



STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

OFFICE OF THE SECRETARY

JAN 02 2013

KS DEPT OF AGRICULTURE

DEREK SCHMIDT  
ATTORNEY GENERAL

January 2, 2013

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Dale A. Rodman, Secretary  
Kansas Department of Agriculture  
109 SW 9<sup>th</sup> Street, 4<sup>th</sup> Floor  
Topeka, KS 66612-1280

Re: Request for Attorney General Opinion on the constitutionality of Kansas corporate farming restrictions and limitations in K.S.A. 17-5903 *et seq.*

Dear Secretary Rodman:

As Secretary of the Kansas Department of Agriculture, you ask for our opinion on the constitutionality of Kansas corporate farming restrictions and limitations in K.S.A. 17-5903 *et seq.*, known as the Kansas Agricultural Corporations Act (Act), under the Dormant Commerce Clause or any other theory. I would note that your request is quite broad and essentially invites this Office to the unusual task of seeking legal theories under which a Kansas statute might be successfully challenged as unconstitutional.

My staff spent a great deal of time researching the issues involved in your request. Based on our review, we believe the exception to the law for an "authorized farm corporation" is likely unconstitutional under the Dormant Commerce Clause, as this term is defined to include only Kansas corporations and is therefore facially discriminatory. See K.S.A. 17-5903(k). Laws that are found to be discriminatory are subject to an almost *per se* rule of invalidity.<sup>1</sup> We cannot conceive a circumstance under which a court would find this provision to pass constitutional muster.

Regarding the remainder of the Act, we believe there are reasonable arguments to be made, on both sides, regarding whether these provisions violate the Dormant Commerce Clause, and that those arguments have not been resolved by any Court whose decision would be dispositive in the matter. While the 8th Circuit Court of Appeals has found similar statutes in other states to be unconstitutional, those decisions are not binding on the 10th Circuit Court of Appeals, which includes Kansas. In the event a legal challenge to the constitutionality of this Act were brought by a party aggrieved by its enforcement, that case would be one of first impression. In such a situation, the precise facts and circumstances of which are necessarily speculative until such time as a lawsuit is actually filed, it is likely that this Office would have a role to

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<sup>1</sup> See *Maine v. Taylor*, 477 U.S. 131, 148 (1986); *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

play, possibly as an advocate, in any such litigation.<sup>2</sup> For that reason, we decline to issue a formal opinion on this matter except in regard to the provision of K.S.A. 17-5903(k) that we believe is clearly unconstitutional.

The Legislature, through enactment of law, establishes policy for the State of Kansas. One of the roles of this office is, in most cases, to defend the decisions of the Legislature if Kansas laws are challenged in court.<sup>3</sup> While we do not defend laws that are clearly unconstitutional under binding court rulings or other law, such is not the case with this Act, except as described above. Therefore, we encourage you to approach the Legislature should you believe changes to the Act are necessary or desirable as a matter of public policy.

Sincerely,

A handwritten signature in cursive script that reads "Derek Schmidt". The signature is written in black ink and is positioned above the printed name.

Derek Schmidt  
Attorney General

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<sup>2</sup> See, e.g., K.S.A. 75-702 on the duty of the Attorney General to appear for the state when the constitutionality of any law of this state is at issue. See, also, 28 U.S.C. 2403(b) and FRAP 44(b), requiring notice to the state attorney general when the constitutionality of a state statute is challenged in federal court.

<sup>3</sup> This approach is consistent with the well-established fundamental rule of statutory construction, adopted by Kansas courts, to which all other rules are subordinate – that the intent of the legislature controls if it can be ascertained. See, e.g., *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607 (2009).