

**LETTER OPINION**  
**2022-L-01**

The Honorable Thomas Beadle  
State Treasurer  
600 E. Boulevard Ave Dept 120  
Bismarck, ND 58505

Dear Mr. Beadle:

Thank you for your letter inquiring as to the method of distribution of gross production and oil extraction taxes to the constitutional funds set forth in N.D. Const. art. X, §§ 22, 24, and 26. For the reasons indicated below, it is my opinion that the distributions of gross production and oil extraction tax revenues should be allocated from the state's share of the aforementioned revenues. Further, that portion of the gross production and oil extraction tax revenue derived from oil and gas exploration and production within the exterior boundaries of the reservations and on trust properties outside reservation boundaries (reservation wells), which is distributed directly to the tribes pursuant to N.D.C.C. ch. 57-51.2, should not be included in the definition of revenue when making constitutional allocations of oil and gas revenues under N.D. Const. art. X.

**ANALYSIS**

In 2007, the 60<sup>th</sup> Legislative Assembly enacted chapter 57-51.2 of the North Dakota Century Code, allowing the state to enter into agreements with the tribes<sup>1</sup> relating to the taxation and regulation of oil and gas extraction and production on reservation wells. This law was passed in response to a U.S. Supreme Court Case, *Cotton Petroleum Corp. v. New Mexico*,<sup>2</sup> where the Court held that states, in addition to the tribe, may tax a “non-indian oil and gas operator” whose operations are located on a reservation. At the time, this created the prospect for dual taxation on oil and gas produced on reservations. The oil produced on reservation wells was taxed at a 5% rate for the tribe

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<sup>1</sup> Three Affiliated Tribes, Standing Rock Sioux Tribe, and Turtle Mountain Band of Chippewa Indians.

<sup>2</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

and an 11.5%<sup>3</sup> rate for the state, which inhibited oil and gas development.<sup>4</sup> The 2007 S.B. 2419, which created N.D.C.C. ch. 57-51.2, was enacted to allow the state and tribe to come to an agreement on a single tax rate, and divide the tax revenue from reservation wells among the state and the tribes to encourage the development of the resources.<sup>5</sup>

Under N.D.C.C. ch. 57-51.2, the tax commissioner administers and enforces the state's oil and gas production and extraction taxes on reservation wells, and the revenue from that taxation is allocated between the tribe and the state as follows:

5. The allocation of revenue from oil and gas gross production and oil extraction taxes on the reservation must be as follows:
  - a. Production attributable to trust lands. The tribe must receive eighty percent of the total revenues, and be subject to all applicable exemptions from all oil and gas gross production and oil extraction taxes attributable to production from trust lands on the reservation and on trust properties outside reservation boundaries. The state must receive the remainder.
  - b. All other production. The tribe must receive twenty percent of the total oil and gas gross production and oil extraction taxes collected, and be subject to all applicable exemptions, from all production attributable to nontrust lands on the reservation in lieu of the application of tribal fees and taxes related to production on such lands. The state must receive the remainder.
  - c. The state's share of the oil and gas gross production tax revenue as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapter 57-51.<sup>6</sup>

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<sup>3</sup> A 5% gross production tax and a 6.5% oil extraction tax.

<sup>4</sup> Hearing on S.B. 2419 Before the Senate Comm. on Nat. Res., 2007 N.D. Leg. (Mar. 23) (Testimony of Steve Kelly); Hearing on S.B. 2419 Before the House Comm. on Nat. Res., 2007 N.D. Leg. (Apr. 2) (Testimony of Steve Kelly).

<sup>5</sup> Hearing on S.B. 2419 Before the Senate Comm. on Nat. Res., 2007 N.D. Leg. (Mar. 23) (Testimony of Steve Kelly).

<sup>6</sup> See N.D.C.C. § 57-51.2-02(5).

The amount allocated to the tribes by statute is not an allocation of state money; rather, that amount is representative of the amount payable to the tribes pursuant to the agreement allowed under N.D.C.C. ch. 57-51.2, in lieu of the tribes levying their own oil and gas production tax on reservation wells.

Article X of the N.D. Constitution creates four funds that are funded by oil production or extraction taxes.<sup>7</sup> The Resources Trust Fund was created by N.D. Const. art. X, § 22 in 1990.<sup>8</sup> “The legislative assembly may provide by law for a percentage of revenue from taxes imposed on the extraction or production of oil to be allocated and credited to a special trust fund, to be known as the resources trust fund.”<sup>9</sup> The required transfers to the Common Schools Trust Fund and the Foundation Aid Stabilization Fund were created by N.D. Const. art X, § 24,<sup>10</sup> in 1994:

1. Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the common schools trust fund.
2. Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the foundation aid stabilization fund in the state treasury, the interest of which must be transferred to the state general fund on July first of each year.<sup>11</sup>

The Legacy Fund was created by N.D. Const. art X, § 26 in 2010.<sup>12</sup> “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.”<sup>13</sup> All of the constitutional fund provisions make reference to payment of a percentage of either the “total revenue”<sup>14</sup> or “the revenue”<sup>15</sup> from oil production and extraction taxes.

You have inquired whether the portion of the gross production and oil extraction tax revenue derived from reservation wells which is allocated and distributed directly to

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<sup>7</sup> See N.D.C.C. chs. 57-51, 57-51.1.

<sup>8</sup> H.C.R. 3022, 1989 N.D. Leg., was approved by the voters on June 12, 1990.

<sup>9</sup> N.D. Const. art. X, § 22.

<sup>10</sup> S.C.R. 4011, 1993 N.D. Leg., was approved by the voters on November 8, 1994.

<sup>11</sup> N.D. Const. art X, § 24.

<sup>12</sup> H.C.R. 3054, 2009 N.D. Leg., was approved by the voters on November 2, 2010

<sup>13</sup> N.D. Const. art. X, § 26.

<sup>14</sup> N.D. Const. art X, § 26.

<sup>15</sup> N.D. Const. art X, §§ 22, 24.

the tribes based upon agreements under N.D.C.C. ch. 57-51.2 is included in the revenue allocated to the constitutional funds described above.

The answer to your question hinges on the definition of the word “revenue”, as it is used in these constitutional provisions, and whether the taxes from oil production and extraction from reservation wells allocated to the tribes are included in the word “revenue.” The North Dakota Century Code does not specifically define “revenue.” “If no definition to a word contained in a certain section is given, the word is to be understood in its ordinary sense, construed according to the context in which it lies, and interpreted to give a reasonable result.”<sup>16</sup> “Revenue” is defined in Black’s Law Dictionary as “1. [i]ncome from any and all sources; gross income or gross receipts. 2. [t]he total current income of a government, however derived; esp., taxes.”<sup>17</sup> The word revenue, as utilized in N.D. Const. art. X, §§ 22, 24, and 26, refers to the state of North Dakota’s portion of the oil production and extraction taxes based upon a plain reading of the text of the constitutional provisions.

Chapter 57-51.2, N.D.C.C. was passed and contemplated as a compromise between the tribes and the State wherein the tribe agreed not to levy an independent oil and gas production tax on reservation wells in exchange for a portion of the state’s oil production and extraction tax from reservation wells. The amount allocated to the tribes under N.D.C.C. ch. 57-51.2 is akin to the state collecting the tribe’s portion of oil and gas production taxes on reservation wells on the tribe’s behalf and then distributing it to them.<sup>18</sup> That portion is not the state’s revenue, but is instead the tribe’s revenue. Based upon a reading of the plain text of the constitutional provisions and the definition of the word “revenue,” the portion of the taxes on production and extraction of oil and gas that is allocated to the tribes pursuant to N.D.C.C. ch. 57-51.2 is not revenue of the State of North Dakota for the purposes of contribution to the constitutional funds established in N.D. Const. art X, §§ 22, 24, and 26. That portion of oil production and extraction taxes allocated to the tribes, pursuant to a tribal agreement, would be considered revenue of the tribes, not allocatable by the North Dakota Constitution. The only revenue contemplated to be distributed to the constitutional funds would be revenue of the State of North Dakota.

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<sup>16</sup> *Ames v. Rose Twp. Bd. Of Twp. Supervisors*, 502 N.W.2d 845, 850 (N.D. 1993) (citing N.D.C.C. §§ 1-02-02, 1-02-03; *Witthauer v. Burkhart Roentgen, Inc.*, 467 N.W.2d 439 (N.D.1991); *Westman v. N.D. Workers Comp. Bureau*, 459 N.W.2d 540 (N.D.1990); *Saetz v. Heiser*, 240 N.W.2d 67 (N.D.1976)).

<sup>17</sup> Black’s Law Dictionary (11<sup>th</sup> ed. 2019).

<sup>18</sup> N.D.A.G. 2010-L-14 (citing *SunBehm Gas, Inc. v. Conrad*, 310 N.W.2d 766, 769 (N.D. 1981)).

Even if the plain language of the constitutional fund provisions does not resolve the matter, other evidence may be considered when interpreting an ambiguous constitutional provision. “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.”<sup>19</sup>

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 constructions.
6. The administrative construction of the statute.
7. The preamble.<sup>20</sup>

Several of these additional considerations support the exclusion of the tribe’s portion of revenue from the reservation wells from the definition of “revenue” as used in the constitutional fund provisions.

The legislative history related to the accompanying concurrent resolutions indicates that the Legislature never intended the portion of oil production and extraction taxes allocated to the tribes by N.D.C.C. ch. 57-51.2 to be affected by or included in the revenue payable to the Legacy Fund. In 2010 the voters created the legacy fund within N.D. Const. art. X, § 26.<sup>21</sup> In presenting H.C.R. 3054 to the House Constitutional Revision Committee, Rep. Dave Weiler stated the following:

Current law in North Dakota states of all the oil tax revenue that comes into the state, there’s a formula by how the money comes in. Then by

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<sup>19</sup> *Newman v. Hjelle*, 133 N.W.2d 549, 556 (N.D. 1965).

<sup>20</sup> N.D.C.C. § 1-02-39.

<sup>21</sup> H.C.R. 3054, 2009 N.D. Leg., was approved by the voters on November 2, 2010.

either constitution or statute there are six different groups that get a percentage of that oil tax revenue right off the top. That will not change. Those groups are going to continue to get the percentage that they received before. We are not disrupting that. That stays as current law. Those groups will get their money before any of the other money goes into the legacy fund.<sup>22</sup>

This legislative history supports the reading of the word “revenue” to exclude those funds payable to the tribe from reservation wells under N.D.C.C. ch. 57-51.2. The other constitutional funds were passed prior to 2007, when N.D.C.C. ch. 57-51.2 was enacted, prior to the State entering into the agreements contemplated by N.D.C.C. ch. 57-51.2. At that time, the tribes were collecting their own oil and gas production and extraction taxes from reservation wells. Because the tax revenue representing the portion of the oil and gas tax from reservation wells allocated to the tribe was previously directly collected by the tribe, it is reasonable to conclude that those sections<sup>23</sup> did not include tribal oil and gas production tax revenue from reservation wells within the meaning of the word “revenue.” The Legacy Fund was created in 2010, after N.D.C.C. ch. 57-51.2 was enacted, and as indicated by the legislative history, was not intended to be funded by the revenue allocated to the tribes pursuant to N.D.C.C. ch. 57-51.2. Therefore, the legislative history of the constitutional fund provisions supports excluding the tribal portion of oil and gas production tax from the definition of “revenue.”

Additionally, as you point out in your request, the practical impossibility resulting from any other interpretation also supports the conclusion that the oil production and extraction taxes allocated to the tribes pursuant to N.D.C.C. ch. 57-51.2 were not intended by the Legislature to be payable to the constitutional funds in N.D. Const. art. X, §§ 22, 24, and 26.<sup>24</sup> Based upon the information provided to my office, to interpret N.D. Const. art. X, §§ 22, 24, and 26 to mean that “revenue” includes the entire oil production and extraction tax produced on the reservation would practically invalidate and render moot the entirety of N.D.C.C. ch. 57-51.2 because the constitutional funds currently contemplate distribution of one hundred percent of the “revenue” from oil and gas production and extraction taxes. In construing possibly conflicting statutes and constitutional provisions, one must give effect and meaning to every provision and

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<sup>22</sup> Hearing on H.C.R. 3054 Before the House Comm. on Const. Revision, 2009 N.D. Leg. (Feb. 26) (Statement of Rep. Weiler).

<sup>23</sup> N.D. Const. art. X, §§ 22, 24.

<sup>24</sup> N.D.C.C. § 1-02-39(5).

reconcile, if possible, apparently inconsistent provisions.<sup>25</sup> The consequences of a statutory interpretation must be considered when determining legislative intent.<sup>26</sup> The sections of the North Dakota Constitution creating the constitutional funds must be reconciled and harmonized with N.D.C.C. ch. 57-51.2 so as to avoid rendering the entire chapter inoperative or superfluous.<sup>27</sup> Therefore, an interpretation of the constitutional provisions which would invalidate an entire chapter of the North Dakota Century Code is not supportable.

Finally, the courts may also consider the administrative constructions when determining the Legislature's intent.<sup>28</sup> The 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).<sup>29</sup>

The Treasurer has been distributing the gross production and oil extraction tax on these reservation wells by depositing the total amount into the State Treasurer's account and then allocating to the applicable tribal nation the amount set forth in N.D.C.C. ch. 57-51.2. After the tribal government is paid, the Treasurer then allocates appropriate amounts to the constitutional funds based off the state's share of the gross production and oil extraction tax revenues.

In this instance, the Treasurer's administrative construction of both the constitutional fund provisions and N.D.C.C. ch. 57-51.2 would be entitled to deference because the Treasurer is charged with administering the constitutional funds and making payment under N.D.C.C. ch. 57-51.2. This interpretation does not contradict any clear and

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<sup>25</sup> *Thompson v. Jaeger*, 788 N.W.2d 586, 589 (N.D. 2010); *Kelsh v. Jaeger*, 641 N.W.2d.100, 105 (N.D. 2002); *State ex rel. Sanstead v. Freed*, 251 N.W.2d 898, 908 (N.D. 1977).

<sup>26</sup> N.D.C.C. § 1-02-39(5); N.D.A.G. 2010-L-14.

<sup>27</sup> *See* 1-02-38(2) (entire statutes are intended to be effective). *See also, Indus. Cont'rs, Inc. v. Taylor*, 899 N.W.2d 680, 684 (N.D. 2017).

<sup>28</sup> N.D.C.C. § 1-2-39(6).

<sup>29</sup> *Western Gas Res., Inc. v. Heitkamp*, 489 N.W.2d 869, 872 (N.D. 1992).

unambiguous language of the law.<sup>30</sup> “[D]eference is an important consideration when an agency interprets a law that is complex and technical such as a taxation statute.”<sup>31</sup> Therefore, even if the language of N.D. Const. art. X, §§ 22, 24, and 26 and N.D.C.C. ch. 57-51.2 were ambiguous or unclear, the Treasurer’s administrative construction of these provisions, which his office is charged with implementing, is reasonable and entitled to deference.

Based upon the foregoing analysis, it is my opinion that “revenue” as utilized in N.D. Const. art. X, §§ 22, 24, and 26, refers only to the state’s share of the revenue from oil production and extraction taxes from reservation wells. The Treasurer should not take into account the gross production and oil extraction tax revenue derived from oil and gas exploration and production within the exterior boundaries of the reservations and on trust properties outside reservation boundaries which is directly distributed to the tribes pursuant to N.D.C.C. ch. 57-51.2 when making constitutional allocations of oil and gas revenues under N.D. Const., art. X.

Sincerely,

Wayne Stenehjem  
Attorney General

AMH

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.<sup>32</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> N.D.A.G. 2010-L-14.

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