

**LETTER OPINION
2010-L-14**

October 22, 2010

The Honorable Kelly L. Schmidt
State Treasurer
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Ms. Schmidt:

Thank you for your letter requesting my opinion on a question concerning the allocations of coal conversion facilities tax revenue under N.D.C.C. § 57-60-14. This statute provides for an allocation of tax revenue to counties, the state general fund, and the Lignite Research Fund, and it also provides that a shortfall payment must be made to each county receiving less than it did in the previous year. You question whether the annual shortfall payments made to counties under subsection 2 of section 57-60-14 are appropriated from tax revenue that has been allocated to the state general fund under subsection 1 of section 57-60-14 or whether the shortfall payments are appropriated from tax revenue that has been received but has not yet been allocated under subsection 1 of section 57-60-14. Based on the following, it is my opinion that the county shortfall payments under subsection 2 of section 57-60-14 are appropriated from coal conversion facility tax revenues that were allocated to the state general fund under subsection 1 of section 57-60-14.

ANALYSIS

Chapter 57-60, N.D.C.C., creates a tax on coal conversion facilities, and section 57-60-14, N.D.C.C., provides a multi-step formula for allocating that tax revenue among the counties, the state general fund, and the Lignite Research Fund. Your question arises from the meaning of the language used in section 57-60-14. Subsection 1 of section 57-60-14, N.D.C.C., provides in part, that:

The state treasurer shall no less than quarterly allocate all moneys received from all coal conversion facilities in each county pursuant to the provisions of this chapter, fifteen percent to the county and eighty-five percent to the state general fund . . . [with an exception not relevant to this question]. From July

1, 2007, through June 30, 2009, three and one-half percent of all funds allocated to the state general fund pursuant to this chapter must be allocated to the lignite research fund and after June 30, 2009, five percent of all funds allocated to the state general fund pursuant to this chapter must be allocated to the lignite research fund, for the purposes defined in section 57-61-01.5.¹

Subsection 2 of section 57-60-14, N.D.C.C., provides in part, that:

Notwithstanding any other provision of law, the allocation under this section to each county may not be less in each calendar year than the amount certified to the state treasurer for each county under this section in the immediately preceding calendar year For a county that has received less in a calendar year than the amount certified to the state treasurer for that county in the immediately preceding calendar year, not later than January tenth of the following year, the county auditor shall calculate the amount that is due under this subsection and submit a statement of the amount to the state treasurer. The state treasurer shall verify the stated amount and make the required payment under this subsection to the county, from collections received under section 57-60-02, not later than March first of the following year. The funds needed to make the distribution to counties under this subsection are appropriated on a continuing basis for making these payments. . . .²

You state that the Treasurer's Office has construed section 57-60-14 to provide for separate distributions under subsections 1 and 2. In particular, a representative of your office has stated that the shortfall payment for counties in subsection 2 is drawn from the coal conversion taxes that were previously allocated to the general fund under subsection 1. This interpretation relies upon statutory language that the funds necessary for the subsection 2 payment are "appropriated," meaning that the funds are to be drawn from amounts previously allocated to the general fund instead of from coal conversion tax revenue that has been received but is yet to be allocated under subsection 1.³

However, you also indicate that the Auditor has suggested you adjust distributions under subsection 1 when a shortfall distribution to counties is made under subsection 2. Under this interpretation, the Auditor's Office relies upon statutory language that the shortfall payment under subsection 2 is to be made from "collections received under section

¹ N.D.C.C. § 57-60-14(1).

² N.D.C.C. § 57-60-14(2).

³ Conversation between members of my staff and Deputy State Treasurer Carlee M. McLeod, September 28, 2010.

57-60-02,” meaning that the source of this payment is to be tax revenues received in the first quarter of the subsequent year that have not yet been allocated.⁴ Therefore, under this interpretation, the coal conversion tax revenue available for allocation under subsection 1 in a succeeding year would be reduced by any shortfall payments that were required to be made in regard to the prior year.

Therefore, resolution of your question depends upon whether the annual shortfall payments are funded by tax revenue received but not yet allocated under subsection 1 of section 57-60-14 or whether the shortfall payments are made from funds received and previously allocated to the general fund.

Section 57-60-14, N.D.C.C., does not state in express terms from what precise funds the county shortfall payment is to be made. The North Dakota Supreme Court noted the following in interpreting a statute:

The primary objective in interpreting a statute is to determine the intent of the legislature by first looking at the language of the statute. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined in the code or unless the drafters clearly intended otherwise. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-09.1. If the language of a statute is clear and unambiguous, “the letter of the statute cannot be disregarded under the pretext of purs[u]ing its spirit.” N.D.C.C. § 1-02-05. A statute is ambiguous if it is susceptible to different, rational meanings. If the language is ambiguous or doubtful in meaning, the court may consider extrinsic aids, such as legislative history, to determine legislative intent. N.D.C.C. § 1-02-39.⁵

Other rules of statutory construction are also useful in analyzing this statute. In enacting a statute, it is presumed a just and reasonable result is intended and a result feasible of execution is intended.⁶

The construction of N.D.C.C. § 57-60-14 made by the Treasurer emphasizes that tax moneys for making the payments to the counties, the general fund, and the Lignite Research Fund are allocated under subsection 1, whereas the shortfall payment in

⁴ Conversation between members of my staff and Paul A. Welk, State Auditor’s Office, September 28, 2010.

⁵ Arnegard v. Cayko, 782 N.W.2d 54, 58-59 (N.D. 2010) (citations omitted) (emphasis added).

⁶ N.D.C.C. § 1-02-38(3) and (4).

subsection 2 is “appropriated.” The North Dakota Supreme Court held in SunBehm Gas, Inc. v. Conrad⁷ that the term “allocate” means something different than the term appropriation. An appropriation is:

the setting apart of a definite sum for a specific purpose in such a way that public officials may use the amount appropriated, and no more than the amount appropriated.⁸

The Court held that an initiated measure that “allocated”⁹ oil extraction tax moneys for distribution among a state program, a special trust fund, and the general fund did not constitute an appropriation of the monies collected pursuant to the tax imposed by the measure.¹⁰ The initiated measure in that case, however, specifically required the Legislature to “make any appropriation of money that may be necessary to accomplish the purposes of” the measure.¹¹ Thus, the allocation directed where funds were to be placed, but an appropriation was required for those funds to be spent.

Where a phrase is used in a similar context in a related statute, the Legislature is presumed to intend that the phrase is being used in the same sense and with the same effect.¹² The oil extraction tax and the distribution of the revenue from the tax considered in SunBehm are substantially similar in context and structure to the coal conversion facility tax and revenue distribution in chapter 57-60. In this instance, it appears that the Legislature intended the allocation of funds under subsection 1 of section 57-60-14 to carry the same meaning as this term was used in the initiated measure considered in SunBehm, and that a separate appropriation is required before the entities receiving these allocated funds may spend them.

⁷ 310 N.W.2d 766, 769-770 (N.D. 1981) (the Court was interpreting article X, § 12 of the North Dakota Constitution).

⁸ Id. at 769, quoting City of Fargo, Cass County v. State, 260 N.W.2d 333 (N.D. 1977).

⁹ Id. at 767, n.1, quoting Initiated Measure No. 6 as approved by the people on November 4, 1980.

¹⁰ Id. at 769.

¹¹ Id. at 769.

¹² State v. E. W. Wylie Co., 58 N.W.2d 76, 82 (N.D. 1953). See also N.D.C.C. § 1-02-03 (“Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language. Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition.”).

Further, statutes must be harmonized to give meaning to related provisions.¹³ The Legislature similarly used the phrase “revenues allocated” to reference the apportionment of the county payments under N.D.C.C. § 57-60-15. Further, the allocations made to the Lignite Research Fund are appropriated to the Industrial Commission by other statutes,¹⁴ which is consistent with the principle that the allocation of these funds by the Treasurer under subsection 1 is not an appropriation authorizing expenditure of the funds, but merely a direction to the Treasurer to provide those funds to the designated entities.¹⁵ And this interpretation would be consistent with the requirement in subsection 2 that the payment must be made “from collections received under section 57-60-02”¹⁶ because the payment can be made from moneys allocated to the general fund under subsection 1 which were received under section 57-60-02.¹⁷

Thus, within the context of N.D.C.C. § 57-60-14, it appears that the Legislature’s intent is that coal conversion tax revenues collected under N.D.C.C. § 57-60-02 are allocated to the different entities and funds, but the authorization for an entity to spend those revenues would come from a separate appropriation. Therefore, it is reasonable to conclude that the Legislature intends that the moneys appropriated to the Treasurer for the purpose of making shortfall payments under N.D.C.C. § 57-60-14(2) may not be drawn from moneys awaiting allocation under subsection 1 of section 57-60-14 based on the Legislature’s use of these two differing terms. Because of this conclusion, the only tax revenue available from which the Treasurer may draw the shortfall payment appropriation is the tax revenue that has been allocated to the general fund because the amounts allocated to the Lignite Research Fund are appropriated to the Industrial Commission and the amounts allocated to the counties are no longer in the state government’s possession.¹⁸

¹³ Mead v. Dep’t of Transp., 581 N.W.2d 145, 147 (N.D. 1998) (construing together statutes in different chapters concerning a peace officer’s authority).

¹⁴ See N.D.C.C. §§ 57-61-01.5(2) and 57-61-01.6.

¹⁵ The moneys allocated to the counties would not require a Legislative appropriation to be spent, but would be spent based on an appropriation made by the governing body of the ultimate recipient. See N.D.C.C. § 57-60-15, which divides moneys allocated to the counties under N.D.C.C. § 57-60-14 between incorporated cities within the counties, the counties’ general funds, and to school districts in the counties.

¹⁶ N.D.C.C. § 57-60-02 imposes the tax on coal conversion facilities which generates the revenue allocated under N.D.C.C. § 57-60-14.

¹⁷ The Treasurer must keep track of the amounts allocated to the general fund and ensure that the amounts of any shortfall payments are not more than those amounts.

¹⁸ In a prior opinion I determined that the Treasurer may adjust future payments to political subdivisions in order to correct erroneous prior distributions. N.D.A.G. 2004-L-42. However, this opinion is not applicable here because the allocations questioned by the Auditor were correctly made.

Therefore, although different rational arguments can be made concerning the source of funds used to make the shortfall payment required by subsection 2, a close reading of N.D.C.C. § 57-60-14 supports the Treasurer's interpretation that the shortfall amounts are appropriated from coal conversion facility taxes collected under N.D.C.C. § 57-60-02 that have been allocated to the general fund, and not from these taxes that have been received but which have not yet been allocated.

Even if the North Dakota Supreme Court's decision in SunBehm does not resolve the matter because of the ambiguity between subsections 1 and 2 of section 57-60-14, N.D.C.C., there is other evidence that may be considered when interpreting an ambiguous statute:

If a statute is ambiguous, the court, in determining the intention of the legislation, may consider among other matters:

1. The object sought to be attained.
2. The circumstances under which the statute was enacted.
3. The legislative history.
4. The common law or former statutory provisions, including laws upon the same or similar subjects.
5. The consequences of a particular construction.
6. The administrative construction of the statute.
7. The preamble.¹⁹

These considerations provide further support for the Treasurer's construction of N.D.C.C. § 57-60-14.

The legislative history of this statute shows that the Legislature's objective in enacting this statute is consistent with the Treasurer's construction of N.D.C.C. § 57-60-14. The language currently in subsection 2 regarding shortfall payments to counties was added to

¹⁹ N.D.C.C. § 1-02-39.

the statute during the 2001 legislative session by S.B. 2299.²⁰ According to a proponent of S.B. 2299, the purpose of the pertinent section of the bill was that it:

. . . changes the allocation to the counties from the coal conversion tax to reflect increased revenues coming from the coal conversion tax and reduced revenues from the coal severance tax. Also guarantees that no coal county (subsection 2) and Morton County (subsection 3) shall receive less revenue than they received in the preceding calendar year;²¹

Similarly, a co-sponsor of the bill testified that it “guarantees the local political subdivision the same amount of revenue they had previously”²² I found nothing in the 2001 legislative history which indicated that there was any intent to reduce the allocations in subsection 1 by the amount of any shortfall payments made under subsection 2. A primary purpose of subsection 2 was to guarantee that counties did not receive less money from the coal conversion tax than they had the previous year.

In 2007, subsection 1 of section 57-60-14 was amended in H.B. 1093 to insert an allocation of the coal conversion tax to the Lignite Research Fund.²³ The stated intent of the amendment in H.B. 1093 was to provide \$500,000 for possible lignite litigation expenses and for continued development of lignite resources.²⁴

The purpose of H.B. 1093 was further explained as giving a fixed amount of money to the Lignite Research Fund from the general fund because the “Finance and Tax Committee felt that it is important in ND to support renewable energies and research and the development of our coal and oil industry.”²⁵ “HB 1093 would provide a \$1.2 million annual revenue stream from the coal conversion tax to help meet the needs of these projects. All state dollars would be matched by project developers and payback provisions to the state R&D fund would be included once the LV21 projects are operational”; “[t]o meet future feasibility, permitting and initial construction needs for approved projects, the Industrial

²⁰ See 2001 N.D. Sess. Laws ch. 535, § 10.

²¹ Hearing on S.B. 2299 Before the House Comm. on Fin. & Taxation, 2001 N.D. Leg. (Mar. 13) (Testimony of John Dwyer, President, Lignite Energy Council).

²² Hearing on S.B. 2299 Before the House Comm. on Fin. & Taxation, 2001 N.D. Leg. (Mar. 13) (Testimony of Sen. Krauter).

²³ See 2007 N.D. Sess. Laws ch. 546, § 1.

²⁴ See 2007 N.D. Sess. Laws ch. 546, § 2.

²⁵ Hearing on H.B. 1093 Before the House Comm. on Appropriations, 2007 N.D. Leg. (Jan. 22) (Testimony of Rep. Belter).

Commission has requested a 5% allocation from the Coal Conversion Tax (**HB 1093**) for a ten-year period, beginning July 1, 2008.²⁶

The 2007 legislative history of H.B. 1093 indicates the intent to provide the Lignite Research Fund with a fixed amount of money per year for research and development and to provide some funds for possible litigation. I found no indication of any intent to have the amount allocated to the Lignite Research Fund reduced by the shortfall payments under subsection 2 of N.D.C.C. § 57-60-14. Adopting an interpretation that may reduce the amounts allocated to the Lignite Research Fund would, therefore, be contrary to this stated legislative intent.

Further, the consequences of a statutory interpretation must be considered when determining legislative intent.²⁷ The interpretation offered by the Auditor's Office would complicate each successive annual allocation by reducing the amount of revenues that may be distributed under subsection 1 in the succeeding year. This interpretation would be contrary to the statutory language in subsection 1 that requires the allocations to be made from "all moneys received" because the revenues available for allocation would be reduced by the amount of the shortfall payment for the prior year. Thus, it is arguable that the plain language of the statute would not be followed under this interpretation, and the allocations for the general fund and for the Lignite Research Fund would be reduced from the percentages of total revenue that are specified in subsection 1.

Moreover, again assuming an unresolved ambiguity, courts may also consider the administrative construction of a statute when determining the Legislature's intent.²⁸ As the North Dakota Supreme Court has noted:

The administrative construction of a statute by the agency administering the law is entitled to deference if that interpretation does not contradict clear and unambiguous statutory language. *Rocky Mountain Oil & Gas Ass'n, supra; Stutsman County, supra; see* Section 1-02-39(6), N.D.C.C. Administrative deference is an important consideration when an agency interprets and implements a law that is complex and technical. *True v. Heitkamp*, 470 N.W.2d 582 (N.D. 1991).²⁹

²⁶ Hearing on H.B. 1093 Before the House Comm. on Fin. & Taxation, 2007 N.D. Leg. (Jan. 10) (Testimony of John Dwyer, President, Lignite Energy Council) (emphasis in original).

²⁷ N.D.C.C. § 1-02-39(5).

²⁸ N.D.C.C. § 1-02-39(6).

²⁹ Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869, 872 (N.D. 1992).

In this instance, I believe that the Treasurer's administrative construction of N.D.C.C. § 57-60-14 would be entitled to some deference because the Treasurer is charged with administering the law, and I believe this interpretation does not contradict any clear and unambiguous language of that statute.³⁰ Further, deference is an important consideration when an agency interprets a law that is complex and technical such as a taxation statute.³¹ Thus, because of the ambiguous or unclear nature of N.D.C.C. § 57-60-14, the Treasurer's administrative construction of this statute, which her office is charged with implementing, is both reasonable and entitled to deference.

Based on the foregoing, it is my opinion that the county shortfall payments under subsection 2 of section 57-60-14 are appropriated from coal conversion facility tax revenues that were allocated to the state general fund under subsection 1 of section 57-60-14.

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.³²

³⁰ Id.

³¹ Id. See also N.D.A.G. 2003-L-04 ("Agencies have a reasonable range of informed discretion, and courts generally defer to an agency's reasonable interpretation of technical or specialized language. Matter of Stone Creek Channel Improvements, 424 N.W.2d 894 (N.D. 1988)."); N.D.A.G. 2006-L-14 ("Finally, as noted in N.D.A.G. Letter to Sperry (Sept. 25, 1990), in construing ambiguous or unclear statutes, '[w]eight is also given "to the long-continued, practical construction placed thereon by the officers charged with the duty of executing and applying the statute."' Horst v. Guy, 219 N.W.2d 153, 159 (N.D. 1974).").

³² See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).