

OFFICIAL OPINION NO. 75-191, Right of South Dakota Legislature to allow South Dakotans concerned with the Oahe Irrigation Project to have a chance to voice their opinions

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 75-191

**Right of South Dakota Legislature to allow South Dakotans concerned with the
Oahe Irrigation Project to have a chance to voice their opinions**

Dear Sirs:

You have requested an official opinion from this office on the following question:

Does the State Legislature have the power to authorize by legislative action, a referendum, having either a binding or advisory effect, to indicate whether the electors of the affected area favor construction of the Oahe Irrigation project?

It is apparent that unless it is clearly prohibited by the federal or state constitution, the Legislature may, by appropriate action, authorize such a vote. It is a well established rule of constitutional law that the Legislature of this state may pass any act that is not repugnant to the federal or state constitution. The rationale behind this principle is based on the principle that insofar as the Legislature is concerned, our constitution is not a grant of power-it is only a limitation. Thus, the powers of the Legislature are plenary or absolute except where clearly limited by the constitution. *State ex rel. Wagner v. Summers*, 33 S.D.

40, 144 N.W. 730 (1913) and *State ex rel. Payne v. Reeves*, 44 S.D. 568, 184 N.W. 993 (1921).

It is obvious that the act of the State Legislature in submitting a question of state policy to a vote of the people would not be repugnant to the federal Constitution. As to whether or not the state constitution prohibits such a vote, a closely related question was submitted to me for an official opinion earlier this year. In Official Opinion Number 75-31, the question asked was whether or not the Legislature, on its own initiative, could refer a statute that it had passed to a vote of the people. After reviewing the powers of the Legislature, I concluded: The constitution nowhere restricts the legislative power to refer legislative actions to a vote of the people. Therefore, it is my opinion that the Legislature has an absolute right to provide for a vote of the people on any laws that may pass.

My conclusion in Official Opinion Number 75-31 was based in large part on the decision of the South Dakota Supreme Court in *State ex rel. Wagner v. Summers* [*supra*]. In *Summers*, the Court was concerned with the referendum power of the Legislature. The Court held that even before the amendment of article III, section 1, of the constitution in 1898, which added the initiative and referendum provisions, the Legislature had the inherent authority to submit legislative acts to the people for their rejection or approval. The Court further held that a referendum is not objectionable as an unconstitutional delegation of legislative power—it is an exercise of the veto power. With respect to limitations on the exercise of the referendum power, the Court stated:

If we are right in our conclusion that the only limitation of that kind upon the legislature was to prevent it from authorizing the submission of ... [emergency measures] ... it seems clear that the legislature in its wisdom must be left to prescribe what acts [not within the exception] may be referred, and that courts are without authority to declare limitations where none are prescribed by the legislature. If other limitations are deemed wise or salutary, the legislature alone can so declare. Whether the power of referendum may be abused or unwisely exercised, to the embarrassment or injury of individuals or the public, is not left to the courts to determine.

In view of the *Summers* decision, it is clear to me that the Legislature, in the exercise of its broad and somewhat discretionary power, may refer a question which it has not acted upon to a vote of the people. After fully examining the South Dakota Constitution, I am unable to find a single provision that would, in my opinion, prohibit such an act.

Therefore, it is my opinion that the State Legislature has the power to authorize by legislative action, a referendum, having either a binding or advisory effect, to indicate whether the electors of the affected area favor construction of the Oahe Irrigation Project.

Respectfully submitted,

William Janklow
Attorney General

WJJ:DDF:dh