

## **N.D.A.G. Letter to Porter (March 23, 2001)**

March 23, 2001

Honorable Todd Porter  
State Representative  
House Chambers  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Representative Porter:

Thank you for your inquiry regarding the constitutionality of proposed amendments to SB 2222.

SB 2222 proposes to amend N.D.C.C. § 61-24.5-10 to eliminate the expiration of the Southwest Water Authority's ability to levy a tax within its boundaries. Currently, the Southwest Water Authority may levy taxes through 2006. SB 2222 proposes to eliminate the expiration date, thereby making the Authority's taxation ability indefinite. Attached to your letter was a proposed amendment to SB 2222 which would, among other things, remove Morton County from the Southwest Water Authority, and allow the Authority to provide service to water user entities residing outside the boundaries of the Authority. Apparently, this would allow those users within Morton County who are currently being served by the Authority to retain services, while eliminating that portion of Morton County that is not being served. Under the current law, a county within the Southwest Water Authority can only be excluded from the Authority by filing a petition under the procedure outlined in N.D.C.C. § 61-24.5-16.

You have asked whether it is constitutional to remove a county from the Southwest Water Authority by amending N.D.C.C. § 61-24.5-03, rather than following the procedure under N.D.C.C. § 61-24.5-16, when the western area of Morton County is currently being served by the Southwest Water Authority. Your letter did not indicate any specific constitutional provisions or issues with which you are concerned. It is difficult to speculate what constitutional challenges may be raised with regard to a particular statute. Also, as will be discussed below, the constitutionality of a statute can depend, in part, on its legislative history. Because the legislative history of SB 2222, and the proposed amendments, is not yet complete, it may be premature to discuss the constitutionality of the proposed statute. Accordingly, this letter will generally address issues that may be raised by the proposed amendments, and explain the analyses that a court may undertake in considering these issues.

Any discussion of a statute's constitutionality is guided by a handful of principles. All statutes are presumed constitutional. N.D.C.C. § 1-02-38; Stokka v. Cass County Elec. Coop., 373 N.W.2d 911, 914 (N.D. 1985). The unconstitutionality of a statute must be proven beyond a reasonable doubt. MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994). All doubts about constitutionality are resolved in favor of

constitutionality. Id. At least four justices of the North Dakota Supreme Court must agree that a statute is unconstitutional. Id. N.D. Const. Art. VI, § 4. Finally, proving that a statute is unconstitutional on its face is especially difficult. The challenger must establish that no set of circumstances exists under which the law would be valid. Rust v. Sullivan, 500 U.S. 173, 183 (1991). See also Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1988) (facial invalidation of a statute is “strong medicine” employed “sparingly and only as a last resort”, quoting Broadrick v. Oklahoma, 418 U.S. 601, 613 (1973)). In sum, the analysis of SB 2222 and the proposed amendments starts with the strong presumption that they, if passed, will likely be constitutional.

There are at least two constitutional questions that might be raised with the proposed amendments to SB 2222. Challengers might argue that the amendments violate the prohibition on laws that impair the obligations of contracts. The proposed amendments to SB 2222 might also be challenged as a special law prohibited by the North Dakota Constitution.

Article I, Section 18 of the North Dakota Constitution provides that no “law impairing the obligations of contracts shall ever be passed.” It is my understanding that both the State Water Commission and the Southwest Water Authority have various contractual obligations regarding the construction, operation and maintenance of the Southwest Pipeline Project. Whether those contractual obligations would be impaired by the elimination of Morton County, and its corresponding tax revenue, from the Southwest Water Authority is a question of fact that this office is unable to resolve. However, depending on the facts, the proposed amendments to SB 2222 may impair existing contractual obligations, and therefore be unconstitutional.

It is also possible that the proposed amendments to SB 2222 could face a constitutional challenge as a “special law.” Article IV, Section 13 of the North Dakota Constitution provides in part:

The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.

(Emphasis added.)

“A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special.” MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d 548 at 552 (citations omitted). “Special laws are made for individual cases of less than a class, due to particular conditions or circumstances.” Id. The special laws language of the North Dakota Constitution constrains laws relating “only to particular persons or things of a class, as distinguished from “general law” which applies to all things or persons of a class.” Id. (Citations omitted.)

The proposed amendments to SB 2222 arguably could be challenged as a special or local law because they allow water user entities in Morton County (and, possibly other counties at some time in the future) to receive the benefits and services of the Southwest Pipeline Project without being subject to taxation to cover the administrative expenses of the Southwest Water Authority. Essentially, the proposed amendments may provide a special exception for certain Southwest Pipeline Project water users, but not for others.

The North Dakota Supreme Court has held that when it examines a statute to determine if the classification is special, rather than general, it will examine the reasonableness of the classification. Id. at 553 (citing Best Products, Co. Inc. v. Spaeth, 461 N.W.2d 91, 99 (N.D. 1990)). The North Dakota Supreme Court has held that a classification challenged under the special laws provision will be upheld “if it ‘is natural, not arbitrary, and standing upon some reason having regard to the character of the legislation of which it is a feature.’” Id. (Citations omitted.)

Accordingly, the reasonableness of the distinction between those water users being served by the pipeline in Morton County and water users in the remaining counties within the Authority will depend on whether the distinction is natural, not arbitrary, and has some reason relating to the legislation’s purpose. This could depend, in large part, on the legislative history of the amendments, which is not yet complete.

Sincerely,

Wayne Stenehjem  
Attorney General

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