorizing The Nature Conservancy to do business in Kansas.

According to information provided by The Nature Conservancy, its purposes and objectives are implemented in Kansas initially by the identification of a protection project. Such a project is undertaken when the Kansas Natural Heritage Inventory identifies a specific site which shelters critically threatened plant or animal species and/or community; a site is proposed from outside the Heritage Inventory and found to meet the ecological criteria of The Nature Conservancy; or an acquisition strategy is designed to enlarge an existing sanctuary. Once the project is recommended by staff and trustees of the Kansas chapter, it is reviewed by The Nature Conservancy's mission, when an owner decides to sell a purchase opinion is negotiated. Upon approval, money for the purchase is made available from The Nature Conservancy's

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revolving loan funds, the land preservation fund. The state chapter is responsible to reimburse the fund so that it can be reinvested in other projects.

According to its Kansas Newsletter, in 1991 The Nature Conservancy successfully bid at an estate auction on nine tracts (4.706 acres) of wetland in the Cheyenne Bottoms. With 731 acres purchased earlier, The Nature Conservancy's preserve in the area was brought to 5,437 acres. In its Autumn 1991 Kansas Newsletter, The Nature Conservancy explained the reason for the importance of this acquisition:

"Some migrating birds fly at 20,000 feet, sometimes for 80 hours without stopping. They may cover 4,000 miles at 50 miles per hour. Due to exertion, length of trip, and their need to arrive at Arctic breeding grounds during the short time when there is food and space for nesting, a few crucial areas along the way are where shorebirds can rest and gain strength. In the Central Flyway, one of four north-to-south ancient migratory lanes across North America, Cheyenne Bottoms is the most important of these 'staging' areas.

"Blood worms (midget larvae) become food for migrating birds at Cheyenne Bottoms. At their peak, there might be 50 larvae in each square inch of mud, some over one inch long. Few wetlands in the region are blessed (from a shorebird's point of view) with such a density of invertebrates. A wading bird which pokes a long bill into the mud for a meal will use less energy if every poke succeeds."

Regarding the use of its Cheyenne Bottoms land, The Nature Conservancy stated in its 1991 corporate annual report filed with the Kansas secretary of state pursuant to the requirement of K.S.A. 1991 Supp. 17-7504:

"The Conservancy owns property primarily for its value as natural habitat. Some of this land might be considered 'agricultural' because of its

characteristics. However, the Conservancy is not in the business of owning land for farming purposes. Occasionally, the Conservancy leases preserve property for grazing, haying or crops when necessary to meet the ecological objectives for the preserve. For example, grazing is often required for proper maintenance of native prairie and crops can provide needed forage for migratory birds and other wildlife. Leasing is done on a cash rent basis and the Conservancy does not engage in the farming operation. Any farming done is incidental to the Conservancy's primary purpose of preserving and maintaining property for its natural value."

This explanation of The Nature Conservancy and its Cheyenne Bottoms project is necessary for an understanding of whether The Nature Conservancy's ownership of land falls within an exception to the prohibition against corporate ownership of agricultural land in Kansas. The primary exception to which our attention is drawn is found at K.S.A. 1991 Supp. 17-5904(a)(3):

"Agricultural land acquired by a corporation or a limited liability company in such acreage as is necessary for the operation of a nonfarming business. Such land may not be used for farming except under lease to one or more natural persons, a family farm corporation, authorized farm corporation, family trust, authorized trust or testamentary trust. The corporation shall not engage, either directly or indirectly, in the farming operation and shall not receive any financial benefit, other than rent, from the farming operation."

From its articles of incorporation, bylaws and stated purposes and objectives, The Nature Conservancy is clearly a nonfarming operation. The question is whether The Nature Conservancy's endeavor in Cheyenne Bottoms is a nonfarming business. In other words, may a nonprofit corporation be considered to be in "business" at all? Or does the very nature of a nonprofit corporation preclude it from being

engaged in the operation of a "business." Since the term "business" is not defined in the agricultural corporations act, guidance regarding the meaning of this term must be obtained from other sources.

"It is a well recognized rule of statutory construction used to determine legislative intent that ordinarily identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended." T-Bone Feeders, Inc. v. Martin, 236 Kan. 641, 648 (1985).

As used in the foreign corporations act, K.S.A. 17-7301 et seq., and amendments thereto, a foreign corporation (one organized under the laws of any jurisdiction other than Kansas) is held to be doing business in Kansas if it "has an office or place of business within this state, or a distributing point herein, or that delivers its wares or products to resident agents in this state for sale, delivery or distribution." K.S.A. 17-7303. Such a corporation which meets one of the criteria of "doing business" in Kansas is subject to the registrations requirements of the foreign corporations act.

Over sixty years ago the Kansas Supreme Court considered the applicability of this statute in regulation to a nonprofit corporation. In The State v. Knights of the Ku Klux Klan, 117 Kan. 564 (1925), the Ku Klux Klan, a corporation organized not for profit under the laws of Georgia, contended that it was not "doing business" in Kansas as that term was used in K.S.A. 17-506 (repealed, L. 1972, ch. 52, § 153) (the predecessor to K.S.A. 17-7303) and as such was not required to register in this state as a foreign corporation. The Klan argued,

". . . that to do business, that must be done which is for pecuniary profit, and that our foreign corporation laws apply only to corporations engaged in some kind of commercial, financial or business enterprise, and not to corporations organized for religious, charitable or benevolent purposes." p. 572.

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After a lengthy discussion and the citation of numerous precedents the court soundly rejected the Klan's argument:

"A corporation organized under the laws of another state, not for financial profit, which in this state performs all the functions it is authorized to do by its charter under the laws of the state of its organization, is doing business in this state within the meaning of the Kansas foreign corporation laws." Syl. 2.

Finding that the Klan performed the corporate functions in Kansas which it was organized to do, the court concluded that the Klan, a foreign nonprofit corporation, was doing business in Kansas within the meaning of the foreign corporation laws. Since the Klan had not complied with those laws, the court ordered the Klan ousted from organizing or controlling lodges and from exercising any of its corporate functions in Kansas except those activities which were protected by the interstate-commerce clause of the constitution of the United States.

In a North Dakota case dealing with that state's corporate farming act in relation to a nonprofit corporation's ownership of land, the court used language consistent with the Kansas Supreme Court:

"In order for a foreign corporation to be 'doing business' or 'transacting business' in a state - (within the purview of laws imposing conditions on its right to do business in such State) - 'there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created and not merely what the corporation might have authority to do.' [Citations omitted.]" Asbury Hospital v. Cass County, 7 N.W.2d 438, 448 (N.D. 1943), affirmed 326 U.S. 207, 66 S.Ct. 61, 90 L.Ed. 6 (1945).

A more recent Kansas case, In re Tax Appeal of Cessna Employees' Flying Club, 11 Kan.App.2d 378 (1986), considered whether a non-profit corporation whose purpose was to promote and encourage private flying and to provide economical flying for its members was entitled to a tax exemption. The exemption was available only to those entities

engaged in "the conduct of a business or industry." The board of tax appeals denied the organization an exemption, concluding that because of its lack of profit-making motive the ownership of the airplanes did not constitute a business. The Court of Appeals however adopted the following broader definition of the word "business":

"Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. Enterprise in which person engaged shows willingness to invest time and capital on future outcome. That which habitually busies or occupies or engage the time, attention, labor, and effort of persons as a principal serious concern or interest or for livelihood or profit." p. 381.

Based on that definition of "business" the court concluded that since the nonprofit corporation employed a full-time staff to manage and maintenance rental aircraft and used its aircraft exclusively for rental to its membership, it was organized and operated as a business and thus entitled to the tax exemption.

For a listing of cases in which nonprofit corporations have been held to be "doing business" for purposes of taxation, of qualifying to do business under the corporation laws of a foreign state, of compliance with legislation regulating corrupt political practices and of service of process on agents, see American Medical Association v. United States, 130 F.2d 233, n. 15 at p. 237 (D.C. 1942).

An encompassing interpretation of the term "business" is provided in Woodring v. Hall, 200 Kan. 597 (1968) within the context of the Kansas long-arm statute (K.S.A. 1991 Supp. 60-308) which determines the reach of personal jurisdiction in a civil proceeding. The court stated:

"It cannot be stated with exactitude what constitutes the 'transaction of any business,' but it may be stated that each case must turn on its own fact pattern. In a broad sense, 'business' is transacted within the state when an individual is within or enters this state in person or by agent and, through dealing with another

within the state, effectuates or attempts to effectuate a purpose to improve his economic conditions and satisfy his desires." p. 607.

In our opinion The Nature Conservancy, a nonprofit foreign corporation, is engaged in "business" of a nonfarming nature. Within the context of K.S.A. 17-7303 which defines the circumstances by which a foreign corporation is considered to be doing business in Kansas, The Nature Conservancy meets the criteria of having "an office or place of business within this state." Within the meaning of the term "doing business" as established in The State v. Knights of the Ku Klux Klan, supra, the Nature Conservancy is performing the functions it is authorized and created to perform by its charter under the laws of the District of Columbia, as well as the functions it is authorized to perform as a foreign corporation operating in Kansas. Within the meaning of the term "business" as defined by In re Tax Appeal of Cessna Employees' Flying Club, supra, The Nature Conservancy is engaged in an enterprise in which it has shown a willingness to invest time and capital on a future outcome. In addition, The Nature Conservancy habitually engages its time, attention, labor and effort toward meeting its corporate purposes as a principal serious concern or interest. Finally, within the meaning of the term "business" as set forth in Woodring v. Hall, supra, while The Nature Conservancy as a nonprofit corporation cannot be said to be dealing with others within Kansas to improve its economic condition, it may be said that its dealings in Kansas are intended to satisfy its stated corporate desires.

We accordingly conclude that The Nature Conservancy's ownership of agricultural land in the Cheyenne Bottoms area of Barton county falls within the exception to corporate ownership of agricultural land provided by K.S.A. 1991 Supp. 17-5904(a)(3) for "acreage as is necessary for the operation of a nonfarming business."

While the above discussion addresses your first and second questions, further inquiry is necessary to respond to your fourth question regarding any limitation to the amount of agricultural land The Nature Conservancy may acquire in the Cheyenne Bottoms area. This inquiry brings us to the issue of the meaning of the phrase "acreage as is necessary" as used in the nonfarming business exception of the agricultural corporations act.

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Within the North Dakota corporate farming act, an exception is also provided for corporate ownership of farm land "as is reasonably necessary in the conduct of its business." Sec. 10-06-03, NDCC. That phrase has been held by the North Dakota Supreme Court to refer to:

". . . that which is useful, convenient, or suitable, and not inconsistent with the legitimate objectives of the corporation. [Citations omitted]. The term is to be distinguished from more exacting degrees of necessity, such as absolute, strict, or indispensable." Slope County v. Consolidation Coal Co., 277 N.W.2d 124, 126 (N.D. 1979).

After noting that its interpretation of the term "reasonably necessary" was in accordance with at least three North Dakota district court decisions and two opinions of the North Dakota Attorney General, the court went on to state:

"The determination of whether or not a particular piece of land is reasonably necessary in the conduct of a corporation's business is not always easily resolved and does not necessarily depend upon the present actual use of the land by the corporation. The business of the corporation will play a dominant role in this determination. If the property is reasonably necessary for the business when acquired, is held for that purpose, and is actually used for the purpose for which it was acquired, then it should be treated as necessary to carry on the business. The necessity for its actual use need not be a present one; it may arise in the future."

277 N.W.2d at 127.

Within Oklahoma's corporate farming constitutional provision is also an exception for corporate ownership of rural real estate except "such as shall be necessary and proper for carrying on the business for which it was chartered or licensed." Art. 22, Sec. 2, Oklahoma Constitution. The Oklahoma Supreme Court held that the words "necessary and proper" as used in that exception:

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". . . do not import that which is
indispensably necessary, but do import
that which is proper, useful and suitable
and thus conducive to the accomplishment
of the purposes of the corporation."
LeForce v. Bullard, 454 P.2d 297,
301 (Okla. 1969).

These definitions are consistent with the meaning of the term "proper and necessary" as understood in general corporation law.

"The term 'proper and necessary' as used in a constitutional or statutory provision limiting the right of a corporation to acquire real estate to property which is proper and necessary for carrying out its legitimate business has been construed to mean proper and needful or useful, rather than essential or indispensable to the corporation's business." 18B Am.Jur.2d Corporations, Sec. 2051 (1985).

Based on the foregoing definitions, there is clearly some outside limit on the amount of agricultural acreage which The Nature Conservancy may acquire in Cheyenne Bottoms. However, the determination of the specific number of acres which is necessary to The Nature Conservancy's nonfarming business is a factual determination which is outside the scope of this legal opinion. We can only say as a matter of law that The Nature Conservancy may own such agricultural land as is useful, convenient, suitable, and needful for the accomplishment of its legitimate corporate purposes.

Your third question regarding whether The Nature Conservancy has filed the proper reports with the secretary of state's office likewise requires a factual determination as opposed to a legal opinion. We therefore referred this question to the secretary of state for a response, a copy of which is attached for your information.

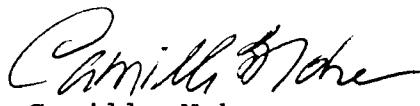
In conclusion, the agricultural corporations act restricts corporations from directly or indirectly owning, acquiring or otherwise obtaining or leasing agricultural land, subject to fourteen enumerated exceptions. In our opinion, The Nature Conservancy, a duly registered foreign nonprofit corporation, is engaged in business of a nonfarming nature in Kansas. Accordingly, agricultural land in Cheyenne Bottoms which is

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owned by The Nature Conservancy falls within the statutory exception which allows a corporation to acquire such acreage as is necessary for the operation of a nonfarming business. The Nature Conservancy may own such agricultural land as is useful, convenient, suitable and needful for the accomplishment of its legitimate corporate purposes.

Very truly yours,


ROBERT T. STEPHAN
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