OFFICIAL OPINION NO. 78-12, South Dakota Conservancy District may not assume financial obligations of conservancy subdistrict with respect to Bureau of Reclamation projects

March 17, 1978

Mr. Douglas E. Haeder
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South Dakota Oahe Unit Task Force
Pierre, South Dakota 57501

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Dear Mr. Haeder:

You have transmitted to this office the request of the Oahe Unit Task Force for my opinion on the following questions:

QUESTIONS:

1. Would assumption of the financial obligations of a conservancy subdistrict under a Bureau of Reclamation contract by the South Dakota Conservancy District upon the request of the conservancy subdistrict constitute a conflict with constitutional or statutory provisions of South Dakota or of the United States?

2. What is your interpretation of the type(s) of such obligation(s) which could be undertaken by the State, acting through the South Dakota Conservancy District, under current law?

3. What is your interpretation of the magnitude of such obligation(s) which could be undertaken by the State, acting through the South Dakota Conservancy District, under current law?

4. If legislation were enacted providing for the implementation of such assumption of obligation by the State, how would this legislation relate to the existing Oahe Unit contracts,

assuming that the Oahe Subdistrict would request assumption of primary or secondary responsibility by the State?

IN RE QUESTION NO. 1.

This question asks whether the Conservancy District may under State and Federal statutes and constitutions assume the financial obligations of a conservancy subdistrict with regard to a United States Bureau of Reclamation contract.

First of all, with regard to federal law, I must respectfully decline this opportunity to issue an opinion on questions as broad as those in your request. Federal reclamation law is typical of statutes and case law which have developed in no readily apparent logical progression since the passage of the original Reclamation Act of June 17, 1902. 43 U.S.C. 371, *et seq*. It is my fear that if this office were to attempt to answer your request based upon this patchwork quilt of amendments to amendments and judicial decision the result may inadvertently be more misleading than authoritative. Furthermore, any opinion I may issue based on Federal law in this area would not in any way be binding on the agency charged with enforcing the statutes--the United States Bureau of Reclamation. If an opinion on federal reclamation statutes is required I would suggest contacting the Solicitor's Office within the Bureau of Reclamation.

With regard to state law as it controls the relationships between the Conservancy District and the various subdistricts, I believe the following statutes are dispositive.

SDCL 46-17-19. The district board of directors may construct, operate and maintain water resources development works not within a subdistrict and may become a party to agreements or contracts with federal agencies, public entities, local groups or persons covering construction, operation and maintenance of water resources development works.

SDCL 46-17-17. The board of directors of the South Dakota conservancy district shall have the power to acquire under the provisions of this chapter and chapter 46-18, by purchase or lease all such real and other personal property as may be necessary for the construction, maintenance and operation of any or all water resources projects; to hold and use the same to lease or otherwise dispose of any part or parcel thereof, or sell the same when not required for water resources project use, and no longer necessary to its use; in carrying out of this section the district board shall follow the procedures required in the case of counties

under the laws of South Dakota.

SDCL 46-17-20. The district board of directors may become a party to long or short-term contracts as principal or guarantor for payment for such services or for performance of construction, operation or maintenance works as is deemed beneficial or advisable by the district board of directors, provided that nothing contained in this chapter or chapter 46-18 shall permit said district board to enter into contracts or agreements whatsoever as shall obligate the state of South Dakota beyond the extent of said district board's then current annual or biennial appropriation.

SDCL 46-17-24. The board of directors of the South Dakota conservancy district shall have the power to co-operate with and to furnish assurances of co-operation and as principal and guarantor or either to enter into a contract, or contracts, with the United States of America, with public entities of South Dakota or with persons for the performance of obligations entered into with the United States for the construction, operation or maintenance of water resources projects or for accomplishment of the purposes and intents of this chapter and chapter 46-18.

SDCL 46-17-19 allows the district to "construct, operate and maintain water resources development works *not within a subdistrict* . . . ." (Emphasis added.) The first question that must be addressed is whether this grant of powers "*not within* a subdistrict" is also a denial of those powers *within* a subdistrict.

As in every question, there is more than one approach to this very preliminary issue. One argument is that SDCL 46-17-19 allows the district to construct projects outside of a subdistrict, but does not explicitly prohibit the construction of projects within a subdistrict. Furthermore, it can be argued that the second half of SDCL 46-17-19 allows the district to become a party to . . . contracts with federal agencies . . . covering construction, operation and maintenance of water resources development works" without regard to the location of the project within or without a subdistrict. I believe, however, that the better argument follows the canon of statutory construction that a statute should be interpreted to give effect to all words within the statute and to avoid making surplusage of any of the statute's language. Under this rule, if the Legislature had intended to allow the district the power to construct a project within and without a subdistrict, it could have explicitly accomplished that purpose by omitting the phrase "not without a subdistrict." This phrase would become meaningless if SDCL 46-17- 19 were interpreted as allowing construction by

the district within a subdistrict's boundaries. This is the result to be avoided. *Northwest Finance Co. v. Nord*, 19 N.W.2d 578 (S.D. 1945); *State ex rel. Kriebs v. Halladay*, 219 N.W. 125 (S.D. 1928). Furthermore, it is settled law in this state that a governmental body may exercise only those powers granted it by the Legislature. *In re Opinion of the Judges*, 287 N.W. 581 (S.D. 1939). Against this legal background, the sound way of interpreting a grant of power to construct *"not within* a subdistrict" is to say that it is also a denial of any power to construct within a subdistrict.

In addition, while the second clause of SDCL 46-17-19 appears to allow the district to become a party to contracts for the construction, operation or maintenance of water resources works without regard to subdistrict boundaries, this clause must be interpreted so as to give effect to all parts of section 46-17-19. It would be impossible for the district to construct, operate or maintain any project without becoming a party to a contract for such construction, operation and maintenance. To interpret SDCL 46-17-19 so as to deny the district the power to "construct, operate and maintain" projects within a subdistrict while, at the same time, allowing the accomplishment of the same ends by contract would be to deny any meaning to the first clause of section 46-17-19.

The preferable construction is that the district's power to contract under SDCL 46-17-19 is limited in the same manner as its power to construct. That is, it is my opinion that SDCL 46-17-19 allows the district the power to construct, operate and maintain or to contract for such construction, operation and maintenance only with regard to "water resources development works not within a subdistrict."

The inquiry, however, cannot end here. Your request is phrased in terms of "assumption of financial obligations . . . under a Bureau of Reclamation contract," and it may be argued that the assumption of financial obligations for a project within a subdistrict is not the same as construction not allowed by SDCL 46-17-19. Using the Oahe Project as an example, however, it can be seen from the master contract that the only real obligations of the subdistrict, with the exception of operation and maintenance when certain works are turned over to the subdistrict, are payments for water supply and for the construction, operation and maintenance of the various works. This is a contract in which the federal government agrees to construct, operate and maintain the project and the subdistrict agrees to make certain payments in consideration of those services and capital improvements. If the conservancy district were to assume the financial obligations of a subdistrict under a master contract like the one for the Oahe Project, the district would be entering into a contract

“covering the construction, operation and maintenance of water resources works” within a subdistrict. This power is generally denied the district under SDCL 46-17-19.

Nor does it appear that the power to construct within a subdistrict, generally denied to the Conservancy District by SDCL 46-17-19, is specifically granted by other provisions of the law. For example, SDCL 46- 17-17 states in part that 'the board . . . of the . . . district shall have the power to acquire under the provisions of this chapter and chapter 46-18 . . . property as may be necessary for the construction, maintenance and operation of any or all water resources projects.'

It is my opinion that this power to acquire property does not allow the district to be the responsible and primary party in the construction of a project. The phrase “under the provisions of this chapter and chapter 46-18” reflects the division of responsibilities between the district and the subdistricts established by those chapters and particularly section 46-17- 19. In addition, the power to acquire property for “any or all water resources projects” under SDCL 46-17-17 is not the power to construct any or all projects but only the power to acquire property to assist a subdistrict with projects inside a subdistrict and to assist the district in its own projects “not within a subdistrict.”

SDCL 46-17-20 is another provision which may be argued as authority for the district to build a subdistrict project. That section, set out above, provides in part that “the district board . . . may become a party to . . . contracts as principal or guarantor for payment for such services or for performance of construction, operation or maintenance works as is deemed beneficial or advisable by the district board . . .” It is my opinion, however, that this provision must be read as limited by the “not within a subdistrict” language of SDCL 46-17-19 and that the powers granted by section 46-17-20 are to be exercised only within the limits of the district's general authority as established by SDCL 46-17-19. This interpretation gives effect to both section 46-17-20 and section 46-17-19 while any other interpretation would give section 46-17-19 no effect at all.

Furthermore, as a practical matter obligations under SDCL 46-17-20 are limited to the “district board's then current annual or biennial appropriation.” This would not be sufficient to assume the obligations under the Oahe Contract, for example, since the subdistrict's obligations run for at least forty years under that contract.

Finally, SDCL 46-17-24 may be argued as authority for the assumption of construction

responsibility for a subdistrict project. That section provides that:

the board . . . of the . . . district shall have the power to co-operate with and to furnish assurances of co-operation and as principal and guarantor or either to enter into a contract . . . with the United States . . . with public entities of South Dakota or with persons for the performance of obligations entered into with the United States for the construction, operation or maintenance of water resources projects or for accomplishment of the purposes and intents of this chapter and chapter 46-18.

One possible interpretation of this provision is that it creates an exception to the "not within a subdistrict" limitation of SDCL 46-17-19 in the case of federal projects. For two reasons, however, I do not believe this section was intended to be an exception to the policy of SDCL 46-17-19. The first is a practical consideration based on the fact that there is federal involvement in a very large number of the water resources projects in this state. Under these circumstances an exception for federal projects would very quickly become the rule and leave the general policy of SDCL 46-17-19 with no effects at all. To read the district's powers with regard to federal projects, however, as being limited by SDCL 46-17-19 and its "not within a subdistrict" language gives some effect to both provisions. That is, SDCL 46-17-19 would retain its full effect, and the district's powers with regard to federal projects would also be effective outside the limits of a subdistrict.

The second reason involves the fact that this language governing the district's powers in federal projects appears in nearly identical form as a grant of power to the subdistricts in Chapter 46-18. See SDCL 46-18-27. The difference between the two grants of power is, with respect to your request, insubstantial. There are many other areas in which the powers of the district and subdistricts parallel each other. Compare SDCL 46-17-15 with 46-18-23; SDCL 46-17-17 with 46-18-24; SDCL 46-17-18 with 46-18-25; SDCL 46-17-23 with 46-18-26.

It is my opinion that in this statutory structure is a legislative intent to keep the responsibility for water projects at a local level. This intent is evidenced most clearly in the "not within a subdistrict" phrase of SDCL 46-17-19. In areas where local interest was sufficient to form a subdistrict, the Legislature apparently intended the responsibility to remain at that level, and the district was to construct projects only in areas where subdistricts were not formed.

This is consistent with the fact that if the district's power under SDCL 46-17-24 with regard to federal projects allows district construction within a subdistrict at the subdistrict's request, that statute must also be read to allow the same type of action without subdistrict consent. There is nothing wrong in section 46-17-24 which would limit the district's actions to requests by the subdistrict. That section must be read as allowing the district to act regardless of subdistrict approval. I do not believe the Legislature intended to make the formation of subdistricts such a potentially meaningless event.

If SDCL 46-17-24, as stated above, is read to allow the district to construct within a subdistrict, it must also be read to allow such construction with or without subdistrict consent. The Legislature, however, provided for subdistricts to ensure local participation in water projects. For example, the contracting authority of a subdistrict is subject to voter approval, SDCL 46-18-37, and the directors of the subdistricts are elected by the voters of the subdistrict, SDCL 46-18-12. None of the construction powers of the district are subject to such electoral control. It would be a strange exercise in participating democracy for the Legislature to give with one hand a local voice in water development through the creation of subdistricts and, with the other hand, allow water development by the district that is not bound by these electoral safeguards.

I realize that a substantial argument can be made for allowing the district to deal directly with the federal government to the exclusion of a subdistrict. Such an argument, however, cannot be reconciled with the legislative direction of SDCL 46-17-19 that the district "may construct, operate and maintain water resources development works *not within a subdistrict*."

In summary, therefore, it is my opinion that the South Dakota Conservancy District may not assume at the request of a subdistrict the subdistrict's financial obligations under a Bureau of Reclamation contract for the following reasons:

1. Assumption of the financial obligations under a contract such as the Oahe Project master contract would in reality make the district the builder of the project.

2. SDCL 46-17-19 allows the district the power to construct only such water projects as are "not within a subdistrict."

3. Other construction powers of the district, although not limited by their own terms to

projects outside of subdistricts, must be read in that manner to prevent SDCL 46-17-19 from becoming meaningless and to preserve the significance of the subdistricts. This is so since any statutes which would allow construction by the district pursuant to subdistrict approval would also authorize the same action without subdistrict approval.

The answer to your first question is yes-assumption of the financial obligations by the district would conflict with South Dakota statutory provisions.

IN RE QUESTIONS NOS. 2 AND 3:

In light of my answer to your first question, these questions become moot.

IN RE QUESTION NO. 4:

In this question, you have asked how legislation which would allow the State, acting through the Conservancy District, to assume subdistrict financial obligations would relate to existing Oahe Unit contracts. The answer to this question with regard to the master contract lies in three articles of that contract.

Article 27 provides that the subdistrict:

shall cause to be levied and collected all necessary assessments, tolls, and other charges, and will use all of the authority and resources of _____ District to meet the obligations of _____ District to make in full all payments to be made pursuant to this contract on or before the date such payments become due and to meet its obligations under this contract.

Obviously, this article contemplates that the responsible subdivision of state government will have the authority to levy taxes, if necessary, to meet the contract obligation. The district possesses no such authority, but the subdistricts do. SDCL 46-18-31, 46-18-40 and 46-18-41. This district's inability to tax may prevent the fulfillment of obligations under article 27 of the master contract.

Article 43 provides:

While this contract is in effect, the obligation of _____ District shall not be changed by reason of the exclusion of lands, by dissolution, consolidation, merger, or otherwise, except

upon the Contracting Officer's written consent thereto.

Article 44 states:

The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment or transfer of this contract, or any part thereof, or interest therein, shall be valid until approved by the Contracting Officer.

Under these two articles, it is my opinion that any assumption of subdistrict responsibilities by the Conservancy District would be void and of no effect until approved by the Contracting Officer who is the United States Secretary of the Interior. The conditions the Secretary of the Interior may place upon this transfer of obligations are solely a matter of federal law and are in the Secretary's discretion in the exercise of his duties. I cannot offer an opinion on what those conditions may be. This need for federal approval would exist regardless of any change in state law concerning the Conservancy District's authority to assume these responsibilities.

In answer to your fourth question, it is my opinion that regardless of any changes in state law, Conservancy District assumption of Oahe Subdistrict obligations for the Oahe Unit would be a violation of the master contract unless approved by the Secretary of the Interior.

Respectfully submitted,

William J. Janklow
Attorney General

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