

**OPINION
63-248**

April 9, 1963 (OPINION)

STATE SOIL CONSERVATION COMMITTEE

RE: Federal Participation Develop Recreational Areas

Your letter of April 1, 1963, is acknowledged.

You have requested an opinion from this office in connection with section 61-16-01, subsection 4 of the North Dakota Century Code which provides as follows:

* * * 4. The term 'project,' as used in this chapter, shall mean, and include, any undertaking for water conservation, flood control, watershed improvement and drainage of surface waters, including incidental features of any such undertaking." (Emphasis supplied).

You then relate that the Federal Food and Agriculture Act of 1962 amended Public Law No. 566 (The Watershed Protection and Flood Prevention Act) to provide for fifty percent federal cost sharing for recreational developments within watershed projects. Further, you state that several Water Conservation and Flood Control Districts, which sponsor watershed projects, have indicated a desire to include recreation developments in watershed projects. You enclose a copy of Public Law 566, as amended, for our perusal. You then request our opinion on the following specific question:

* * * whether or not Water Conservation and Flood Control Districts are legally qualified to participate financially toward the required 50 percent non-Federal cost sharing for water related recreational developments which are an integral part of an overall watershed protection, flood prevention and resource development project?"

It appears clear, from a reading of Section 4(1) of Public Law 566, that the Federal government both encourages and provides the necessary machinery, from the Federal standpoint, for local organizations to participate in both watershed and recreational development areas which are included in an integrated watershed or related project.

The answer to your question would appear to turn on what is meant by the words "* * * including incidental features of any such undertaking.", as they appear in section 61-16-01, subsection 4 of the North Dakota Century Code, underlined above. If such recreational areas can be considered as being incidental features of watershed projects, then the Conservation and Flood Control Districts would be legally qualified to participate in the Federal project, and receive the matching funds provided in Public Law 566.

There are no court decisions in this state which have construed this section of the law, or the language therein contained. Therefore, we

must refer to the general law, commencing with the definition of the term "incidental" as defined in Black's Law Dictionary, Fourth Edition (1951) at pages 904-905 as follows.

INCIDENTAL. Depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose. The Robin Goodfellow, D.C. Wash. 20 F.2d. 924, 925."

Further, Volume 20A of Words and Phrases at page 101 shows "incidental" interpreted as follows:

* * * * 'Incidental' has much the same meaning as 'accessory' and 'subordinate' and is used to convey the idea of a thing being subordinate to, dependent on, and pertaining to another thing which is the principal one. Lowry v. City of Mankato, 42 N.W.2d. 553, 556, 559, 231 Minn. 108."

'Incidental' is an adjective which has reference to something which is subordinate to, and dependent on, and follows the existence of another and principal thing, incident to the main purpose of the main business. Kantor v. U.S., D.C. Tex., 154 F. Supp. 58, 61, 62."

And at page 103 of Volume 20A we note the following:

* * * at first blush the word 'incidental' connotes subordination to a primary purpose, and ordinarily the use of the word is regarded as referring to minor matters; the word also has the significance of collateral matters and accessory, directly pertinent to or in some relation to. In re Elimination of Highway-Railroad Crossing, City of Buffalo, 64 N.Y.S. 2d. 764, 771, 271 App. Div. 266."

The above-quoted definitive judicial interpretations appear to be the generally accepted meaning of the term "incidental." The Words and Phrases volume referred to above contains literally hundreds of interpretations of the term, some holding a more strict or narrow view while others take a more liberal view.

Therefore, as applied to your question, it is our view that recreational developments could be considered as being incidental features of an overall watershed project, if there is a close enough connection, direct or indirect, with the basic or principal project. However, we also wish to point out that a fact question is actually involved here, and this office cannot determine a question of fact, as that is a matter which must be determined by juries, in proper cases. One further point, and that is, that when a statute specifically refers to certain objects, such as water conservation, flood control, watershed improvement, and drainage of surface waters, such specification excludes other objects from the provisions of the section, as a general rule. The foregoing reasoning is based on the Latin maxim, "Expressio unius est exclusio alterius," which in its simplest terms means that the expression of one thing is the exclusion of another." (See Black's Law Dictionary, Fourth Edition at the bottom of page 692).

In connection with your specific question then, we wish to give an example to help point out our reasoning. If, as a result of a specific watershed project, an artificial lake is created due to the impounding of drainage waters, flood control projects, or one of the other projects specifically enumerated in section 61-16-01, subsection 4, it almost certainly follows that the particular artificial lake could be used or utilized for recreational purposes, such as boating, swimming, and related water sports. In that sense, recreation is incidental to the main project. However, in referring back to the language of subsection 4, we note that the words "* * * such undertaking" are also involved in reaching a determination.

It is our opinion that these words refer specifically back to the term "* * * undertaking * * *" in direct connection with the specific objects enumerated, such as water conservation projects, flood control projects, and watershed improvement and drainage of surface waters projects. Therefore, it is our view that though recreational activities could be connected with one of the enumerated projects, as an incident of such a project, it does not follow that recreational development projects can be embarked on without specific statutory authority providing or authorizing the same in section 61-16-01, subsection 4 of the North Dakota Century Code. In conclusion, it is our opinion that no statutory authority exists at this time, which authorizes the construction or expenditure of funds, for the purpose of recreational developments.

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