

## **N.D.A.G. Letter to Hoffner (May 23, 1988)**

May 23, 1988

Mr. S.F. Hoffner  
Executive Director  
North Dakota Centennial Commission  
2204 East Broadway  
Bismarck, ND 58501

Dear Mr. Hoffner:

Thank you for your letter of March 31, 1988, in which you request my opinion on whether the North Dakota Centennial Commission has the legal authority to award Centennial Legacies grant moneys to various state agencies and the Greater North Dakota Association (GNDA). A related question is whether the state agencies have the legal authority to accept and expend the grant moneys.

In pursuing its purpose of "plan[ing] and promot[ing] activities in North Dakota for the 1989 centennial celebration of North Dakota statehood," 1983 N.D. Sess. Laws, ch. 583, § 3, the Centennial Commission has implemented the Centennial Legacies Grant Program. N.D. Admin. Code ch. 16.5-03-01. The Centennial Legacies Grant Program is funded by the \$1.25 centennial celebration fee imposed on every vehicle subject to state registration. See 1987 N.D. Sess. Laws ch. 453, § 3. The fees are transferred monthly by the Registrar of Motor Vehicles to the Centennial Commission and deposited in the Centennial Commission's revolving fund.

Although the centennial celebration fees have been dedicated to the Centennial Commission, the question remains whether those moneys have been appropriated by the Legislature, as required by N.D. Const. art. X, § 12, for the purpose of awarding grants. In this regard, 1983 N.D. Sess. Laws ch. 583, § 7, states as follows:

Acceptance, expenditure of gifts, grants, bequests, and donations. Whenever any grant, devise, bequest, donation, gift, or assignment of money or other property is made to the commission or any earnings or income accrued to the commission, the commission shall accept and receive the same in the name of the state. Any such property coming into the possession of the commission shall be deposited in the state treasury in a special revolving fund and all money in such fund is hereby appropriated on a continuing basis to the commission for carrying out the purpose of this act.

(Emphasis supplied.)

The dispositive issue, therefore, is whether the continuing appropriation of the dedicated revenue satisfies the requirement of N.D. Const. art. X, § 12.

An "appropriation," as that term is used in the North Dakota Constitution, "is the setting apart from the public revenue of a definite sum of money for the specified object in such a manner that the officials of the government are authorized to use the amount so set apart, and no more, for the object." State v. Holmes, 123 N.W. 884, 886-87 (N.D. 1909). The court in Holmes arrived at this definition through a discussion and analysis of N.D. Const. art. IV, § 36, which provides that the general appropriation bill of the Legislature may embrace only appropriations for the expenses of the executive, legislative, and judicial branches of the state, interest on debt of the state, and for public schools. The court further stated:

The purpose of limiting by law the amount which may be expended for a definite purpose, and requiring that it be stated in the act relating to the particular subject, is to enable the Legislature and state officials to approximate in advance the total amount of appropriations made so they may be kept within the power of the state pay.

Id. at 886.

In Menz v. Coyle, 117 N.W.2d 290 (N.D. 1962), the supreme court held that the statute under consideration in that case did not meet the tests of an appropriation established in Holmes. The statute in question, 1947 N.D. Sess. Laws. ch. 228, § 7, provided as follows:

All funds received by the state bar association of North Dakota as herein provided shall be used for legal research and education, and supervision and improvement of the judicial system of the state of North Dakota.

The court interpreted this statute in light of the requirements set forth in N.D. Const. Art. X, § 12, and stated as follows:

Even though the requirement that an appropriation must specify the purpose for which it shall be expended, is met by the provisions of [1947 N.D. Sess. Laws ch. 228, § 7] there is no specific and direct appropriation of a definite sum, and therefore, no valid appropriation of the moneys in question.

Id. at 302.

In reaching this decision, however, the court acknowledged the concept of a continuing appropriation by stating that "the wording of the chapter itself [may] constitute an appropriation." Id. at 301. The North Dakota Supreme Court did not elaborate on the requirements of a continuing appropriation that would satisfy N.D. Const. art. X, § 12.

Courts in other jurisdictions have recognized the validity of continuing appropriations in the absence of a constitutional provision to the contrary. Button's Estate v. Anderson, 28 A.2d 404, 409-10 (Vt. 1942); Board of Regency of University of Nebraska v. Exon, 256 N.W.2d 330, 333-334 (Neb. 1977); McDonald v. Frohmiller, 163 P.2d 671, 674 (Ariz. 1945); State ex rel. Hawkins v. Oklahoma Tax Commission, 462 P.2d 536, 538-540 (Okla. 1969); Louisiana State Department of Agriculture v. Sibille, 22 So.2d 202, 208 (La. 1945).

In Sibille, the Louisiana Legislature imposed a tax on all sweet potatoes shipped in Louisiana and dedicated the revenue to finance advertisement and promote consumption of sweet potatoes. The Legislature established a special revolving fund and authorized continuing disbursements therefrom. This concept was attacked as violating the constitution which read "no money shall be drawn from the treasury except in pursuance of specific appropriation made by law; nor shall any appropriation of money be made for a longer term than two years." The court rejected this challenge and stated that the taxing system "created a dedication, not an appropriation and the mentioned constitutional provision is not violated." Id. at 208.

It is my opinion that N.D. Const. art. X, § 12 does not prohibit the Legislature from dedicating revenue from a specific source and authorizing its expenditure on a continuing basis for defined purposes. The purpose underlying the appropriation requirement, as discussed by the North Dakota Supreme Court in Holmes, supra discussion at p. 2, is clearly not violated when these conditions exist.

After reviewing the Centennial Commission's revolving fund and continuing appropriation therefrom in light of these considerations, it is my opinion that it does not violate the constitution.

The related question is whether the state agencies may lawfully expend the grant moneys they receive. We understand that the agencies which have tentatively been awarded Centennial Legacies grants are as follows:

1. State Historical Society (\$133,000)
2. North Dakota Dairy Promotion Commission (\$2,000)
3. North Dakota Council on the Arts (\$15,000)
4. University of North Dakota (\$11,000)

Prior to discussing the statutory authority of each of these agencies to expend the grant moneys in question, I will discuss the general principles underlying N.D. Const. art. X, § 12, as applied to grant moneys.

The North Dakota Supreme Court has recognized that not all moneys in the custody of the state constitute "public moneys" as contemplated by N.D. Const. art. X, § 12. In State v. Jorgenson, 150 N.W. 565 (N.D. 1915), the North Dakota Supreme Court addressed whether the moneys in the state hail insurance fund were subject to N.D. Const. art. X, § 12. The court concluded that the fund was comprised of "premiums paid by owners of

crops within the state" and did not constitute state funds. Accordingly, the hail insurance fund was not subject to legislative appropriation.

Similarly, in State v. Bonzer, 279 N.W. 769 (N.D. 1938), the supreme court held that moneys in the state bonding fund "are not state moneys but are held in trust by the state treasurer for the benefit and protection of those who, under the terms of the act, may become claimants under such fund." Id. at 771. See also, State of North Dakota ex rel. Linde v. Taylor, 156 N.W. 561 (N.D. 1916).

Other jurisdictions have recognized that moneys impressed with a trust do not constitute public funds for which a special appropriation is necessary. For example, in Button's Estate v. Anderson, 28 A.2d 404, 410 (Vt. 1942), the court concluded that the "clear construction to be given this [constitutional provision] requiring a legislative appropriation for the expenditure of public moneys is that they intended to have it apply only to such funds, the equitable as well as the legal rights to which are in the State. " See also, Navajo Tribe v. Arizona Department of Administration, 528 P.2d 623 (Ariz. 1975); Opinion of the Justices to the Senate, 378 N.E.2d 433 (Mass. 1978). Thus, in the case where funds are held or used by the state for the benefit of a specific class of beneficiaries with a recognizable equitable interest in the funds, courts have indicated that it is not necessary that an appropriation exist prior to the expenditure of those funds.

The drafters of N.D. Const. art. X, § 12, recognized the trust fund concept by providing a continuing appropriation for the state hail insurance fund, the state bonding fund, the state fire and tornado fund, the worker's compensation fund, the teachers fund for retirement, state tax refunds, and income of the state institutions derived from permanent trust funds. All of the above-mentioned funds are in some respect impressed with a trust for the benefit of a class of individuals with a recognizable equitable interest in the funds. I do not interpret N.D. Const. art. X, § 12's specific enumeration of the various trust funds as creating a negative implication that other funds similarly impressed with a trust cannot be afforded special consideration when applying the requirements of the constitution.

It is my conclusion that moneys held or used by the state, and subject to an equitable interest, are not on the same constitutional level of scrutiny as are general funds in which the state possesses all legal and equitable rights. This would assuredly include moneys that are granted to an agency for a specific purpose. Grants, by definition, include conditions as to their use. As a result, the money is subject to the equitable interest of the grantor or an intended class of beneficiaries and is not available to general appropriation for other purposes by the Legislature. It is my opinion that the Legislature may constitutionally authorize an agency to accept grant moneys and expend such moneys on a continuing basis in accordance with the conditions of the grant.

Having concluded that the constitution does not prohibit the Legislature from permitting state agencies to expend grant moneys on a continual basis, it becomes necessary to examine the relevant legal authority of each grantee state agency in the case at hand.

The ability of the State Historical Society to receive and expend the grant moneys in question is controlled by N.D.C.C. § 55-01-04 which states in relevant part as follows:

The state historical board may only receive and accept any grant, devise, bequest, donation, gift, or assignment of money, bonds, or choses in action, or of any property for any purpose consistent with the statutory responsibilities of the board. The board must receive and accept the same, and the right and title thereto, in the name of the state. All moneys coming into the hands of the board as donations, gifts, grants, and bequests, unless by the terms of the donation, gift, grant, or bequest the moneys are required to be maintained in another manner, must be maintained within the state treasury. . . . The moneys must be paid out for the purposes prescribed by the donor upon the approval of the state historical board by warrant-check prepared by the office of management and budget.

It is our understanding that a special revolving fund has been established in the State Treasury for the purpose of implementing N.D.C.C. § 55-01-04. It is our further understanding that the Historical Society has expended moneys from this fund in accordance with the grantor's or donor's conditions and has not relied on specific appropriation authority, as reflected in its biennial appropriation act, to do so. The Historical Society's activities under N.D.C.C. § 55-01-04 are consistent with my interpretation of that provision.

In light of the legal principles discussed above, it is my opinion that the Historical Society's authority to accept and expend grant moneys does not violate N.D. Const. art. X, § 12. Assuming that the grant moneys in question will be expended for a "purpose consistent with the statutory responsibilities of the board," which entails a factual determination for the State Historical Board, the State Historical Society is authorized by N.D.C.C. § 55-01-04 to receive and expend the grant moneys in question.

The North Dakota Dairy Promotion Commission is authorized by N.D.C.C. § 4-27-05(6) to "accept and disburse voluntary contributions for the use and purposes of the commission." The Dairy Promotion Commission does not receive a biennial appropriation from the Legislature but, rather, relies on its special fund nature and its statutory continuing appropriation as authority to expend its revenue. See N.D.C.C. §§ 4-27-05(7) and 4-27-06(2). Assuming that the grant in question is "for the use and purposes of the commission," it is my opinion that the Dairy Promotion Commission may lawfully accept the grant and expend it for the purpose tendered.

The North Dakota Council on the Arts is authorized "to accept gifts, contributions, and bequests of unrestricted funds from individuals, foundations, corporations, and other organizations or institutions for the purpose of furthering the educational objectives of the Council's programs." N.D.C.C. § 54-54-06. However, N.D.C.C. § 54-54-06 does not express a clear legislative intent that the Council on the Arts is authorized to expend the moneys so received. Rather, the Council on the Arts' biennial appropriation act makes provision for estimated income from sources other than the general fund, such as grant

moneys, and appropriates the same. See 1987 N.D. Sess. Laws ch. 15. Therefore, to the extent that the Council on the Arts has appropriation authority to expend the grant moneys in question, as expressed in its 1987-89 appropriation act, it is entitled to do so.

The Board of Higher Education's 1987-89 appropriation act states as follows:

Section 3. Appropriation. There are hereby appropriated any funds received by the board of higher education, not otherwise appropriated, pursuant to federal acts and private grants for the purpose as designated in such federal acts or private grants for the period beginning July 1, 1987, and ending June 30, 1989.

1987 N.D. Sess. Laws ch. 3, § 3. See also, N.D.C.C. § 15-10-12 (the Board may accept grants and expend them for the purpose tendered). The Legislature, thus, has clearly authorized the Board of Higher Education to expend grant moneys for the purpose tendered. Therefore, it is my opinion that the Board of Higher Education may accept and expend the grant awarded to the University of North Dakota by the Centennial Commission.

The Centennial Commission also awarded a grant to GNDA, a nonprofit organization licensed by the Secretary of State of North Dakota. N.D. Admin. Code § 16.5-03-01-02(a) authorizes the Centennial Commission to award grants to nonprofit organizations. The Centennial Commission's award of grant moneys to a nonprofit organization such as GNDA is an appropriate exercise of discretion by the Commission.

The grant moneys awarded to GNDA were originally awarded to the Tourism Division for the same purpose. In response to our office's tentative conclusion that the Tourism Division did not have statutory authority that would allow it to expend the funds in question (other than its biennial appropriation act), the Centennial Commission at its May 5, 1988, meeting voted to rescind its original grant award to the Tourism Division and instead awarded the money to GNDA.

I trust that this discussion has satisfactorily answered your inquiry.

Sincerely,

Nicholas J. Spaeth

cc: Bud Walsh, OMB  
James Sperry, Historical Society