LETTER OPINION
2003-L-05

January 31, 2003

Honorable Bob Stenehjem
Senate Majority Leader
Senate Chambers
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Senator Stenehjem:

Thank you for your letter asking whether North Dakota's participation in the Streamlined Sales Tax Project (SSTP) or enactment of implementing legislation would be in violation of the Constitution of the United States or the Constitution of North Dakota.

No specific provision in either the Constitution of the United States or North Dakota was cited in your request. In reviewing Senate Bills 2095 and 2096, which relate to North Dakota's participation in the SSTP and implementing legislation necessary to carry out the interstate compact contemplated by that project, it appears that the basis of the claim is the Compact Clause of the Constitution of the United States and the supremacy of the federal government.[1] There is no parallel provision in the Constitution of North Dakota.

In this regard, the United States Supreme Court squarely addressed this basis on substantially similar factual grounds in U.S. Steel Corp. v. Multistate Tax Com'n, 434 U.S. 452 (1978), a case that reviewed and approved a number of states' participation in the Multistate Tax Commission (MTC), including North Dakota. The plaintiff in that case had challenged the existence of the MTC and its Compact, asserting that the Compact was an unconstitutional encroachment upon the supremacy powers granted to the federal government by U.S. Const. art. I, § 10, cl. 3.

The Compact under which states agreed to participate in the MTC was drafted in 1966 and became effective, according to its own terms, on August 4, 1967. By 1972, 21 states, including North Dakota, had become members.[2]

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[1] U.S. Const art. 1, § 10, cl. 3.
[2] 434 U.S. at 454; see N.D.C.C. § 57-59-01, et seq.

In U.S. Steel, the Court noted that

> [The MTC Compact] symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer. In accord with that recognition, Art. I of the Compact stated four purposes: (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation.

434 U.S. at 456.[3]

The U.S. Steel Court further noted that

> Articles VII and VIII [of the MTC Compact] detail more specific powers of the Commission. Under Art. VII, the Commission may adopt uniform administrative regulations in the event that two or more States have uniform provisions relating to specified types of taxes. These regulations are advisory only. Each member State has the power to reject, disregard, amend, or modify any rules or regulations promulgated by the Commission. They have no force in any member State until adopted by that State in accordance with its own law.
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> Article VIII applies only in those States that specifically adopt it by statute. . . . Moreover, individual member States retain complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base (including the determination of the components of taxable income), and the means and methods of determining tax liability and collecting any taxes determined to be due.

Id. at 457.

After a review of the MTC Compact's formation and adoption among the member states, the U.S. Steel Court held that the application of the Compact Clause of the United States Constitution "is limited to agreements that are 'directed to the formation of

[3] See N.D.C.C. § 57-59-01, Article I – Purposes.

any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" Id. at 471, quoting New Hampshire v. Maine, 426 U.S. 363, 369 (1976). The Court made three further key conclusions as summarized in the syllabus:

> (a) The Compact's multilateral nature and its establishment of an ongoing administrative body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause. The number of parties to an agreement is irrelevant if it does not impermissibly enhance state power at the expense of federal supremacy, and the powers delegated to the administrative body must also be judged in terms of such enhancement.
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> (b) Under the test of whether the particular compact enhances state power *quoad* the Federal Government, this Compact does not purport to authorize member States to exercise any powers they could not exercise in its absence, nor is there any delegation of sovereign power to the Commission, each State being free to adopt or reject the Commission's rules and regulations and to withdraw from the Compact at any time.
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> (c) Appellants' various contentions that certain procedures and requirements of the Commission encroach upon federal supremacy with respect to interstate commerce and foreign relations and impair the sovereign rights of nonmember States, are without merit, primarily because each member State could adopt similar procedures and requirements individually without regard to the Compact. Even if state power is enhanced to some degree, it is not at the expense of federal supremacy.

U.S. Steel at 452-53 (internal cites omitted); see id. at 473-78 for the Court's discussion of these points.

The facts and circumstances of U.S. Steel bear a striking resemblance to the SSTP and implementing legislation necessary to carry out its purposes. Having reviewed both Senate Bills 2095 and 2096, and applying the rationale of U.S. Steel to the facts of this matter, the same result is reasonably reached.

First, the agreement integral to participation in the SSTP is not directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Second, the SSTP's multilateral nature and its establishment of an ongoing administrative or

governing body do not, standing alone, present significant potential for conflict with the principles underlying the Compact Clause. The number of parties to the SSTP, and the powers delegated to the body of governing states that would participate in the SSTP, do not impermissibly enhance state power at the expense of federal supremacy.

Third, the SSTP agreement and its implementing legislation do not purport to authorize participating states to exercise any powers they could not exercise in the absence of the project or its legislation, nor is there any delegation of sovereign power to the governing body, each state being required only to be within substantial compliance of the SSTP's rules and regulations and having the ability to withdraw from the agreement at any time. And finally, there is no evidence tending to prove that any procedures or requirements of the SSTP encroach upon federal supremacy with respect to interstate commerce and foreign relations or impair the sovereign rights of nonparticipating states. North Dakota, as with all other states participating in the SSTP, may adopt similar procedures and requirements individually without regard to the SSTP's provisions. Even if state power is enhanced to some degree, it is not at the expense of federal supremacy.

Finally, should the Legislative Assembly choose to enact Senate Bills 2095 and 2096, N.D.C.C. § 1-02-38(1) would apply. Under this law, acts of the North Dakota Legislative Assembly enjoy a strong presumption of constitutionality under both the state and federal constitutions. Grand Forks Professional Baseball, Inc. v. N.D. Workers Compensation Bureau, 654 N.W.2d 426, 431 (N.D. 2002). The North Dakota Supreme Court articulated in detail the importance of this presumption in MCI Telecommunications v. Heitkamp, 523 N.W.2d 548 (N.D. 1994):

> The court recently reiterated a number of premises underlying analysis of constitutional challenges to statutes:
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> > "'[A]n act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity.' *Southern Valley Grain Dealers Ass'n v. Board of County Comm'rs,* 257 N.W.2d 425, 434 (N.D. 1977). 'A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution.' *Richter v. Jones,* 378 N.W.2d 209, 211 (N.D.1985).' "The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination." ' *Manikowske v. North Dakota Workmen's Compensation Bureau,* 338 N.W.2d 823, 825 (N.D.1983), *quoting Asbury Hospital v. Cass County,* 72 N.D. 359, 7 N.W.2d 438, 442 Syllabus ¶ 11 (1943)." *Haney v. North Dakota Workers*

> *Compensation Bureau,* 518 N.W.2d 195, 197 (N.D.1994). "The power to hold an Act of the Legislature invalid is one of the highest functions of the courts, and such power should be exercised with great restraint." *Montana-Dakota Utilities Co. v. Johanneson,* 153 N.W.2d 414, 416-17 Syllabus ¶ 6 (N.D.1967). The presumption of constitutionality is so strong that a statute will not be declared unconstitutional "unless its invalidity is, in the judgment of the court, beyond a reasonable doubt." *Menz v. Coyle,* 117 N.W.2d 290, 293 Syllabus ¶ 3 (N.D.1962). The policy of upholding the constitutionality of a statute whenever possible is so strong that our state constitution provides that this court "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide." Article VI, § 4, N.D. Const.

Id. at 552.

Therefore, it is my opinion that North Dakota's participation in the SSTP or enactment of implementing legislation would violate neither the Constitution of the United States nor the Constitution of North Dakota.

Sincerely,

Wayne Stenehjem
Attorney General

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