

**OPINION
70-340**

March 13, 1970 (OPINION)

Mr. James E. Sperry
Superintendent
State Historical Society of North Dakota

RE: State - Historical Society - Concession

This is in reply to your letter requesting the opinion of this office in regard to concession operations, sales of books, historical reprints and back issues of your quarterly. You call our attention to that portion of section 55-02-04 of the 1969 Supplement to the North Dakota Century Code providing:

All moneys collected as fees, compensation for concession agreements, or otherwise, shall be placed in the general fund for the purpose of reimbursing such fund for appropriations made to the state historical board, except that funds received in the normal course of business from concession operations actually carried on by the state as a proprietor shall be deposited in the state treasury in a special revolving fund, and all moneys in such fund are hereby appropriated on a continuing basis for expenditure in the course of carrying on the business activities of such concession operations. * * *."

Your questions are stated as follows:

1. Does the sale of historical publications appear to be a legal and justifiable activity of a concession operation carried on by the state as proprietor as covered by this section? This would not include our quarterly publication which we sell by subscription. I would assume that the sales of books and reprints would be no different than handling post cards, film, candy bars, or other items already on sale in our concession operation.
2. Is there anything within the existing laws of the State of North Dakota which would prevent us from including and selling historical reprints and back issues of the quarterly on hand and owned by the State Historical Society under such a concession operation? These are existing inventory and were originally paid for from appropriations to the State Historical Society over a span of some 64 years. Can this be accomplished by reimbursing the general fund from the concession fund for original costs of these publications already on hand or what other measures might be necessary."

It will probably help in understanding the problems extant under the factual situation you set forth and the statute you ask us to consider, if we also consider the provisions of Section 186 of the North Dakota Constitution. Said Section 186 provides, insofar as here applicable, as follows:

"* * * (1) All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the State receiving the same, to the State Treasurer, and deposited by him to the credit of the State, and shall be paid out and disbursed only pursuant to appropriation first made by the Legislature;* * *."

During the greater part of the span of some sixty-four years that historical reprints and back issues of the quarterly were paid for from appropriations to the State Historical Society, we would assume that the said State Historical Society was operating more or less as a private association or corporation, though devoted largely to a proper public function. At the current time, of course, the State Historical Society Board is operating very much in the same manner as other state agencies and is, for most practical purposes, a State agency.

Your letter does not indicate specifically the original source of the funds "received in the normal course of business from concession operations actually carried on by the state as a proprietor", which, under the statutory provision, are to be deposited in the State Treasury in a special revolving fund. We would assume, however, that funds and proceeds from items purchased from such funds so used by the State Historical Society, when the State entered directly into the State Historical Society picture, would continue on this basis pursuant to this statutory provision. Also, funds appropriated by the legislative assembly to establish such a revolving fund could continue on such a basis.

The facts stated in your letter, however, do not indicate that the funds appropriated originally for the historical reprints and back issues of the quarterly on hand and owned by the State Historical Society were intended to be, or were stated to be, such a revolving appropriation. Also, it does not appear that such funds were handled on such a revolving basis at the time the State entered directly into the Historical Society affairs.

We do not feel that there would be any legal problem with the actual sale of such historical reprints or back issues of the quarterly on hand through concession operations or otherwise by the State Historical Society Board. The sale of items surplus to the needs of a State agency has been recognized in many instances. The difficulty that might arise would be with regard to disposition of the proceeds of such sales. We would assume that the funds for the original cost of preparation of same were appropriated State funds. They have been held by the State Historical Society, supported in part by the State, and are currently being held by the State Historical Society Board, which is for practical purposes a State agency. The sale of such publications will be, in effect, the action of the State. On such basis, the proceeds of such sales would be public monies. To this extent they should properly be paid over to the State Treasurer, deposited by him to the credit of the State, and paid out and disbursed only pursuant to appropriation first made by the legislative assembly.

Insofar as these items have been preserved by State action, funds and

facilities, as well as having been originally produced at State expense, we would assume that the State Historical Society Board is, at the current time, for practical purposes and on behalf of the State, the owner of same. On such basis, they should receive full current market value if, at the current time, they determine same to be surplus to the needs of the State Historical Society Board and dispose of same. We would further assume that full current market value of the total inventory of these items would be somewhat less than the amount that could eventually be realized by a concession program of continued sales of individual items from such total inventory.

It is, therefore, our opinion that these books, reprints, and back issues of the quarterly could be made available for sale by the State Historical Society Board as a concession proprietor by transferring from available concession funds to the State Historical Society general fund receipts in an amount equivalent to current full market value of the inventory of these items on hand.

We have not considered herein the provisions of section 15-61-05 of the 1969 Supplement to the North Dakota Century Code insofar as your Department does not actually contemplate a transfer to another Department of the State Government the appropriation, items and preservation of same, which were from general fund moneys rather than from special fund monies and, of course, the ultimate objective of the program contemplated.

HELGI JOHANNESON

Attorney General