OFFICIAL OPINION NO. 75-125, Appropriation of water for future needs by the Walworth, Edmunds, Brown Water Development Association

STATE OF SOUTH DAKOTA

OFFICE OF

THE ATTORNEY GENERAL

July 7, 1975

Mr. Vern W. Butler Secretary
Department of Natural Resources
Development
Anderson Office Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 75-125

Appropriation of water for future needs by the Walworth, Edmunds, Brown Water Development Association

Dear Mr. Butler:

Your letter dated June 26, 1975 posed two questions:

1) Can the Walworth, Edmunds, Brown Water Development Association appropriate water for future needs under SDCL 46-5-38 (1967)?

2) Does S.B. 309 (now SDCL 46-5-20.1 (Supp. 1975» require legislative approval of this water development association's request prior to any action by the Water Rights Commission?

My answer to the first question is no and yes to the second.

1) SDCL 46-5-38 (1967) states:

A state institution, facility or property, municipality or conservancy subdistrict may appropriate water for its contemplated future needs in the manner above provided for appropriations for existing needs.

The Water Development Association, from the information you have provided me, is a conglomeration of municipalities and counties attempting to provide water for their individual needs through a unified effort. Admittedly, the Association is not one of those entities entitled to appropriate for future needs under SDCL 46-5-38 (1967). SDCL 1-24-2 (Rev. 1972), however, states in part that

Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority ...

The plain meaning of this statute is that anything two or more municipalities can do individually they can also do in concert. In contradistinction, however, no public agencies can jointly exercise a power that each does not have individually. That is, two governmental units cannot band together to use a governmental power belonging to only one of them.

Since municipalities have the power to appropriate water for future use, any association of municipalities acting under SDCL 1-24 (Rev. 1974) may do the same.

The question still remains, however, of whether the inclusion of counties in this association is an attempt to give those counties power to appropriate for future use that they do not possess individually. Is a county a "state institution, facility or property, municipality or conservancy subdistrict"?

My opinion is that a county may not appropriate for future use. Clearly, a county cannot be classified as either a conservancy subdistrict or a municipality. Their separate powers are too well delineated in the statute for the Legislature to have meant county when it said municipality and conservancy subdistrict. Furthermore, my research has found no statute granting counties the exercise of water distribution powers normally belonging to municipalities and subdistricts such as was done with solid waste disposal in SDCL 34-16B-20 (Rev. 1972).

Nor do I believe the Legislature intended the terms "state institution, facility or property" to include counties. Our courts have uniformly construed statutes dealing with county powers very strictly. For example, in *State v. Hansen*, 75 S.D. 476, 68 N.W. 2d 480 (1955), the South Dakota Supreme Court construed a statute authorizing a county to "establish and maintain a county hospital" and to issue bonds "for the purpose of purchasing a site for such hospital and for the erection, equipment, and maintenance thereof ... " The court held

that the Tripp County Commissioners were certainly authorized to purchase a hospital already built, but that the statute prohibited them from issuing bonds to facilitate that purchase. Bonds were only to be used to purchase a vacant site, to erect a new hospital on that site and to equip and maintain that new hospital. In other words, if the Legislature had wished to make the authority to sell bonds as broad as the authority to establish and maintain a hospital it should have said so explicitly. As the Court said:

A county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted. *Hansen, supra*, 68 N. W. 2d at 481.

See also State v. Bd. of County Commissioners of Beadle County, 68 S.D. 237, 300 N.W. 832 (1941); *South Dakota Employees Protective Association v. Poage*, 65 S.D. 198, 272 N. W. 806 (1937); *Pearson v. Johnson*, 59 S.D. 163,238 N.W. 644 (1931).

This judicial adherence to strict construction of statutory powers and the fact that the terms "state institution, facility or property" are generally accepted as referring to state proprietary functions rather than governmental subdivisions mandate the conclusion that counties are not entitled to appropriate water for future use under SDCL 46-5-38 (1967).

It necessarily follows from this that an association of counties and municipalities is also prohibited from future use appropriation. To rule otherwise would allow the counties to exercise powers they do not possess thereby violating SDCL 1-24 (Rev. 1974).

Your letter states that this association claims to be incorporated but is not registered with the Secretary of State. I would only comment in passing by citing you to SDCL 1-24-5 (Rev. 1974) which explicitly provides for the joint exercise of governmental powers by unincorporated associations if there is compliance with that section.

In summary, if this association contains governmental units other than those specifically mentioned in SDCL 46-5-38 (1967), it may not appropriate water for future use.

2) Your second question deals with the construction of SDCL 46-5-20.1 (Supp. 1975). That statute states:

Any application for appropriation of water, pursuant to this chapter, in excess of ten thousand acre feet annually shall be presented by the Water Rights Commission to the

Legislature for approval prior to the board's acting upon the application and all powers of eminent domain shall be denied any common carrier appropriating over ten thousand acre feet of water per annum which has not obtained such prior legislative approval.

Your question is raised by the fact that the present application was filed on May 29, 1975, the new statute was effective on July 1, 1975, and the Commission will not meet until July 24, 1975, and you are wondering whether an application that predates the statute must be referred to the Legislature.

The general law is that pending proceedings must comply with procedural statutes even though the statute does not become effective until after the proceeding has started. Retrospective action will not be allowed if it will destroy a vested right. No right here is, as yet, vested; only the application to receive a vested right is involved. *See Koga v. Ball*, 497 F. 2d 702 (4th Cir.1974); *Frame v. Marlin Firearms Company, Inc.*, 514 S. W. 2d 728 (Tenn. 1974).

Furthermore, it is my opinion as attorney for the Commission, that the statute affects not only applicants for water appropriations but also the Commission itself. The Commission is prohibited from acting on applications for more than 10,000 acre feet/year without prior submission to the Legislature. My advice is that unless directed otherwise by court order the Commission must now submit all appropriate applications to the Legislature.

For these reasons, I answer your second question in the affirmative.

Sincerely,

William Janklow
Attorney General

WJJ:RN:dk