

TORTS:
RECREATION:
STATE PARK BOARD:
SOVEREIGN IMMUNITY:

The state of Missouri acting through the Inter-Agency Council for Outdoor Recreation and the Missouri State Park Board, pursuant to Section 258.500, RSMo 1969, can agree

under long-term contract with the United States to provide operation, maintenance and replacement of federally financed water control projects under the Federal Water Projects Recreation Act, 16 U.S.C.A., Sections 460l-12 and 13, and further to agree to reimburse the federal government in those projects; that under present law neither the Council nor the Park Board has the authority to agree to hold and save the United States free from damages due to the construction works.

OPINION NO. 78

May 25, 1972

Mr. Clifford L. Summers
Executive Director
Water Resources Board
P. O. Box 271
Jefferson City, Missouri 65101



Dear Mr. Summers:

This is in reply to your request for an official opinion of this office asking several questions relating to state involvement with the federal government on federal water resources projects.

Your questions are whether the state of Missouri, acting through the Missouri State Park Board can: (1) agree under long-term contract with the United States to provide operation, maintenance and replacement of federally financed water control projects and to agree to reimburse the federal government for all or part of those added costs associated with identified local benefits or uses, in return for investment by the federal government in these projects; and (2) can the state further agree to hold and save the United States free from damages due to the construction works and, if so, does the state have legal authority to pay damages for failure to perform.

The federal water resource projects you refer to are those which come under the Federal Water Projects Recreation Act, 16 U.S.C.A., Sections 460l-12 and 13 (P.L. 89-72, 79 Stat. 213-218).

Sections 460l-12 and 13 of 16 U.S.C.A. provide as follows:

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"It is the policy of the Congress and the intent of this Act that (a) in investigating and planning any Federal navigation, flood control, reclamation, hydroelectric, or multiple-purpose water resource project, full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement and that, wherever any such project can reasonably serve either or both of these purposes consistently with the provisions of this Act, it shall be constructed, operated, and maintained accordingly; (b) planning with respect to the development of the recreation potential of any such project shall be based on the coordination of the recreational use of the project area with the use of existing and planned Federal, State, or local public recreation developments; and (c) project construction agencies shall encourage non-Federal public bodies to administer project land and water areas for recreation and fish and wildlife enhancement purposes and operate, maintain, and replace facilities provided for those purposes unless such areas or facilities are included or proposed for inclusion within a national recreation area, or are appropriate for administration by a Federal agency as a part of the national forest system, as a part of the public lands classified for retention in Federal ownership, or in connection with an authorized Federal program for the conservation and development of fish and wildlife. Pub.L. 89-72, § 1, July 9, 1965, 79 Stat. 213." (16 U.S.C.A., Section 460ℓ-12)

"(a) If, before authorization of a project, non-Federal public bodies indicate their intent in writing to agree to administer project land and water areas for recreation or fish and wildlife enhancement or for both of these purposes pursuant to the plan for the development of the project approved by the head of the agency having administrative jurisdiction over it and to bear not less than one-half the separable costs of the project allocated to either or both of said purposes, as the case may be, and all the costs of operation, maintenance, and replacement incurred therefor--

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(1) the benefit of the project to said purpose or purposes shall be taken into account in determining the economic benefits of the project;

(2) costs shall be allocated to said purpose or purposes and to other purposes in a manner which will insure that all project purposes share equitably in the advantages of multiple-purpose construction: Provided, That the costs allocated to recreation or fish and wildlife enhancement shall not exceed the lesser of the benefits from those functions or the costs of providing recreation or fish and wildlife enhancement benefits of reasonably equivalent use and located by the least costly alternative means; and

(3) Not more than one-half the separable costs and all the joint costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by the United States and be non-reimbursable.

Projects authorized during the calendar year 1965 may include recreation and fish and wildlife enhancement on the foregoing basis without the required indication of intent. Execution of an agreement as aforesaid shall be a prerequisite to commencement of construction of any project to which this subsection is applicable.

"(b) The non-Federal share of the separable costs of the project allocated to recreation and fish and wildlife enhancement shall be borne by non-Federal interest, under either or both of the following methods as may be determined appropriate by the head of the Federal Agency having jurisdiction over the project: (1) payment, or provision of lands, interests therein, or facilities for the project; or (2) repayment, with interest at a rate comparable to that for other interest-bearing functions of Federal water resource projects, within fifty years of first use of

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project recreation or fish and wildlife enhancement facilities: Provided, That the sources of repayment may be limited to entrance and user fees or charges collected at the project by non-Federal interests if the fee schedule and the portion of fees dedicated to repayment are established on a basis calculated to achieve repayment as aforesaid and are made subject to review and renegotiation at intervals of not more than five years. Pub.L. 89-72, § 2, July 9, 1965, 79 Stat. 214." (16 U.S.C.A., Section 460l-13)

In 1969 the Missouri General Assembly enacted Senate Bill No. 58 to specifically provide for state participation in such federal water resource projects. Such law now appears as Sections 258.500 through 258.540, RSMo 1969.

Section 258.510, RSMo, provides as follows:

"The general assembly of Missouri may transfer money from the general revenue fund to the 'Missouri Federal Water Projects Recreation Fund', which is hereby created, and may appropriate money from the fund for purposes of paying nonfederal costs associated with the enhancement of recreation and fish and wildlife benefits on federal reservoir lands and waters as required by the 'Federal Water Projects Recreation Act' (P.L. 89-72, 79 Stat. 213-218). Any unexpended balance in the Missouri federal water projects recreation fund at the end of any appropriation period shall not be transferred to the general revenue fund of the state treasury and, accordingly, shall be exempt from the provisions of section 33.080, RSMo, relating to transfer of funds to the general revenue funds of the state by the state treasurer."

Section 258.530, RSMo, provides as follows:

"The inter-agency council for outdoor recreation, with the approval of the pertinent state agency having primary responsibility and authority to acquire and manage land or water for recreation or fish and wildlife enhancement, may indicate in writing to appropriate federal officials the intent of the state of Missouri to enter into agreements to administer

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federal project land and water areas for recreation or fish and wildlife enhancement, and under instructions received through appropriate joint concurrent resolutions duly passed by the general assembly may enter into agreements or contracts to administer such lands in accordance with the provisions of the federal water projects recreation act, and to bear not less than one-half of the separable costs of the project allocated to those purposes and to bear all costs of operation, maintenance, and replacement incurred therefor from appropriations made from the fund; and such action shall be applicable to federal projects prior to authorization by congress, to authorized projects, and to completed works."

It is our opinion that under Section 258.530 the Missouri State Park Board is the "pertinent state agency having primary responsibility and authority to acquire and manage land or water for recreation." The Park Board has the authority and duty under Chapter 253, RSMo, to provide for a state park program, whereby park is defined as:

". . . any land, site or object primarily of recreational value or of cultural value because of its scenic, historic, prehistoric, archeologic, scientific, or other distinctive characteristics or natural features;" (Section 253.010(3), RSMo)

In performing its duties the Park Board:

". . . is hereby authorized to accept or acquire by purchase, lease, donation, agreement or eminent domain, any lands, or rights in lands, sites, objects or facilities which in its opinion should be held, preserved, improved and maintained for park or parkway purposes. The board is authorized to improve, maintain, operate and regulate any such lands, sites, object or facilities when such action would promote the park program and the general welfare. . . ." (Section 253.040.1, RSMo)

In a previous opinion of this office (No. 45, Missouri State Park Board, 1955), we held that under Chapter 253 the Park Board is authorized to accept a license to land in a federal reservoir area for park purposes.

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It is our opinion that the Park Board still is so authorized but that for any federal water resources projects that come under the Federal Water Project Recreation Act, Sections 258.500 through 258.540, apply.

Therefore, for such projects the Park Board would be authorized to give approval to the Inter-Agency Council for Outdoor Recreation to indicate in writing to the appropriate federal officials the intent of the state of Missouri to enter into agreements. Then, after proper instruction through appropriate joint concurrent resolution of the General Assembly, the Council may enter into an agreement or contract. It is suggested that if the Park Board is going to manage the facilities that the Board also enter into the agreement or contract.

Therefore, if such steps are followed, it is our opinion that the state of Missouri through the Council and the Park Board can agree by long-term contract to provide operation, maintenance and replacement of federally financed water control projects, and to bear not less than one-half of the separable costs of the project allocated to recreation purposes.

The second question regarding the state is whether the state or the Park Board can agree to hold the United States free from damages. To do so would mean that the state has consented to be sued in tort, or, stated another way, has waived sovereign immunity.

We find nothing in the Missouri Constitution or in the laws of the state (including Chapter 253) whereby sovereign immunity in this regard has been waived.

Therefore, at the present time neither the Council nor the Park Board could agree to hold and save the United States free from damages.

We recognize the argument that the General Assembly could do so by a joint concurrent resolution pursuant to Section 258.530. In 81 C.J.S., States, Section 215, it is stated:

"There is authority to the effect that the legislature may, without attempting to pass a law pursuant to such a provision, pass a joint resolution, which, although not effective as a law, is an effective consent by the sovereign to subject itself to suit; but it has also been held that suit cannot be maintained against the state where legislation, attempted pursuant to such a provision, is invalid as a law because not passed in accordance

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with the rules and solemnities prescribed by
the fundamental law. . . ."

We have examined the cases cited from other states and adhere
to the latter view.

Therefore, it would seem that only the legislature could, by
a duly enacted statute, waive sovereign immunity. Whether or not
such a statute would be valid cannot be answered until such a stat-
ute is enacted and presented for review.

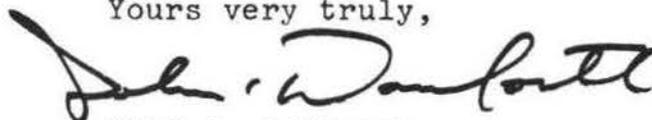
Since, at the present time, the state through the Park Board
cannot agree to hold the United States free from damages, it neces-
sarily follows that there is no legal authority to pay damages.

CONCLUSION

It is the opinion of this office that the state of Missouri
acting through the Inter-Agency Council for Outdoor Recreation
and the Missouri State Park Board, pursuant to Section 258.500,
RSMo 1969, can agree under long-term contract with the United States
to provide operation, maintenance and replacement of federally fi-
nanced water control projects under the Federal Water Projects Re-
creation Act, 16 U.S.C.A., Sections 4601-12 and 13, and further to
agree to reimburse the federal government in these projects; that
under present law neither the Council nor the Park Board has the
authority to agree to hold and save the United States free from
damages due to the construction works.

The foregoing opinion, which I hereby approve, was prepared
by my assistant, Walter W. Nowotny, Jr.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 45
12-5-55, Jaeger