

**OPINION  
78-229**

December 27, 1978           (OPINION)

Mr. Michael Dwyer  
Special Assistant Attorney General  
State Water Commission  
900 East Boulevard  
Bismarck, ND 58501

Dear Mr. Dwyer:

I.

This is in response to your letter of December 11, 1978, wherein you request an opinion, on behalf of the State Water Commission and the State Engineer, regarding their authority to assess water use fees pursuant to Chapters 61-02 and 61-04 of the North Dakota Century Code. You state that the State Water Commission and the State Engineer are considering making such assessment by adoption of rules and regulations. You further state:

The statutes to be implemented by regulations pertaining to water use fees are contained in Sections 61-02-01, 61-02-14, 61-02-29, and 61-04-06.2 of the North Dakota Century Code.

Sections 61-02-14 and 61-04-06.2 are most specific, and portions thereof provide as follows:

61-02-14. POWERS AND DUTIES OF THE COMMISSION. The commission shall have full and complete power, authority, and general jurisdiction:

2. To define, declare, and establish rules and regulations:

a. For the sale of waters and water rights to individuals, associations, corporations, municipalities, and other political subdivisions of the state, and for the delivery of water to users;

61-04-06.2. TERMS OF PERMIT. The state engineer . . . may issue a permit subject to fees for water use, terms, conditions, restrictions, limitations, and termination dates he considers necessary to protect the rights of others, and the public interest.

You conclude by stating:

. . . it is my opinion that the Legislative Assembly has unequivocally granted to the State Water Commission and the State Engineer the authority to levy fees. However, notwithstanding the extensive authority vested in the State Water Commission and the State Engineer to levy water use fees, there is a question concerning potential limits of this

authority by virtue of Section 175 of the North Dakota Constitution. Basically, Section 175 provides that only the Legislative Assembly may levy a tax. The State Water Commission and the State Engineer are not intending to levy a tax. Rather, it is proposed to levy a reasonable fee for certain uses of water, and to establish through a legislative enactment a special fund for the proceeds of such fees, to be used for the development of water resource projects in North Dakota. Since only the Legislature can levy a "tax", if a water use fee is likely to be determined a tax, the Commission intends to seek the appropriate enabling legislation. However, if water use fees do not fall within the definition of a "tax", but rather are "fees," the State Water Commission and the State Engineer intend to proceed to adopt regulations pursuant to existing authority.

Therefore, my question is:

Do water use fees constitute a "tax", whereby the requirements of Section 175 of the North Dakota Constitution must be satisfied?

## II.

Section 175 of the north Dakota Constitution provides, in part:

No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

In determining that a statutory increase in the fee charged for each case filed in district court was a tax rather than a fee, the Supreme Court, in *Menz v. Coyle*, 117 N.W.2d. 290 (N.D. 1962), stated:

The moneys collected under this chapter are designated as "fees" by the Legislature. The fact that they are called "fees," however, does not decide the question of whether they are in fact fees or taxes. The name by which a tax is called in the law creating it is not controlling. It is the circumstances, the incidence, and the attributes of each case which control. *Montana-Dakota Power Co. v. Weeks*, D.C., 8 F. Supp. 935.

. . .

This court has defined a "tax" as "an enforced contribution for public purposes and is in no way dependent upon the will or express consent of the person taxed." *State v. Kromarek*, 78 N.D. 769, 52 N.W.2d. 713; certiorari denied, 343 U.S. 968, 72 S. Ct. 1964, 96 L. Ed. 1364. (P. 297)

Two Supreme Court decisions are considered controlling in determining whether the water use fee as proposed by the State Engineer and the State Water Commission's tax. In *Scott v. Donnelly*, 133 N.W.2d. 481 (N.D. 1965) the court held that a state statute authorizing the Potato Development Commission to levy and collect "fees" not exceeding one cent per hundred weight of all potatoes produced, sold

or shipped from processors and shippers was a tax and therefore an unconstitutional delegation of legislative authority in violation of Section 175 of the state Constitution. The court established the test which distinguishes a fee from a tax:

The taxing power is exclusively a legislative function, and a tax is an enforced contribution for public purposes. State v. Kromarek, 78 N.D. 769, 52 N.W.2d. 713; Menz v. Coyle (N.D.), 117 N.W.2d. 290. Whether an extraction is called a "fee" or a "tax" is of little weight in determining what it really is. Its nature is the test. Sometimes an exaction may appear to be partly for revenue and partly for regulation. If the primary purpose is revenue, it is a tax; on the other hand, if the primary purpose is regulation, it is not a tax. Cooley Taxation Vol. 1, 4th Ed., Sec. 27, p. 98, 99.

\* \* \*

The tax before us for consideration is not levied by the Legislature or by any municipality or political subdivision of the State. It is not levied by a local government nor is it necessarily used for the benefit of the area within which it is levied or the benefit of the people who must pay. The proceeds are applied to purposes that are largely statewide. (p. 423)

The more recent case of Ralston Purina Company v. Hagemeister, 188 N.W.2d. 405 (N.D. 1971) also addressed the distinction between a fee and a tax. The court upheld the constitutionality of the Poultry Improvement Act. That Act authorized the Poultry Board to exact a license fee, the maximum amount set by the Legislature, from anyone engaging in the business of poultry feed manufacturing, wholesaling or retailing. The court held that a license fee imposed by state law is an enforced contribution and therefore a "tax" within the definition established in Menz, supra. The constitutionality of the license "tax" established by the Poultry Act was upheld by the court because the Legislature had fixed the maximum license fees to be paid:

The law does not delegate to the Board the power to enact any legislation as to the maximum fees to be paid, or as to whom the provisions of the statute should apply.

\* \* \*

The statute fixes the maximum fees to be charged, and does not give to the Poultry Improvement Board "uncontrolled discretion" in fixing fees.

\* \* \*

We conclude that the statute has adequate controls within its provisions. (p. 411)

### III.

The statutory authority relied on for the purpose of establishing water use fees must be reviewed to determine whether it contains

language which establishes the stated purpose represented in your request, that the water use fee revenues would be " . . . used for the development of water resource projects in North Dakota." Section 61-02-14(2)(a), relied upon by the State Water Commission, states neither the object nor the purpose of the proceeds from the "sale of waters." No monetary standard amount is fixed by the statute for the "sale of waters." Section 61-04-06.2, relied upon the State Engineer, also fails to state the object or purpose to which "fees for water use" would be applied and does not fix a standard fee to be assessed.

Since the stated purpose of the proposed "water use fees" would be to raise revenues necessary to provide for the development of water resource projects, it is our opinion that such fees would be judicially determined a "tax" within the definition established by Menz, Scott, and Ralston Purina, supra. Due to the failure of the Legislature to fix the amount of the "tax" to be assessed and state the purpose for its use it is also our opinion that a court of competent jurisdiction would hold that the statutory authority relied upon was an unconstitutional delegation of legislative authority to tax in violation of Section 175 of the North Dakota Constitution.

#### IV.

While your inquiry does not request our opinion on the issue of whether it is within the power of the State Water Commission and the State Engineer, under the same statutory authority, to exact a fee for the limited purpose of meeting the costs directly incurred for the necessary and proper planning and administration of the regulation of the allocation and appropriation of the waters of the state, we do offer our observations on the subject. A review of the powers and duties of the State Water Commission under Section 61-02-04 would suggest that the authority of the Commission to provide for the "sale of waters" is limited to those waters which the Commission has itself appropriated and reserved by the construction, operation and control of "works" authorized generally by Chapter 61-02, and made available for delivery to water users. It would also appear that the amount of moneys raised by the "sale" of such waters would be limited to the service costs of making the water available by storage and delivery "works."

The provisions of Section 61-04-06.2, as applied within the context of the general provisions of Chapter 61-04, would suggest that the authority of the State Engineer to subject water appropriation permits to "fees for water use" is limited to those amounts for planning and administration "necessary to protect the rights of others, and the public interest."

#### V.

Should the State Water Commission and the State Engineer desire to adopt fees subject to the purposes and limitations discussed above in IV, it is considered that sufficient statutory authority exists for those limited purposes in Chapters 61-02 and 61-04 of the North Dakota Century Code.

It is hoped that the foregoing has been of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General