

N.D.A.G. Letter to Nelson (Feb. 6, 1987)

February 6, 1987

Honorable Gary Nelson
Senator
District 22
Senate Chambers
State Capitol
Bismarck, ND 58505

Dear Senator Nelson:

At Senator Olson's request, we are responding to your inquiry as to the legality of Senate Bill No. 2400.

Senate Bill No. 2400 concerns the confiscation of property and the manner in which it is to be disposed. Under current law, property which has been confiscated as a result of its use in the connection with the illegal taking, holding, or transporting of game or fish which has been ordered to be disposed is done so by the commissioner of the Game and Fish Department. Following the disposal of such property, the proceeds are deposited into the state treasury for credit to the game and fish fund.

Senate Bill No. 2400, if enacted, would change the manner in which such confiscated property is disposed. Under this bill, confiscated property ordered to be disposed by a court would be referred to the North Dakota Wildlife Federation who is directed to sell the property and to deposit the proceeds with the North Dakota Wildlife Federation's "Report All Poachers" fund.

Senate Bill No. 2400 poses two potential conflicts with the provisions of the constitution of North Dakota. The first potential conflict is Art. X, §12. This constitutional provision requires all public moneys, from whatever source derived, to be deposited with the state treasurer and disbursed only pursuant to legislative appropriation. Should those funds received by the North Dakota Wildlife Federation following its sale of the confiscated property be considered public moneys, this constitutional provision would require the deposit of such moneys to be made with the state treasurer rather than the North Dakota Wildlife Federation's "Report All Poachers" fund.

However, Senate Bill No. 2400 only requires that property which has been ordered to be disposed by a court be turned directly over to the North Dakota Wildlife Federation for disposal. Thus, Senate Bill No. 2400 provides for a transfer of private property as opposed to public moneys following the court ordered disposal of confiscated property.

A contrary argument may be advanced that the confiscated property is public property despite in whose possession the property may be found. Under this argument, any

moneys received from the disposal of such public property would be considered public moneys and subject to Art. X, §12. However, it is my conclusion that once the property has been transferred to the possession of the North Dakota Wildlife Federation for disposal, it loses its public identity and becomes the property of the Federation. As such, any proceeds realized from the disposal of a confiscated property would be considered private rather than public moneys.

Although this analysis of Senate Bill No. 2400 and the effect of Art. X, §12, is not free from doubt, the presumption as to the constitutionality of statutes along with the previous analysis support my conclusion that Senate Bill No. 2400 is in compliance with Art. X, §12 of the constitution.

The second potential conflict posed by Senate Bill No. 2400 is Art. X, §18 of the North Dakota Constitution. This particular provision prohibits the state from loaning or giving its credit or making donations to, or in aid of any individual, association, or corporation, except for the reasonable support of the poor. However, the constitutional provision does allow such activities to occur where the state is making internal improvements or engaging in any industry, enterprise, or business as allowed by law. Northwestern Bell Telephone Co. v. Wentz, 103 N.W.2d 245 (N.D. 1965). In other words, where a state is authorized to engage in a particular industry, enterprise, or business, the state may engage in that activity by the making of loans, the giving of credit, or the making of donations in the aid of any individual, association, or corporation.

Senate Bill No. 2400 does provide for state donations in aid of a particular association; namely, the North Dakota Wildlife Federation. However, the aid provided to the North Dakota Wildlife Federation is part of the state's business of confiscating and disposing of property used in the unlawful taking of game and fish. By its enactment of N.D.C.C. Ch. 20.1-10, the Legislature has set out the interests of the state in the confiscation of property used for the unlawful taking of game and fish and the manner in which such property is to be confiscated and disposed of. As the confiscation and disposal of this property is a permitted enterprise in which the state may engage, any legislation which allows the state to loan, give credit, or make a donation in aid of any association would not be violative of Art. X, §18 of the constitution. Northwestern Bell Telephone Co. v. Wentz. Thus, it is my conclusion that Senate Bill No. 2400 does not violate Art. X, §18.

In summary, Senate Bill No. 2400 does not violate either Art. X, §12 or Art. X, §18 of the North Dakota Constitution.

Sincerely,

Nicholas J. Spaeth

cc: Senator John Olson