

**LETTER OPINION
2018-L-05**

December 14, 2018

Rep. Rick Becker
District 7, House of Representatives
6140 Ponderosa Ave
Bismarck, ND 58503

Dear Representative Becker:

Thank you for your letter asking whether transfers from the highway tax distribution fund to the ethanol production incentive fund, as provided in N.D.C.C. § 39-04-39, and the subsequent use of the funds for incentive payments to ethanol plants pursuant to N.D.C.C. ch. 17-02, are contrary to the allowable uses of gasoline and other motor fuel excise and license taxation revenue as described in Section 11 of Article X of the North Dakota Constitution.

Applying the long-standing principles of constitutional interpretation to this case, transfers from the highway tax distribution fund to the ethanol production incentive fund, as provided in N.D.C.C. § 39-04-39, for purposes of providing incentive payments to ethanol plants pursuant to N.D.C.C. ch. 17-02, are presumed constitutional until declared otherwise by a court.

ANALYSIS

In enacting a statute, it is presumed that the Legislature intended to comply with the North Dakota and United States constitutions, and any doubt must be resolved in favor of the statute's validity.¹ This presumption is conclusive unless the statute clearly contravenes the state or federal constitution.² Furthermore, a statute may be declared unconstitutional only upon the concurrence of four out of five justices of the North Dakota Supreme Court.³ The opinion of an Attorney General is not binding on the judiciary. Therefore, it has been this

¹ N.D.C.C. § 1-02-38(1); *State ex rel. Johnson v. Baker*, 21 N.W.2d 355, 357 (N.D. 1945).

² *State v. Hegg*, 410 N.W.2d 152, 154 (N.D. 1987).

³ N.D. Const. art. VI, § 4.

office's policy to refrain from calling into question the constitutionality of a statute unless it is clearly and patently unconstitutional.⁴

Section 11, art. X of the North Dakota Constitution has been the subject of both North Dakota Supreme Court cases and opinions from this office. It states:

Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, except revenue from aviation gasoline and unclaimed aviation motor fuel refunds and other aviation motor fuel excise and license taxation used by aircraft, after deduction of cost of administration and collection authorized by legislative appropriation only, and statutory refunds, shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways.⁵

It is well settled that revenue from the taxes and registration fees dedicated in N.D. Const. art. X, § 11, constitutionally can only be used for the "construction, reconstruction, repair or maintenance, or activity appropriately connected with, and necessarily incidental to, the construction, reconstruction, repair or maintenance of part of a road designated and built for and used by the public."⁶ The North Dakota Supreme Court has ruled the Constitution does not define or restrict the meaning of "construction," therefore the term includes "everything appropriately connected with, and necessarily incidental to, to complete accomplishment of the general purpose for which the fund exists."⁷

Revenue collected pursuant to N.D. Const. art. X, § 11 is deposited in the "highway tax distribution fund" which is established by N.D.C.C. § 54-27-19. The highway tax distribution fund serves as the depository for multiple revenue sources.⁸ Although most of the revenue deposited in the highway tax distribution fund consists of funds dedicated by

⁴ N.D.A.G. 95-L-05.

⁵ N.D. Const. art. X, § 11.

⁶ N.D.A.G. 96-F-13.

⁷ *Nw. Bell Tel. Co. v. Wentz*, 103 N.W.2d 245, 256 (N.D. 1960); see 40 C.J.S. Highways § 176h(2)(a); *State ex rel. Syvertson v. Jones*, 23 N.W.2d 54 (1946).

⁸ See N.D.C.C. ch. 57-43.2 (money collected under chapter dealers, fees to obtain a license to import fuel, and penalties imposed and paid); N.D.C.C. §§ 39-24-05 (snowmobile registration); 39-04-10.15 (portion of the fee for patriotic number plates); 39-05-30 (vehicle title registration fees); 39-22.1-02.1 (trailer dealers registration fees); 39-18-03.2 (park model trailer fee); 39-18-02.1 (mobile home dealer registration fee); 39-29-05 (registration fees for off-highway vehicles); 39-04-10.13 (portion of organizational plate fees).

N.D. Const. art. X, § 11, there are also non-dedicated funds that are deposited in that fund.⁹ Non-dedicated funds include revenue from sources other than those specifically identified in N.D. Const. art. X, § 11. The Legislature is not subject to the same constitutional restrictions when appropriating non-dedicated funds. Thus, the statutory directive in N.D.C.C. § 39-04-39 to appropriate funds from the highway tax distribution fund is only unconstitutional if the appropriated funds are derived from dedicated funds.

Section 39-04-39, N.D.C.C., directs funds to be transferred from the highway tax distribution fund, as follows:

Any moneys in the registration fund accruing from license fees or from other like sources, in excess of the amount required to pay salaries and other necessary expenses, in accordance with the legislative assembly's appropriation for such purposes, must be promptly deposited in the highway tax distribution fund which must be distributed in the manner as prescribed by law. The state treasurer shall transfer annually from the highway tax distribution fund to the ethanol production incentive fund an amount equal to forty percent of all sums collected for the registration of farm vehicles under subsection 5 of section 39-04-19 except that no transfer may be made in an amount that would result in the balance of the ethanol production incentive fund exceeding seven million five hundred thousand dollars.

Whether the funds appropriated pursuant to N.D.C.C. § 39-04-39 are dedicated funds is a question of fact and this office will not issue an opinion when the issues presented are questions of fact rather than questions of law.¹⁰ At the time N.D.C.C. § 39-04-39 was enacted, the constitutional constraints regarding the appropriation of dedicated funds within the highway tax distribution fund were well known to the Legislature.¹¹ Based on the Legislature's appropriation of revenue specifically from the registration of farm vehicles, as defined by N.D.C.C. § 39-04-19(5), it appears the Legislature is of the opinion that "farm vehicles" are distinct from "motor vehicles" and therefore not within subject to the constitutional limitations in N.D. Const. art. X, § 11.

As previously indicated, the appropriation in N.D.C.C. § 39-04-39 is specific to "sums collected for the registration of farm vehicles under subsection 5 of section 39-04-19" "Farm vehicles" is defined as follows:

⁹ N.D.A.G. 96-F-13.

¹⁰ See N.D.C.C. § 54-12-01(6),(8) (opinions issued to state agencies and legislators on "legal questions"). See also N.D.A.G. 99-L-68 (whether property or an activity is taxable depends on findings of fact and cannot be conclusively answered by this office as a matter of law).

¹¹ See S.L. 2003, ch. 57 § 6.

[T]rucks or combinations of trucks and trailers weighing more than twenty thousand but not more than one hundred five thousand five hundred pounds [more than 9071.84 but not more than 47854.00 kilograms] owned, or leased for at least one year by a bona fide resident farmer who uses the vehicles exclusively for transporting the farmer's own property or other property on a farm work exchange basis with other farmers between farms and the usual local trading places but not in connection with any commercial retail or wholesale business being conducted from those farms, nor otherwise for hire.¹²

The courts have a duty to “reconcile statutes with the constitution when that can be done without doing violence to the language of either, and in all cases of doubt the doubt must be resolved in favor of the constitutionality of the statute.”¹³ This rule has been followed in many subsequent cases.¹⁴

It is entirely plausible a court could determine that the registration fees for farm vehicles can be distinguished from registration fees of other motor vehicles so that N.D.C.C. § 39-04-39 can be read in a manner consistent with Art. X, sec. 11. The statutory definition of “farm vehicle” includes registered vehicles that are used for “transferring a farmer’s own property . . . between farms and the usual local trading places but not in connection with commercial retail or wholesale business.”¹⁵ The use of the funds dedicated in Article X, Section 11 of the North Dakota Constitution have consistently been tied to the use for the construction, reconstruction, repair or maintenances connected with roads designated and built for and used by the public.¹⁶ Farm vehicles, although required to be registered, based on their specific definition, may be found to have a predominately agricultural purpose as distinct from a vehicle primarily designed for use on public roads.¹⁷

¹² N.D.C.C. § 39-04-19(5).

¹³ *Verry v. Trenbeath*, 148 N.W.2d 567, 570 (N.D. 1967) citing *Martin v. Tyler*, 60 N.W. 392 (1894).

¹⁴ *State ex rel. Gaulke v. Turner*, 164 N.W. 924 (1917); *State v. First State Bank of Jud*, 202 N.W. 391 (1925); *Baird v. Burke Cnty.*, 205 N.W. 17 (1925); *Aubol v. Engeseth*, 262 N.W. 338 (1935), *State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (1945); *Stark v. City of Jamestown*, 37 N.W.2d 516 (1949); *State ex rel. Rausch v. Amerada Petroleum Corp.*, 49 N.W.2d 14 (1951); *Kessler v. Thompson*, 75 N.W.2d 172 (N.D. 1956); *Nw. Bell Tel. Co. v. Wentz*, 103 N.W.2d 245 (N.D. 1960); *Convis v. State*, 104 N.W.2d 1 (N.D. 1960).

¹⁵ N.D.C.C. § 39-04-19(5).

¹⁶ *Nw. Bell Tel. Co. v. Wentz*, 103 N.W.2d 245, 256 (N.D. 1960); see 40 C.J.S. Highways § 176 h(2)(a); *State ex rel. Syvertson v. Jones*, 23 N.W.2d 54 (1946). N.D.A.G. 96-F-13.

¹⁷ See generally *Grinnell Mut. Reinsurance Co. v. Center Mut. Ins. Co.*, 658 N.W.2d 363 (N.D. 2003).

The North Dakota Supreme Court has stated that if a statute is susceptible to two constructions, one which will be compatible with constitutional provision or one which will render the statute unconstitutional, we must adopt the construction which will make the statute valid.¹⁸ The court has also held that every reasonable presumption is in favor of the constitutionality of a statute,¹⁹ and, if it is possible to do so, interpretations of statutes which place the statute in disharmony with the constitution are avoided.²⁰

It has been this office's policy to refrain from calling into question the constitutionality of a statute unless it is clearly and patently unconstitutional.²¹ Although N.D.C.C. § 39-04-39 touches upon a fund and revenue that is well established as constitutionally protected, I cannot clearly say that by its plain language it is patently unconstitutional. A statute should not be held to be unconstitutional either in whole or in part unless its unconstitutionality is clearly established, and this principle applies with particular force to a holding by the Attorney General of this state regarding the constitutionality of a law of this state.²² There are fact determinations that if made, could call into question the constitutionality of the appropriation within N.D.C.C. § 39-04-39, but those facts must be determined by a court.

Sincerely,

Wayne Stenehjem
Attorney General

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²³

¹⁸ *Paluck v. Bd. of City Comm'rs, Stark Cnty.*, 307 N.W.2d 852, 856 (N.D. 1981).

¹⁹ *State, et rel., Sathre v. Bd. of Univ. and Sch. Lands*, 262 N.W. 60, 64 (N.D. 1935).

²⁰ *Grace Lutheran Church v. N.D. Emp't Sec. Bureau*, 294 N.W.2d 767, 772 (N.D. 1980).

²¹ N.D.A.G. 95-F-05.

²² N.D.A.G. 80-67.

²³ *See State ex rel. Johnson v. Baker*, 21 N.W.2d 355 (N.D. 1946).