

October 11, 1973

OPINION LETTER NO. 96  
Answer by Letter - Nowotny

Mr. Clifford L. Summers  
Acting Executive Director  
Missouri Water Resources Board  
Post Office Box 271  
Jefferson City, Missouri 65101



Dear Mr. Summers:

This letter is in answer to your opinion request asking whether Section 256.300, RSMo, authorizes the Water Resources Board to enter into a certain contract with the United States which contains the following paragraph:

"ARTICLE 9 - Release of Claims. The User shall hold and save the Government, including its officers, agents, and employees harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage in the Project, or withdrawal, use, or release of water from the Project, made or ordered by the User or as a result of the construction, operation, or maintenance of the features of appurtenances owned and operated by the User, provided, that this shall not be construed as obligating the User to hold and save the Government harmless from damages or liability resulting from the sole negligence of the Government or its officers, agents, or employees and not involving negligence on the part of User or its officers, agents, or employees."

Section 256.300, RSMo, provides:

"The water resources board is authorized to make reasonable assurance that demands for

Mr. Clifford L. Summers

use will be made within a period of time to permit payment of costs allocated to water supply within the life of the project, and upon receipt of specific appropriations from the fund may enter into contract with the appropriate federal departments for purposes of discharging nonfederal responsibilities relating to municipal and industrial water supply storage as permitted by applicable federal legislation on water resource projects and, in so doing, shall consider the projected water needs of the area that can be served by the project and shall also consider the ability of future users to reimburse any investment of funds that may be made by this state."

It is settled that the state may be sued only with its consent. See Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare, State of Missouri, \_\_\_ U.S. \_\_\_, 36 L.Ed.2d 251, 93 S.Ct. \_\_\_ (1973); Dicarlo Construction Co., Inc. v. State, 485 S.W.2d 52 (Mo. 1972); State ex rel. Eagleton v. Hall, 389 S.W.2d 798 (Mo. banc 1965); Kleban v. Morris, 247 S.W.2d 832 (Mo. 1952).

The issue posed by your question is whether Section 256.300 may be construed as a waiver of the state's sovereign immunity. It is our view that Section 256.300 does not authorize a waiver of sovereign immunity.

Section 256.300, when read pari materia with Section 256.290, RSMo, grants the Water Resources Board the authority to contract with the United States for municipal and industrial water supply storage in public works projects; it does not grant authority to waive the state's immunity from suit. See Attorney General's Opinion No. 78 issued May 25, 1972.

Section 8.623 (House Bill No. 77, 77th General Assembly), provides:

"Any repair or maintenance of any building, facility, or other property of the state of Missouri undertaken after the effective date of this act involving the use of federal funds or other federal assistance shall, whenever practicable, conform to the standards of this act, and any agency or entity of the state of Missouri authorizing such repair

Mr. Clifford L. Summers

or maintenance may enter into an agreement with the federal government or any agency thereof whereby the state of Missouri would hold harmless or hold free the government of the United States from any damages which may result from the repair or maintenance."

Any law which purports to waive the sovereign immunity of the state must be strictly construed. It is our view that the above section, read in conjunction with the remainder of the bill (including the title of the bill) which deals with standards for public buildings required to make such buildings accessible to the handicapped, does not authorize the Water Resources Board to enter into the hold harmless agreement.

It is the opinion of this office that the Water Resources Board is without authority to enter into a contract with the United States which provides that the state of Missouri will hold and save the United States harmless from liability of any nature or kind for or on account of any claim for damages which may be filed or asserted as a result of the storage, withdrawal, use or release of water in the Long Branch Lake on East Fork Little Chariton River, Missouri, made or ordered by the state of Missouri or as a result of the construction, operation or maintenance of the features of appurtenances owned and operated by the state of Missouri.

Very truly yours,

JOHN C. DANFORTH  
Attorney General

Enclosure: Op. No. 78  
5-25-72, Summers