

**LETTER OPINION
2010-L-13**

September 20, 2010

The Honorable Kari L. Conrad
State Representative
224 8th Street SE
Minot, ND 58701-4038

Dear Representative Conrad:

Thank you for your letter asking whether the passage of House Concurrent Resolution 3054 (HCR 3054) in the November 2010 general election would affect the constitutional allocations of oil extraction tax revenue for the common schools trust fund and the foundation aid stabilization fund contained in N.D. Const. art. X, § 24. For the reasons indicated below, it is my opinion that the passage of HCR 3054 in the upcoming November general election, creating the legacy fund, would have no effect on the constitutional allocation of oil extraction tax revenue to the common schools trust fund and the foundation aid stabilization fund contained in N.D. Const. art. X, § 24. However, the passage of HCR 3054 may affect various statutory allocations of the oil extraction tax and the oil and gas production tax and necessitate legislative adjustments by the 62nd Legislative Assembly.

ANALYSIS

Section 24 of article X of the North Dakota Constitution provides as follows:

Section 24. Twenty percent of the revenue from oil extraction taxes from taxable oil produced in this state must be allocated as follows:

1. Fifty percent must be deposited in the common schools trust fund.
2. Fifty percent must be deposited in the foundation aid stabilization fund in the state treasury, the interest income of which must be transferred to the state general fund on July first of each year. The principal of the foundation aid stabilization fund may be expended only upon order of the governor, who may direct such a transfer only to offset

foundation aid reductions that were made by executive action pursuant to law due to a revenue shortage.

If passed by the people in the upcoming November general election, HCR 3054 would create a new section to N.D. Const. art. X¹ and would establish a new fund, called the legacy fund, in the North Dakota Constitution. HCR 3054 provides, in part, as follows:

SECTION 1. A new section to article X of the Constitution of North Dakota is created and enacted as follows:

1. Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund. The legislative assembly may transfer funds from any source into the legacy fund and such transfers become part of the principal of the legacy fund.
2. The principal and earnings of the legacy fund may not be expended until after June 30, 2017, and an expenditure of principal after that date requires a vote of at least two-thirds of the members elected to each house of the legislative assembly. Not more than fifteen percent of the principal of the legacy fund may be expended during a biennium.
3. Statutory programs, in existence as a result of legislation enacted through 2009, providing for impact grants, direct revenue allocations to political subdivisions, and deposits in the oil and gas research fund must remain in effect but the legislative assembly may adjust statutory allocations for those purposes.

The state investment board shall invest the principal of the North Dakota legacy fund. The state treasurer shall transfer earnings of the North Dakota legacy fund accruing after June 30, 2017, to the state general fund at the end of each biennium.

SECTION 2. EFFECTIVE DATE. If approved by the voters, this measure becomes effective for oil and gas produced after June 30, 2011.²

¹ See HCR 3054.

² HCR 3054 (to be denominated as Constitutional Measure No. 1 on the November general election ballot).

The stated intent of HCR 3054 is to establish a North Dakota legacy fund, provide for deposit of certain oil and gas tax revenues in the fund, and impose limitations on the use of moneys in the fund.³ Both N.D. Const. art. X, § 24 and the proposal in HCR 3054 would allocate oil extraction tax revenues, potentially conflicting with each other, and HCR 3054 would additionally allocate other tax revenues.

You first ask whether the passage of HCR 3054 in the upcoming November general election would affect the current constitutional allocations of a portion of the oil extraction tax revenue to the common schools trust fund and the foundation aid stabilization fund set out in N.D. Const. art. X, § 24. You also appear to be questioning whether the passage of HCR 3054 would repeal or amend N.D. Const. art. X, § 24. I will address the latter issue first.

As is evident, HCR 3054 does not expressly repeal or amend current N.D. Const. art. X, § 24. However, the lack of an express repeal or amendment does not necessarily end the inquiry. A legal principle that sometimes comes into play in interpreting statutes or constitutional provisions is that of an implied amendment or implied repeal of a current provision based on the passage of a new provision. Although an implied repeal or implied amendment of a statute is disfavored, that conclusion may be reached where a conflict between the two statutes [or constitutional provisions] is irreconcilable.⁴ As noted in a 2004 opinion from this office:

An “implied amendment” is an act that makes a material modification to a statute without specifically amending the statute in question. Tharaldson v. Unsatisfied Judgment Fund, 225 N.W.2d 39, 45 (N.D. 1974). There is a presumption against implied amendments. In order to overcome that presumption, there must be an irreconcilable conflict between the implied amendment and the applicable statute. Id.⁵

On the other hand, an implied repeal was explained as follows:

The North Dakota Supreme Court has held on numerous occasions that implied repeals are not favored and are to be avoided when possible. . . . In order for two statutes to be so irreconcilable as to result in the implied repeal of the first enacted, there must be a clear repugnancy between the two to such an extent that a necessary implication arises that the Legislature, by enactment of the later, intended to repeal the former.⁶

³ See HCR 3054.

⁴ Birst v. Sanstead, 493 N.W.2d 690, 695 (N.D. 1992).

⁵ N.D.A.G. 2004-L-29.

⁶ N.D.A.G. 81-90; see also N.D.A.G. 2005-L-36 (implied repeals are not favored; the conflict between the two provisions must be irreconcilable to overcome the presumption against implied repeals).

Stated another way: “[t]hough repeals by implication are not favored the provisions of a Constitution may be impliedly repealed or abrogated by the adoption of changes in other portions which render such provisions obnoxious or ineffective.”⁷

There is nothing in the plain language of HCR 3054 or in the legislative history for that provision which indicates such a direct conflict between these provisions that the Legislature intended to impliedly amend or repeal existing N.D. Const. art. X, § 24.

Although HCR 3054 and N.D. Const. art. X, § 24 are not in direct conflict, you question whether passage of HCR 3054 would have an effect on existing allocations of oil and gas revenue under N.D. Const. art. X, § 24. The North Dakota Supreme Court provided the following guidance in construing constitutional provisions:

In construing and interpreting the Constitution we must give effect and meaning to every provision and reconcile, if possible, apparently inconsistent provisions.

. . .

“In ascertaining both the intent and general purpose, as well as the meaning, of a constitution or a part thereof, it should be construed as a whole. As far as possible, each provision should be construed so as to harmonize with all the others, with a view to giving effect to each and every provision in so far as it shall be consistent with a construction of the instrument as a whole. . . .

Different sections, amendments, or provisions relating to the same subject, or of the same matter so that they can be said to be in pari materia, are to be construed together and read in the light of each other.”⁸

Thus, every attempt should be made to harmonize and read together the provisions of HCR 3054 and N.D. Const. art. X, § 24.⁹

⁷ Egbert v. City of Dunseith, 24 N.W.2d 907, 909 (N.D. 1946).

⁸ State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 908 (N.D. 1977) (citations omitted); see also Lein v. Sathre, 113 N.W.2d 679, 683 (N.D. 1962) (if possible, constitutional provisions must be harmonized).

⁹ See Lucier v. N.D. Workers Comp. Bureau, 556 N.W.2d 56, 60 (N.D. 1996) (statutes on the same subject should be harmonized if possible); Johnson v. Johnson, 527 N.W.2d 663, 668 (N.D. 1995) (statutes should be read in relation to other statutes involving similar subject matter to harmonize statutory scheme); Van Raden Homes, Inc. v. Dakota View Estates, 520 N.W.2d 866, 867 (N.D. 1994) (statutes should be harmonized to give meaning to each without rendering one or the other useless).

Although, as you note, both HCR 3054 and N.D. Const. art. X, § 24 deal with the allocation of the oil extraction tax, I do not view the provisions as being either repugnant or irreconcilable but, rather, they are easily harmonized and considered together, i.e., each constitutional provision would merely carve out a portion of the oil extraction tax revenue for different but not conflicting purposes. Consequently, it is my opinion that if approved by the voters at the November 2010 general election, HCR 3054 would not affect the constitutional allocation of 20% of the revenue from the oil extraction tax going, in equal shares, to the common schools trust fund and the foundation aid stabilization fund under N.D. Const. art. X, § 24. Both provisions would govern the distribution of oil extraction tax revenue. HCR 3054's legacy fund would allocate approximately 30% of the oil extraction tax to the legacy fund, and N.D. Const. art. X, § 24 would continue to allocate 20% of the oil extraction tax in equal shares to the common schools trust fund and the foundation aid stabilization fund.

You next ask about the effect the constitutional allocations, i.e., HCR 3054, if approved by the voters, and current N.D. Const. art. X, § 24, would have on the various statutory fund allocations and programs currently in existence, including the general fund. In order to answer your questions, I first must determine which tax revenues are affected by the constitutional allocations. As you noted, N.D. Const. art. X, § 24 only deals with constitutional allocations from the oil extraction tax. However, the legacy fund, which would be created by the passage of HCR 3054, would be funded by "[t]hirty percent of total revenue derived from taxes on oil and gas production or extraction."¹⁰

At the outset, it is necessary to examine this language of the measure. Although this section talks about revenue derived from taxes on "oil and gas production or extraction,"¹¹ it seems apparent from the legislative history that the drafters were contemplating total revenue of both the oil and gas production tax and the oil extraction tax.

Normally, "or" means the disjunctive,¹² while "and" is conjunctive and ordinarily means in addition to.¹³ However, that is not always the case, and these terms must be examined in context.¹⁴ In the context and history here it seems apparent that the references to the production tax and the extraction tax were meant to be in the conjunctive. For example, the fiscal note that was attached to HCR 3054 through various drafts and hearings referred to a North Dakota legacy fund that will receive "a portion of the state's share of oil

¹⁰ HCR 3054, § 1(1) (emphasis added).

¹¹ *Id.*

¹² *See, e.g., Indus. Contractors, Inc. v. Workforce Safety & Ins.*, 772 N.W.2d 582, 589 (N.D. 2009) (the word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions).

¹³ *Christl v. Swanson*, 609 N.W.2d 70, 73 (N.D. 2000).

¹⁴ *Id.* ("The literal meaning of the terms 'and' and 'or' should be followed unless it renders the statute inoperable or the meaning becomes questionable." 1A Norman J. Singer, *Sutherland Statutory Construction*, § 21.14 (5th ed. 1991) (2000 Cum.Supp. 26)).

and gas tax revenues,” and the revenue estimates provided by the Tax Department accompanying HCR 3054 included both oil production and oil extraction taxes.¹⁵ In addition, reading HCR 3054, § 1(1) in the disjunctive would render the provision inoperable or the meaning questionable;¹⁶ the State Treasurer would have no way of ascertaining what tax revenue to transfer to the legacy fund, making that provision inoperable or the meaning questionable. Therefore, the language in HCR 3054 must mean that the allocation is to be made from oil extraction tax revenue and from oil and gas production tax revenue.¹⁷

Therefore, to answer your question, I must next examine statutory allocations from the oil extraction tax revenue and statutory allocations from oil and gas production tax revenue.

The oil extraction tax statutory allocations are governed by N.D.C.C. ch. 57-51.1. The allocation of the oil and gas gross production tax is governed by N.D.C.C. ch. 57-51. Some of the programs and allocations are funded entirely by the oil extraction tax, some are funded solely from the oil and gas production tax, and others are funded by a combination of both taxes. The allocation of monies in the oil extraction tax development fund are set out in N.D.C.C. § 57-51.1-07. Twenty percent of those funds is allocated to payment of the debt service on the North Dakota Water Development Bonds, Southwest Pipeline Series, and any monies in excess of debt service are allocated to the resources trust fund.¹⁸ Twenty percent of the oil extraction tax development fund is allocated to the common schools trust fund and the foundation aid stabilization fund as set out in N.D. Const. art. X, § 24.¹⁹ Sixty percent of the oil extraction tax development fund is allocated to the general fund for general state purposes.²⁰

Thus, N.D.C.C. § 57-51.1-07 presently accounts for the allocation of 100% of the funds in the oil extraction tax development fund. Passage of HCR 3054 would add an additional 30% split of the oil extraction tax revenues which is not accounted for in N.D.C.C. § 57-51.1-07. Consequently, if HCR 3054 is approved by the people, the

¹⁵ See Fiscal Note, Office of State Tax Comm’r (Feb. 20, 2009) and Comparison of Forecasted Oil Tax Revenues for the 2009-11 and 2011-13 Biennia Under Current Law Distributions and Under the Provisions of HCR 3054 and SCR 4030.

¹⁶ See Christl, 609 N.W.2d at 73; see also N.D.C.C. § 1-02-38(3) and (4) (in enacting laws it is presumed that a reasonable result is intended and that a result feasible of execution is intended).

¹⁷ North Dakota does not assess a gas extraction tax. Compare, N.D.C.C. chs. 57-51 (oil and gas production tax) and 57-51.1 (oil extraction tax).

¹⁸ N.D.C.C. § 57-51.1-07(1). The resources trust fund is authorized under N.D. Const. art. X, § 22. Under N.D.C.C. § 57-51.1-07(1)(a) and (b), the resources trust fund is to be used by the State Water Commission for the purpose of planning for and constructing water-related projects and by the Industrial Commission for the funding of programs for development of energy conservation and renewable energy sources, and for other related purposes.

¹⁹ See N.D.C.C. § 57-51.1-07(2).

²⁰ N.D.C.C. § 57-51.1-07(3).

non-constitutional allocations contained in subsections 1 and 3 would likely need to be adjusted to account for the amounts that would be required to be transferred to the legacy fund if the goal is to preserve the amounts needed to fund one or more of the non-constitutional programs or allocations at current levels.²¹ The allocation in subsection 2 of section 57-51.1-07 would not need to be adjusted since it relates to the constitutional allocation of the oil extraction tax development fund contained in N.D. Const. art. X, § 24. Section 2 of HCR 3054 provides that the effective date for the measure would be June 30, 2011. Consequently, the Legislature would have time to adjust the statutory allocations contained in N.D.C.C. § 57-51.1-07(1) and (3). However, at this point in time, it is unknown what the various statutory programs and allocations would be on June 30, 2011, the effective date of HCR 3054 if it is approved. That would depend on what adjustments the 62nd Legislative Assembly may make.

Passage of HCR 3054 would also have an impact on allocations of the oil and gas production tax revenues. As noted above, some statutory programs and allocations are funded by both the oil and gas production tax and the oil extraction tax. For example, N.D.C.C. § 57-51.1-07.2 creates a permanent oil tax trust fund which receives deposits in excess of \$71,000,000, i.e., the first \$71,000,000 goes into the general fund and the remainder goes into the permanent oil tax trust fund.²² Similarly, the oil and gas research fund is funded by 2% of the oil and gas production tax and the oil extraction tax revenues going into the general fund, up to \$4,000,000 per biennium.²³

Also, as noted above, certain statutory allocations are funded solely by the oil and gas gross production tax under N.D.C.C. ch. 57-51. These include revenues for the oil and gas impact fund up to \$8,000,000 per biennium²⁴ and allocations to political subdivisions within producing counties.²⁵ The drafters of HCR 3054 took into account some of the impacts on statutory programs and allocations.²⁶ The resolution provides, in pertinent

²¹ According to the Legislative Council:

During the 2007-09 biennium, total oil and gas tax collections for North Dakota totaled more than \$799 million, of which over \$430 million was collected from gross production taxes and over \$368 million was collected from oil extraction taxes. The state's share of gross production taxes was over \$555 million, with more than \$334 million from gross production taxes and more than \$220 million from oil extraction taxes. Of the state's share of oil and gas taxes, \$71 million was deposited into the general fund and over \$484 million was deposited into the permanent oil tax trust fund.

Background Memorandum, Mineral Resource Impact and Taxation Issues, N.D. Legis. Council (Oct. 2009). Thus, passage of HCR 3054 would reduce the amounts of these tax revenues otherwise available for distribution to existing programs and allocations by 30%.

²² N.D.C.C. § 57-51.1-07.2.

²³ N.D.C.C. § 57-51.1-07.3.

²⁴ See N.D.C.C. § 57-51-15.

²⁵ See N.D.C.C. § 57-51-15.

²⁶ See HCR 3054, § 1(3).

part, that “[s]tatutory programs, in existence as a result of legislation enacted through 2009, providing for impact grants, direct revenue allocations to political subdivisions, and deposits in the oil and gas research fund must remain in effect but the legislative assembly may adjust statutory allocations for those purposes.”²⁷

Based on the foregoing, it is evident that the 62nd Legislative Assembly may need to address some of the statutory programs and allocations contained in current law because of funding dislocations that may be caused by passage of HCR 3054. Any adjustments can be put into effect prior to the June 30, 2011, effective date of HCR 3054, if the measure is approved by the voters.²⁸ Thus, until the measure is approved by the people and the 62nd Legislative Assembly has had an opportunity to make any necessary adjustments to any of the statutory allocations, it is premature to speculate on what changes may ultimately be made to the statutory programs and allocations, as well as to the general fund.

Sincerely,

Wayne Stenehjem
Attorney General

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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.²⁹

²⁷ Id.

²⁸ HCR 3054, § 2.

²⁹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).