

**OPINION
74-139**

June 13, 1974 (OPINION)

Mr. Robert L. Eckert
State's Attorney
Richland County
Wahpeton, ND 58075

Dear Mr. Eckert:

This is in reply to your letter of June 6, 1974. You state that the existing Richland County jail which also services prisoners from the City of Wahpeton, North Dakota, will be torn down while a new Richland County - City of Wahpeton Law Enforcement Center will be constructed. You further state that there will be a time lag of about 15 months before a new Richland County Jail will be available. You also state that an agreement has been reached with Wilkin County, Minnesota, whereby Richland County prisoners can be housed in the Wilkin County Jail, located in Breckenridge, Minnesota. You state that the contractor will commence tearing down the old jail within ten days and you request a reply at our earliest convenience.

An examination of pertinent law reveals the following statutes:

North Dakota Century Code section 32-22-36 provides as follows:

32-22-36. PRISONERS SHALL NOT BE REMOVED FROM ONE PRISON TO ANOTHER - EXCEPTIONS. Any person being committed to any prison, or in custody of any officer, sheriff, jailer, keeper, or other person, or his under officer or deputy, for any criminal or supposed criminal matter, shall not be removed from such prison or custody, into another prison or custody, unless it is by habeas corpus or some other legal writ, or when the prisoner shall be delivered to the constable or other inferior officer, to be carried to some common jail, or shall be removed from one place to another within the county, in order to procure his discharge or trial in due course of law, or in a case of sudden fire, infection, or other necessity, or when the sheriff shall commit such prisoner to the jail of an adjoining county for the want of a sufficient jail in his own county, as is provided in the chapters concerning jails and jailers, or when the prisoner, in pursuance of law, may be claimed or demanded by the executive of the United States, or the executive of any other state. If any person, after comment as aforesaid, shall make out, sign, or countersign any warrant or warrants for such removal, except a before excepted, then he shall forfeit to the prisoner or aggrieved party, a sum not exceeding three hundred dollars, to be received by the prisoner or party aggrieved in the manner hereinafter mentioned."

North Dakota Century Code section 12-44-29 provides as follows:

"12-44-29. COMMITMENT WHEN NO JAIL IN COUNTY - CONTRACTS WITH UNITED STATES. When there is no jail in a county or when the jail is not sufficient, every judicial or executive officer of

the county who has power to order, sentence, or deliver a person to the county jail may order, sentence or deliver such person to the jail of an adjoining county, or to a jail operated by the United States or any of its departments or agencies when an agreement or contract exists between the county commissioners of the county not having a sufficient jail and the appropriate officers of an agency of the United States operating such jail. Such judicial or executive officer of the county shall have the same continuing jurisdiction over prisoners placed in a jail operated by an agency of the United States as he has over prisoners placed in a county jail. When the county seat of another county having a suitable jail may be reached more conveniently and with less mileage by rail or automobile than the county seat of the adjoining county having the nearest suitable jail, such officer shall order, sentence, or deliver such person to the jail of the county most conveniently located. The jailer of any such adjoining or other county shall receive and keep the prisoner in the same manner as if he had been ordered, sentenced, or delivered to him by an officer or court of his own county. The county from which such prisoner is taken shall pay all the expenses of maintaining him in such jail."

It is clearly provided that prisoners shall not be removed from one prison to another unless the qualifications of a statutory exception are met pursuant to the provisions of section 32-22-36. Since Richland County will be without a jail facility for a period of time, the transfer of prisoners to another county facility for a period of time, the transfer of prisoners to another county facility is obviously permitted. It is provided that "the sheriff shall commit such prisoner to the jail of an adjoining county for the want of a sufficient jail in his own county, as is provided in the chapters concerning jails and jailers."

It is not specifically stated that the adjoining or other county need be in North Dakota. Clearly, Wilkin County, Minnesota, is an adjoining county and at least appears to meet that requirement. However, it is our opinion that the transfer of prisoners must be made within the State of North Dakota.

Also provided in Section 12-44-29 is the requirement that the jailer of the receiving county be subject to the same duties respecting the keeping of prisoners as he is with prisoners of his own county. There are other statutory requirements concerning the conduct of officials in the operation of county jails in North Dakota. Namely, the judges of the district courts are compelled to prescribe written rules for the regulation of jails pursuant to section 12-44-04. The sheriffs are to have charge of the jails and conform to the rules made by the district judges, as provided by section 12-44-12. Based upon these legislative requirements, it is our opinion that the legislature has intended that a transfer can only be made between counties in North Dakota. Although an exception in this regard does exist for the transfer of prisoners to a federal facility as provided in section 12-44-29, the legislature has clearly not provided for a transfer of prisoners to a county jail in another state.

We recognize that many agreements exist between North Dakota and

Minnesota based upon our mutual friendship and cooperation. We also realize that a good deal of comity underscores our relationship with the State of Minnesota. However, we conclude that even a generous expansion of the doctrine of comity will not accommodate a transfer of prisoners from this state to another in the manner you propose.

Those prisoners sentenced by the City of Wahpeton may be included in the transfer of prisoners from the Richland County jail to another county jail. These prisoners have been lawfully committed to the custody and control of the county as is provided by section 40-05-01, subsection 41, and section 40-11-12. The transfer of prisoners sentenced by the municipality together with the prisoners incarcerated by the county is governed by section 12-44-29. In the case of a municipal sentence, the city judge would necessarily have to order the transfer, while such responsibility for county sentences would rest with the county or district judge in accordance with their sentencing authority.

I trust that the foregoing sufficiently sets forth our position in this matter.

Sincerely yours,

ALLEN I. OLSON

Attorney General