

Date Issued: February 12, 1987 (AGO 87-02)

Requested by: Vern Fahy, State Engineer

- QUESTION PRESENTED -

Whether the State Water Commission may reimburse landowners for their cost of modifying illegal dikes on their property?

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the State Water Commission may, under appropriate circumstances, reimburse landowners for their cost of modifying illegal dikes on their property.

- ANALYSIS -

The dikes in question are located on the banks of the Red and Marais Rivers and are involved in the North Dakota-Minnesota dike dispute, as well as a pending action in federal district court. By agreement with Minnesota, North Dakota promised to lower dikes in North Dakota. In addition, the federal court ordered modification of the North Dakota dikes.

To comply with the interstate agreement and court order, the State Engineer instituted administrative proceedings to lower the dikes. The basis for the proceedings was the determination that the dikes are unauthorized and unsafe. Such characteristics made the dikes unlawful structures and gave the State Engineer considerable power to oversee their removal or modification. North Dakota law authorized the State Engineer to enter private property and modify the dikes and assess the costs of this work against the property of the landowner. N.D.C.C. section 61-03-21.2. Most of the landowners were uncooperative, forcing the State Engineer to modify the dikes. A few landowners performed the work themselves.

The landowners, through their local water resource district, now seek reimbursement for their assessments or, as the case may be, their costs in modifying the dikes. Funds for the reimbursement are to come from the State Water Commission's contract fund.

Article X, Section 18 of the North Dakota Constitution says:

SECTION 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, nor prohibited by Article XX of the Constitution, but neither the state nor any political subdivision thereof, shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

In determining whether an appropriation of public funds is an unconstitutional donation, the primary question is whether the funds are to be used for a public or private purpose. It is not determinative that the appropriation is made to private persons or that private persons receive a special benefit. Marks v. City of

Mandan, 296 N.W. 39, 44 (N.D. 1941); Stanley v. Jeffries 284 p. 134, 138 (Mont. 1929). If a public purpose justifies or serves as a basis for an expenditure, it will be constitutional. Stutsman v. Arthur 16 N.W. 2d. 449, 454 (N.D. 1944). A public purpose is one that promotes the general welfare. Green v. Frazier 176 N.W. 11, 17 (N.D. 1920).

A universal test does not exist for deciding whether a public purpose is served by an expenditure and, if so, whether such purpose is paramount or merely incidental. "Each case must be decided with reference to the object sought to be accomplished and the degree and manner in which that object affects the public welfare." Allydonn Realty Corp. v. Holyoke Housing Authority 23 N.E. 2d. 665, 667 (Mass. 1939).

The North Dakota Supreme Court has not directly ruled on the issue. In Petters & Co. v. Nelson County 281 N.W. 61, 65 (N.D. 1938), however, the Court said that an unconstitutional donation is a gratuity "unsupported by any consideration, legal, equitable, or moral." The implication is that an appropriation for the satisfaction of a moral obligation is constitutional.

Thus, existing law suggests that the question is one of fact. Under the circumstances, I am unable to render a "yes" or "no" legal opinion. The question must be resolved by the State Water Commission. If it concludes that reimbursement serves a public purpose or is supported by consideration, moral or otherwise, then reimbursement would be proper.

- EFFECT -

This opinion is pursuant to N.D.C.C section 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

NICHOLAS J. SPAETH
Attorney General

Assisted by: Charles M. Carvell
Assistant Attorney General