

**LETTER OPINION
2016-L-02**

November 23, 2016

The Honorable Kelly Schmidt
State Treasurer
600 E Boulevard Avenue
Bismarck, ND 58505

Dear Ms. Schmidt:

Thank you for your letter requesting my opinion on whether the North Dakota legacy fund (legacy fund) earnings accruing from its inception through June 30, 2017, may be expended by the Legislature with a simple majority vote. You indicate that while N.D. Const. art. X, § 26 clearly sets forth the treatment and spending limitations applicable to expenditures of principal and earnings of the legacy fund accruing subsequent to June 30, 2017, you seek guidance on the appropriate classification or method of disbursement applicable to earnings accruing from the legacy fund's inception through June 30, 2017. Specifically, you ask whether these earnings become part of the legacy fund principal and thus expendable only upon a two-thirds vote, or whether these earnings may be expended with a simple majority vote of the Legislature.

For the following reasons, it is my opinion that legacy fund earnings accruing from inception through June 30, 2017, become part of the principal of the legacy fund and may therefore only be expended by the Legislature with a two-thirds vote subject to the principal biennial limitation set forth in the North Dakota Constitution, while earnings accruing after June 30, 2017, must be transferred by your office to the state general fund at the end of each biennium.

ANALYSIS

Article X, § 26, N.D. Const., which creates the legacy fund, provides in part:

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.

...

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.¹

This section contains no explicit provision permitting an expenditure of the earnings that will accrue through June 30, 2017, prior to the initial transfer by your office.

Previous opinions of this office have recognized the need for aids in constitutional construction to determine the appropriate administration of the legacy fund.² The North Dakota Supreme Court has provided guidance on the appropriate scope and use of such aids:

The sole object sought in construing a constitutional provision is to ascertain and give effect to the intention and purpose of the framers and of the people who adopted it. All rules of construction are subservient to and intended to effectuate such object. . . .

The questions must be answered, if possible, from the language of the constitutional provisions itself but, if the language is ambiguous or the answer doubtful, then the field of inquiry is widened and rules applicable to construction of statutes are to be resorted to. In fact, a wider field of inquiry for information is proper where needed in construing constitutional provisions than legislative enactments.

It is a well-settled rule that in placing a construction on a constitutional provision, the court may look to the history of the times and examine the state of being existing when the constitutional provision in question was framed and adopted by the people in order to ascertain the prior law, the mischief, and the remedy.³

¹ N.D. Const. art. X, § 26 (emphasis added).

² N.D.A.G. 2011-L-05, N.D.A.G. 2010-L-13.

³ Newman v. Hjelle, 133 N.W.2d 549, 555-56 (N.D. 1965) (citations omitted); see also State ex rel. Sanstead v. Freed, 251 NW 2d. 898, 905 (N.D. 1977); State ex rel. Linde v. Robinson, 160 N.W. 514, 516 (N.D. 1916); Lynn M. Boughey, A Judge's Guide to

Through the course of its decisions, the court instructs that the plain language of the Constitution controls and conflicting provisions must be harmonized before seeking aids in interpretation. If an ambiguity persists, however, it is appropriate to look to the object sought to be attained, the prior state of the law, and contemporaneous and practical constructions including subsequent legislative enactments.⁴

The plain language of N.D. Const. art. X, § 26 requires a two-thirds vote to spend the principal after June 30, 2017, and requires subsequent earnings be automatically transferred to the general fund. General appropriation measures need a simple majority vote pursuant to N.D. Const. art. IV, § 13.⁵ Legacy fund earnings accruing prior to June 30, 2017, must be classified before these two constitutional provisions may be harmonized. It is therefore appropriate to employ aids in constitutional construction.

When determining the object sought to be obtained in a constitutional amendment it is helpful to review the expressed intent of those who adopted it.⁶ The legacy fund was created under House Concurrent Resolution No. 3054, (H.C.R. 3054), which was passed by the people of North Dakota in the November 2010 general election as Measure No.1.⁷ H.C.R. 3054 contained a statement of intent:

This measure establishes a North Dakota legacy fund, provides for deposit of certain oil and gas tax revenues in the fund, and imposes limitations on use of moneys in the fund.⁸

The intent behind the establishment of the legacy fund was commented on several times throughout the proceedings before the House Constitutional Revision Committee. The testimony largely focused on the desire to provide inter-generational equity among North Dakotans by preserving the wealth gained from the state's exhaustible resource for use by

Constitutional Interpretation, 66 Temp. L. Rev. 1269, 1273-6 (1993) (summarizing the North Dakota Supreme Court analysis regarding constitutional construction).

⁴ Lynn M. Boughey, A Judge's Guide to Constitutional Interpretation, 66 Temp. L. Rev. 1269, 1273-6 (1993) (summarizing the North Dakota Supreme Court analysis regarding constitutional construction); State ex rel. Linde v. Robinson, 160 N.W. 514, 516 (N.D. 1916); Newman v. Hjelle, 133 N.W.2d 549, 555-56 (N.D. 1965); State ex rel. Sanstead v. Freed, 251 NW 2d. 898, 905 (N.D. 1977).

⁵ N.D. Const. art. IV, § 13 authorizes the Legislature to enact appropriation measures by a simple majority vote unless it is an emergency measure requiring a two-thirds vote.

⁶ Newman v. Hjelle, 133 N.W.2d 549, 555 (N.D. 1965).

⁷ N.D.A.G. 2011-L-05. H.C.R. 3054, creating the legacy fund, appears as N.D. Const. art. X, § 26. This provision became effective after June 30, 2011.

⁸ H.C.R. 3054.

future generations.⁹ The Committee discussed, at length, spending limitations applicable to both the principal and earnings of the legacy fund. Ultimately, at its hearing on April 28, 2009, the Committee specifically addressed the question you pose by approving an amendment to H.C.R. 3054 that required interest to be transferred from the legacy fund automatically:

Rep. Weiler: I move that we lock up the principal until 2020 and that the interest automatically goes to the general fund starting right away.

Sen. Triplett: Second.

Sen. Hogue: I'll disagree with Rep. Weiler on that one. I'll use one of his main concerns to oppose it and that is trying to get support [for] this from the interest groups. I think if we start locking this away for too long, we're going to lose that needed support. That's why I would support 2016 for the principal and for the interest, and let the interest start going into the general fund without a separate vote after that time.

...

Chairman Koppelman: 2020 thoughts? My only comment would be we're looking at what is good for the state and future.

Rep. Schneider: Is the motion on just the principal? Or is it the principal and transfer the interest immediately.

Chairman Koppelman: The principal is the motion.

Chairman Koppelman took a voice vote, followed by a hand vote. The motion failed.

Sen. Hogue: I'll move June 30, 2016 for the principal.

Rep. Schneider: Second.

The motion passed on a voice vote.

Sen. Hogue: I'll move same date for interest, 2016, and then thereafter it spills over to the general fund.

⁹ See Hearing on H.C.R. 3054 Before the House Comm. on Const'l Revision, 2009 N.D. Leg. (Feb. 26).

Chairman Koppelman: A five year lock-up then if this motion were to pass of both interest and principal and after that, it would automatically spill in the general fund.

Rep. Schneider: Second.
Motion passed on a hand vote.¹⁰

At a subsequent hearing, the Committee approved an amendment clarifying that transfers of interest would encompass only that interest accruing after June 30, 2017, at the end of each biennium.¹¹ Thus the legislative history supports a finding that the Committee intended interest be transferred from the fund automatically and not subject to a vote, and that the first transfer of such interest occur at the end of the biennium following June 30, 2017. The effect of these amendments expresses an intent or expectation that interest accruing from inception through June 30, 2017, become part of the legacy fund principal.¹²

Our supreme court has also suggested that the prior state of the law may be considered when attempting to ascertain the intent of an ambiguous provision.¹³ The resolution that created the legacy fund, H.C.R. 3054, did not seek to amend or replace an existing constitutional provision, but it was a successor to a substantially similar 2007 measure, H.C.R. 3045, which ultimately failed.¹⁴ The legislative histories of both measures indicate an intent to create a constitutional amendment to improve upon or replace the permanent

¹⁰ Hearing on H.C.R. 3054 Before the House Comm. on Const'l Revision, 2009 N.D. Leg. (Apr. 28).

¹¹ Hearing on H.C.R. 3054 Before the House Comm. on Const'l Revision, 2009 N.D. Leg. (Apr. 29).

¹² A contrary conclusion would result in a single biennium during which two transfers of interest income from the legacy fund was possible, the first occurring by a majority vote at its onset and comprised of earnings accrued over a period of six years and a second occurring at the end of the 2017-2019 biennium comprised of earnings accruing over only two years.

¹³ State ex rel. Linde v. Robinson, 160 N.W. 514, 516 (N.D. 1916) (“The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision. . .”).

¹⁴ H.C.R. 3045, 2007 N.D. Leg.

oil tax trust fund established under N.D.C.C. § 57-51.1-07.2.¹⁵ Therefore, both the prior measures and statute may be considered in determining the drafters' intended treatment of earnings under the legacy fund resolution. The plain language of N.D.C.C. § 57-51.1-07.2 and the legislative history of the 2007 measure, do not support a conclusion that the framers of the legacy fund resolution intended interest to be expended upon a simple majority vote, rather both measures and the statute include language requiring it to be transferred automatically.¹⁶

The North Dakota Supreme Court has also considered subsequent legislative enactments and contemporaneous interpretations of ambiguous constitutional provisions when determining intent.¹⁷

Thus, the implementation of the legacy fund by those tasked with its administration may be considered in determining the practical construction of N.D. Const. art. X, § 26. Two subsequent pieces of legislation are pertinent to this inquiry: N.D.C.C. § 21-10-11 and N.D.C.C. § 21-10-12.

Section 21-10-11, N.D.C.C., was created by S.B. 2302 during the 2011 legislative session and created the Legacy and Budget Stabilization Fund Advisory Board (Advisory Board). The intent of this legislation was to provide more direct legislative oversight of the legacy fund.¹⁸ This was accomplished by creating a seven member board that included four legislators.¹⁹

¹⁵ See Hearing on H.C.R. 3054 Before the House Comm. on Const'l Revision, 2009 N.D. Leg. (Apr. 27). See also, Hearing on H.C.R. 3045 Before the House Comm. on Const'l Revision, 2007 N.D. Leg. (Feb. 21). See H.C.R. 3045, 2007 N.D. Leg. ("The state treasurer shall transfer interest earnings of the permanent oil tax trust fund to the general fund at the end of each fiscal year. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.").

¹⁶ N.D.C.C. § 57-51.1-07.2. Hearing on H.C.R. 3045 Before the House Comm. on Const'l Revision, 2007 N.D. Leg. (Feb. 27). H.C.R. 3054.

¹⁷ State ex rel. Sanstead v. Freed, 251 N.W.2d 898, 905 (N.D. 1977) citing State ex rel. Linde v. Robinson, 160 N.W. 514, 516 (N.D. 1916). ("Where there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist.").

¹⁸ N.D.C.C. § 21-10-11; Hearing on SB 2302 before the Senate Comm. on Ind., Bus. and Labor, 2011 N.D. Leg. (Apr. 11) ("**Rep. Ruby**: Said that their intent was to have an advisory for the legacy and budget stabilization fund and that is where some of the legislative members become part of the process.").

¹⁹ Id.

The Advisory Board was created to develop recommendations for the investment of funds in the legacy fund.²⁰ Pursuant to this mandate, the Advisory Board approved an asset allocation and spending policy project for the legacy fund that included investment objectives for the legacy fund and assumptions regarding its spending and administration in order to guide decisions regarding investment policy.²¹

These spending and administration assumptions include an assumption that the fund would have two distinct phases: an accumulation phase through June 2017 during which the corpus of the fund would be built and a permanent phase beginning after June 2017 in which expenditures, subject to certain limitations, would be made.²² Further it was assumed all income from the legacy fund would be withdrawn each biennium beginning with the permanent phase, and that withdrawals of the corpus were permitted beginning mid-2017 subject to a fifteen percent biennial limitation.²³ The actions of the Advisory Board support an interpretation that the interest income earned by the legacy fund from its inception through June 30, 2017, would become part of the principal or corpus of the fund during its accumulation phase, and that the interest income would not be subject to expenditure until it was automatically transferred at the end of the 2017-2019 biennium during the permanent phase.

Finally, during the 2013 legislative session, an additional statute relevant to the administration of the legacy fund was enacted to provide a definition of earnings as follows:

21-10-12. Legacy fund - Earnings defined.

For the purposes of section 26 of article X of the Constitution of North Dakota, the term "earnings" means net income in accordance with generally accepted accounting principles, excluding any unrealized gains or losses.²⁴

While this definition is not dispositive of your question, the discussions of the proposed bill do offer some guidance as to how the legacy fund was being administered subsequent to its enactment:

²⁰ N.D.C.C. § 21-10-11.

²¹ R. V. Kuhns & Assocs., Inc., N.D. Legacy Fund, Asset Allocation and Spending Policy Project, (Mar. 28, 2013), R V Kuhns & Associates, Inc. Approved by legacy and budget stabilization fund advisory board at its meeting on Apr. 2, 2013.

²² Id. at 14.

²³ Id.

²⁴ H.B. 1167, 2013 Leg. created N.D.C.C. § 21-10-12.

Senator Cook: I have a question; to what degree can the legislature spend money in 2017 without a two-thirds vote?

Connie Flanagan:²⁵ My understanding is that anything that is earned through June 30, 2017, becomes part of the principal. So only anything accruing after June 30, 2017, the income accruing after that can be transferred out.²⁶

Discussions surrounding the enactment of a statute clarifying the administration of the legacy fund suggest that those responsible for its administration and oversight understood that the first expenditure of interest income or earnings would occur automatically at the end of the 2017-2019 biennium.

Consequently, it is my opinion that, when viewing N.D. Const. art. X, § 26 in light of the object sought to be attained, the prior state of the law, and contemporaneous and practical constructions, legacy fund earnings accruing from inception through June 30, 2017, must become part of the principal of the legacy fund and may therefore only be expended by the Legislature with a two-thirds vote subject to the principal biennial limitation set forth in the North Dakota Constitution. Further, the first transfer of earnings accruing after June 30, 2017, must occur at the end of the 2017-2019 biennium.

Sincerely,

Wayne Stenehjem
Attorney General

jkm

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.²⁷

²⁵ Fiscal and Investment Officer, North Dakota Retirement and Investment Office.

²⁶ Hearing on H.B. 1167 Before the Senate Gov't and Veterans Affairs Comm., 2013 N.D. Leg. (Mar. 22); see also Hearing on H.B. 1167 Before the Senate Gov't and Veterans Affairs Comm., 2013 N.D. Leg. (Apr. 9).

²⁷ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).