

**OPINION
63-148**

March 16, 1963 (OPINION)

HIGHWAY DEPARTMENT

RE: Contract with Federal Government - Right-of-Way Control

This is in response to your request for an opinion on the validity or constitutionality of the agreement entered into between the State Highway Commissioner and the Department of Commerce of the United States of America, dated May 18, 1961.

In the contract, as such, it is agreed that the State will control, or cause to be controlled, the erection and maintenance of outdoor advertising signs, displays and devices in adjacent areas within such state along the interstate highway. Adjacent area is defined in the contract to mean such areas as are within six hundred and sixty feet of the edge of the right-of-way of interstate system highways.

In the consideration of such agreement, the Federal Government will increase its share of costs in the total acquisition by one-half of one per cent of the total cost if and when funds are appropriated and made available for such purposes. Prior to entering the contract or agreement, a resolution was adopted by the Highway Commissioner on April 7, 1961. This resolution, as is material to the question, provides as follows:

Whereas it is deemed necessary and in the public interest that advertising rights outside of the right-of-way for the national system of interstate and defense highways in the State of North Dakota be acquired and controlled to the extent necessary to comply with national standards for regulation by states of outdoor advertising signs.* * *."

This resolution indicates that additional right-of-way must be acquired to carry out the agreement entered into May 18, 1961. At least it leaves the unmistakable impression that additional right-of-way must be acquired to fully carry out the agreement.

Section 24-01-32 of the North Dakota Century Code authorizes the Highway Commissioner to acquire private or public property to controlled access facilities and service roads and such advertising rights outside of the right-of-way as may be determined to be in the public interest. Such acquisition may be by gift, device, purchase or condemnation in the same manner as property is acquired in connection with construction of highways and streets.

The contract as such seems to be supported by legislative authority and in itself appears to be a valid contract, except for the money to be used to acquire such additional right-of-way. In reviewing the law relating thereto, we are unable to find where the Legislature made any appropriation for the acquisition of additional right-of-way. The Legislature could have designated any state agency or officer to acquire right-of-way and control advertising within such right-of-way and could have appropriated funds to accomplish

same. Such action would have been legal provided the funds needed to carry out such program were not appropriated from so-called "sacred funds."

In the absence of any specific appropriation, we must assume that the Highway Commissioner will use funds acquired under Article 56 of the Constitution. This article, as is material to the question at hand provides that "*** Revenue from gasoline or other motor fuel excise and license taxation, motor vehicle registration and license taxes, *** shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways."

The North Dakota Supreme Court in McKenzie County vs. Lamb, 70 N.D. 782, (298 N.W.241) said that this article (56) dedicates the revenue to public highway purposes and is intended to prevent the use of such revenue for other than highway purposes.

As to the appropriation, we note that Section 186 of the Constitution appropriates the funds allocated to the State Highway Department and the various counties for the construction, reconstruction and maintenance of public roads. It is apparent that the appropriation is only for the purposes set out above in Section 86 of the Constitution.

The North Dakota Supreme Court in Northwestern Bell Telephone Co. vs. Wentz in 103 N.W.2d, 245 said that the payment of the relocation of utility facilities did not violate the Constitution and that the law enacted by the Legislature providing for the reimbursement for and relocation was not unconstitutional. The Court made the observation that the Legislature, by the enactment of the law, considered it as a payment of obligations incurred in the construction of public highways. The Court also made the observation that the term "construction" embraces everything appropriately connected with and necessarily incidental to the complete accomplishment of the general purpose for which the fund exists.

However, in this instance we find no legislation stating that the acquisition of the additional right-of-way shall be considered part of the construction program. Neither can it be logically claimed that the additional right-of-way is a cost relating to the construction, reconstruction, repair and maintenance of public highways. It is a project independent of constructing, repairing and maintaining the highways.

It is significant to note that the Attorney General of South Dakota had a similar question under consideration relating to an almost identical constitutional provision. The South Dakota constitutional provision provides, as is material here, as follows: "*** shall be used exclusively for the maintenance, construction and supervision of highways and bridges of this state.**". We observe that the South Dakota Constitution uses the term "supervision" which is not found in the North Dakota Constitution. The term "supervision" embraces more than maintenance and construction. In essence, the South Dakota constitutional provision is broader than the North Dakota constitutional provision. Nevertheless, the Attorney General of

South Dakota specifically stated that a law authorizing the Highway Commissioner to expend highway funds to acquire additional right-of-way for purpose of regulating and controlling advertising is unconstitutional.

While our situation is not identical, we do believe that the reasoning of the Attorney General of South Dakota has merit.

The agreement, assuming funds will be expended which were raised under Article 56 of the North Dakota Century Code, in our opinion, is questionable as to whether it will meet the constitutional test. We have serious doubts that such agreement is constitutional. However, in this respect, we wish to call your attention to House Bill NO. 781 which, if passed and becomes law, will negate the agreement entered into. The language of House Bill No. 781 which will accomplish this is as follows:

***The highway commissioner shall not enter into any agreements or contracts with the bureau of public roads or any other federal agency inconsistent with the terms of this Act, and he shall terminate any existing executory agreement in regard to advertising adjacent to interstate highways in this state."

HELGI JOHANNESON

Attorney General