

## **N.D.A.G. Letter to Johnson (Oct. 1, 1987)**

October 1 1987

Mr. James O. Johnson  
Assistant State's Attorney  
Mercer County State's Attorney  
Mercer County Courthouse  
Stanton, ND 58571

Dear Mr. Johnson:

Thank you for your letter of September 1, 1987, inquiring as to whether the county may borrow money without authorization of the voters to build a county-owned power pipeline. According to your letter, the county proposes to pay for the cost of the construction of the pipeline solely with those revenues received from the operation of the pipeline. As such, the amount of money to be borrowed would not be considered a general obligation of the county since general taxation moneys would not be used to repay the loan.

Your letter inquires whether this project may occur without compliance with the majority voter approval provision of N.D.C.C. § 21-03-04. Subsection 2 of that statute authorizes counties, when authorized by a majority vote of the qualified electors, to issue bonds upon any revenue-producing utility owned by the county for the purchase or acquisition of the utility, the building or establishment thereof, in amounts not exceeding the physical value of the utility, industry, or enterprise. N.D.C.C. § 21-03-04 essentially carries forth the provisions of N.D. Const. art. X, § 15 ("any county or city by a majority vote may issue bonds upon any revenue-producing utility owned by such county or city").

The North Dakota Supreme Court has long recognized a special fund doctrine as an exception to the provisions of N.D. Const. art. X, § 15 (formerly 183). This doctrine has been stated as an established rule of law holding that bonds, warrants, contracts, or other obligations issued or entered into by the state or its municipalities do not come within the meaning of the words "debt" or "indebtedness" as used by the debt limitation provisions of N.D. Const. art. X, § 15, if those obligations are secured by and payable exclusively from revenues to be realized from public property acquired with the proceeds of the obligations. In other words, the doctrine holds that revenues obtained from a public utility which is devoted to the debt created by that utility as the sole source of payment of the indebtedness does not become a public debt of the governmental entity within the provisions of N.D. Const. art. X, § 15. State ex re. Lesmeister v. Olson, 354 N.W.2d 690 (N.D. 1984); State ex re. Syvertson v. Jones, 23 N.W.2d 54 (N.D. 1946). The special fund doctrine requires the debt to be specially authorized by statute. Marks v. City of Mandan, 296 N.W. 39 (N.D. 1941).

The special fund doctrine has been applied by the court to the improvement and expansion of a municipal water plant to be funded by revenues from the plant (Stark v.

City of Jamestown, 37 N.W.2d 516 (N.D. 1949)), a municipal electrical power plant to be funded from plant revenues (Thomas v. McHugh, 256 N.W. 763 (N.D. 1934)), and a municipal electrical plant funded by plant revenues (Lang v. City of Cavalier, 228 N.W. 819 (N.D. 1930)). In City of Jamestown, the bonds issued for the water and sewerage project of the city were to be payable solely out of the revenue derived from the operation of the project and were secured by a pledge of the net income from such income producing undertaking. The court concluded that the bonds were issued pursuant to the revenue bond law (N.D.C.C. ch. 40-35) and did not come within the confines of N.D. Const. art. X, § 15. As such, there was no need for any election to approve the bonds in question. Id. at 521.

In summary, N.D. Const. art. X, § 15, and N.D.C.C. § 21-03-04 restrict counties in the amount of outstanding debt which may be incurred. An exception to this restriction exists with respect to bonds issued upon any revenue-producing utility owned by the county where such bond issuance has been approved by a majority of electors. However, there also exists a special fund doctrine holding that the debt of a revenue-producing utility owned by a county is not a debt within the provisions of N.D. Const. art. X, § 15, where such debt is satisfied by revenues produced by the utility. For the special fund doctrine to apply, there must be independent statutory authorization for the bond issuance. Otherwise, the bond issuance will be subject to the majority vote requirement of N.D. Const. art. X, § 15, and N.D.C.C. § 21-03-04.

In most of the cases previously cited, the cities have relied upon the revenue bond law as found at N.D.C.C. ch. 40-35 for the necessary statutory authorization. In reviewing that statute, however, one notes that it appears to be limited to cities only. The revenue bond law refers solely to municipalities throughout its provisions. N.D.C.C. § 40-01-01(4) states that municipalities include cities, but does not include any other political subdivision. Thus, there is no provision within N.D.C.C. ch. 40-35 allowing counties to enjoy the authority to borrow pursuant to the revenue bond law.

Our search for applicable laws as to the ability of counties to borrow money brings us back to N.D.C.C. ch. 21-03. There appears to be no additional independent bases upon which a county may issue bonds for the project described in your letter. N.D.C.C. §§ 11-11-11, 11-11-14. Failing to discover a statutory basis for the issuance of bonds for the payment of a power pipeline by a county other than N.D.C.C. § 21-03-04(2), we must conclude that a county desiring to issue bonds to construct a power pipeline and to use the revenues produced by such a utility for the purchase or acquisition of the pipeline must rely upon N.D.C.C. § 21-03-04(2) for its action. As such, the county must obtain the majority vote of the qualified electors voting on the question before the bonds may be issued.

Sincerely,

Nicholas J. Spaeth

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