

**LETTER OPINION**  
**2011-L-09**

October 18, 2011

Mr. Mark Zimmerman  
North Dakota Parks & Recreation  
1600 E Century Ave Ste 3  
Bismarck, ND 58503-0649

Dear Mr. Zimmerman:

Thank you for your letter asking about the North Dakota Parks and Recreation Department's (Department) authority to place mineral lease bonus payments and lease royalties in the state park fund under N.D.C.C. § 55-08-07. It is my opinion that mineral lease bonus payments and lease royalties are revenues received under N.D.C.C. § 55-08-07, and the Department has statutory authority to place these funds in the state park fund.

**ANALYSIS**

You indicate in your letter that the Department has leased minerals it owns pursuant to its statutory authority to manage<sup>1</sup> and lease<sup>2</sup> the Department's or the state's property within the Department's control. You ask whether mineral lease bonus<sup>3</sup> payments and

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<sup>1</sup> N.D.C.C. § 55-08-01.3(1).

<sup>2</sup> The director has the authority under N.D.C.C. § 55-08-01.3(5) to lease, sell, or exchange real property under the Department's control if necessary for the improved management of state parks, state campgrounds, and state recreational areas or reserves. See also N.D.C.C. § 55-08-01.3(8) (providing the director with the authority to sell, mortgage, transfer, or dispose of property under the control of the Department as authorized by law); N.D.C.C. § 55-08-01.3(6) (providing the director with the authority to administer all real property and interests in real property and personal property held for recreational purposes as an agent for any state or federal agency or a political subdivision of the state).

<sup>3</sup> A bonus is "[u]sually . . . the cash consideration paid by the lessee for the execution of an oil and gas lease by a landowner. Bonus is usually figured on a per acre basis." 8 Williams & Meyers, Manual of Terms, p. 97 (2010) (citing Carroll v. Bowen, 68 P.2d 773 (Okla. 1937)).

lease royalties<sup>4</sup> (mineral revenue) collected incident to your management of Department property stay within the control of the Department and where the funds should be placed.

The Legislature established requirements and a framework for the Department to manage its resources and revenue:

All revenues collected as permit fees, admissions, use charges, rentals, compensation for concession agreements, or otherwise, with the exception of revenue from bequests, trusts, or gifts,<sup>5</sup> and with the exceptions noted in subsections 1 and 2 of section 55-08-06, must be placed in the state park fund . . . .<sup>6</sup>

Neither section 55-08-07 nor any other law specifically addresses mineral revenues received by the Department. Nonetheless, you specifically ask whether the catch-all phrase “or otherwise,” as it is used in section 55-08-07, means that the Department’s mineral revenue should be placed in the state park fund.

The objective in interpreting a statute is to determine legislative intent, sought first by looking at the statutory language.<sup>7</sup> Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined in the code or unless the Legislature clearly intends otherwise.<sup>8</sup>

On its face, the phrase “or otherwise” is very broad.<sup>9</sup> It “means different, under different circumstances, in a different way or manner, in other respects.”<sup>10</sup> The word “otherwise” means “for any other reason.”<sup>11</sup> Read literally the term “mean[s] an assurance of

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<sup>4</sup> A royalty interest is a smaller real property interest in a mineral estate which is a share of the product or proceeds reserved to the owner for permitting another to develop or use the property. Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1991), citing 1 Williams & Meyers, Manual of Terms, at § 301. See also GeoStar Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61, 67 (N.D. 1993) (disavowing certain dicta in Acoma and reaffirming that a royalty interest is real property).

<sup>5</sup> Section 55-08-07.2, N.D.C.C., provides that the revenue from bequests, trusts, or gifts is to be placed in the state parks gift fund.

<sup>6</sup> N.D.C.C. § 55-08-07.

<sup>7</sup> Locken v. Locken, 797 N.W.2d 301, 304 (N.D. 2011).

<sup>8</sup> N.D.C.C. § 1-02-02.

<sup>9</sup> Hunnihan v. Mattatuck Mfg. Co., 705 A.2d 1012, 1018 (Conn. 1997).

<sup>10</sup> Thornbury v. Allen, 39 P.3d 1195, 1198 (Colo. Ct. App. 2001) (citing Webster’s Third New Int’l Dictionary 1598 (1986)); see also State v. Lambert, 206 P.3d 1065, 1070 (Or. App. 2009) (“otherwise” means “in a different way or manner”).

<sup>11</sup> Gooch v. United States, 297 U.S. 124, 128 (1936).

comprehensiveness.”<sup>12</sup> Thus, application of the ordinary meaning to the usage of the phrase “or otherwise” in N.D.C.C. § 55-08-07, is an indicator that the phrase be given a broad meaning.

A complete reading of the first sentence in section 55-08-07 further supports this interpretation. The law lists specific sources of revenue - permit fees, admissions, use charges, rentals, compensation for concession agreements - and it includes a catch-all phrase “or otherwise.” The same sentence, however, makes an exception for other types of revenue donated to the Department: bequests, trusts, and gifts.<sup>13</sup> Since revenue from donations can clearly be differentiated from revenue generated by use or entrance into park property, it appears that the phrase “or otherwise” must include donations. Thus a plain reading of the law indicates the Legislature contemplated a broad application of the catch-all phrase “or otherwise.”

Although it is my opinion that the law itself provides sufficient guidance for you to place mineral revenue in the state park fund, the North Dakota Supreme Court<sup>14</sup> has stated that when the phrase “or otherwise” follows an enumeration of particulars,<sup>15</sup> it “should receive an ejusdem generis interpretation.”<sup>16</sup>

Ejusdem generis is a specific application of the general rule of statutory construction.<sup>17</sup> It literally means “of the same kind” and provides “that where general words follow specific words in a statutory enumeration, the general words are construed to embrace

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<sup>12</sup> N.Y. Marine & Gen. Ins. Co. v. LaFarge N. Am., Inc., 599 F.3d 102, 115 (2nd Cir. 2010); see also Dunham v. Omaha & Council Bluffs St. Ry. Co., 106 F.2d 1, 3 (2nd Cir. 1939) (“‘or otherwise’ . . . can only enlarge”).

<sup>13</sup> See n.5.

<sup>14</sup> Many courts, when interpreting the phrase “or otherwise” and similar language, invoke the ejusdem generis doctrine to assess whether “or otherwise” requires a more restrictive interpretation. See, e.g., Ali v. Fed. Bur. of Prisons, 552 U.S. 214, 223-25 (2008) (rejecting the doctrine’s application); Id. at 230-32 (Kennedy, J., dissenting) (urging the doctrine’s application); United States v. Walker, 393 F.3d 819, 824 (8th Cir. 2005); see also Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50, 53 (N.D. 1991) (using the doctrine to interpret “other”); Gaustad v. Nygaard, 256 N.W. 230, 232 (N.D. 1934).

<sup>15</sup> As previously stated, the enumeration of particulars in N.D.C.C. § 55-08-07 are “permit fees, admissions, use charges, rentals, compensation for concession agreements . . . .”

<sup>16</sup> State ex rel. Ilvedson v. Dist. Court, 291 N.W. 620, 628 (N.D. 1940) (quoting People v. Feitner, 75 N.Y.S. 738, 739 (N.Y. App. Div. 1902)).

<sup>17</sup> Resolution Trust Corp. v. Dickinson Econo-Storage, 474 N.W.2d 50, 52 (N.D. 1991); Gaustad v. Nygaard, 256 N.W. 230, 231-232 (N.D. 1934).

only objects similar in nature to those objects specifically enumerated.”<sup>18</sup> “Stated another way, . . . ‘general words following particular and specific words are not given their natural and ordinary sense, standing alone, but are confined to persons and things of the same kind or genus as those enumerated.’”<sup>19</sup>

Section 55-08-07 contains a primary list of revenue sources and the exceptions. For eiusdem generis to apply, these listed sources of revenue must have a distinct similarity, a “common attribute” to link them.<sup>20</sup> Thus, the list’s “genus [ ] must be determined.”<sup>21</sup>

The first four sources of revenue can best be described as follows: permit fees are collected by the Department from visitors who purchase annual and daily passes for park entrance; admission fees are the entrance fees and a percentage of fees that the Department collects for special events such as weddings, reunions, and corporate events that are held on the Department’s property; the Department collects use charges from park visitors who reserve campsites, shelters, and cabins managed by the Department; and rental fees are collected by the Department for the rental of cabins and shelters at state parks by the public.

These revenue sources all appear to have common features: the revenues are collected frequently, even daily during the summer season; they are all small amounts paid by individual members, and sometimes groups of the recreating public, to use state parks and park facilities and amenities; and they each allow a privilege of short duration. These common characteristics give the first four revenue sources in section 55-08-07 a common thread that strings them together. The fifth item on the enumerated list, concession agreements, is different because these agreements have none of the characteristics just described.

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<sup>18</sup> Resolution Trust, 474 N.W.2d at 52.

<sup>19</sup> Id. at 52-53.

<sup>20</sup> Ali v. Fed. Bur. of Prisons, 552 U.S. at 225; see also Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003) (in the clause “execution, levy, attachment, garnishment, or other legal process,” eiusdem generis requires that for a process to fall within the phrase “or other legal process” it must be much like the processes listed); United States v. Amato, 540 F.3d 153, 160 (2nd Cir. 2008) (“[E]iusdem generis cannot be called into play when the specified terms preceding the general one do not themselves have a common attribute from which a ‘kind or class’ may be defined.”).

<sup>21</sup> State ex rel. v. Frazier, 167 N.W. 510 (N.D. 1918); see also Christman v. Emineth, 212 N.W.2d 543, 549 (N.D. 1973) (in applying eiusdem generis to determine whether coal falls within “other minerals” in the phrase “oil, gas, and other minerals,” the similarities and dissimilarities of coal and oil and gas were examined); MacMaster v. Onstad, 86 N.W.2d 36, 41-42 (N.D. 1957) (assessing the genus of enumerated words).

Proceeds from concession agreements are not paid by the recreating public, but rather by a person engaged in a business enterprise that involves the commercial use of state park property. Terms of these business arrangements are often of some duration. For instance, the Department may allow a business to operate a gas station or bait store on park property. Traditionally, the Department's concession agreements have been for ten-year periods. These agreements also have a royalty-like provision which compensates the Department for a percentage of the concessionaire's net income.

It is my further understanding the Department has broadly interpreted the phrase "or otherwise" so that all revenue received, besides donated revenue, was placed in the state park fund. The Department has applied the phrase "or otherwise" when it has received revenue from a "one-time" or special event. For example, on occasion the Department has opened park property to livestock grazing and haying, and placed the payments received into the state park fund. The Department has on occasion also collected biological and other data under contract and placed the contract proceeds into the state park fund, deeming it revenue "otherwise" collected.

Finally, the last sources of revenue, bequests, trusts, or gifts, generally speak for themselves. Revenue is classified into these categories when it is donated to the Department. Obviously, donated revenue is dissimilar from revenue generated by entrance, admissions, and business or commercial use fees.

There are some similarities between the revenues specifically listed in section 55-08-07, but the eiusdem generis doctrine is not to be "woodenly" applied.<sup>22</sup> "[T]echnically unnecessary" examples may be included in legislation "out of an abundance of caution."<sup>23</sup> Further, eiusdem generis is not a doctrine, "as is sometimes mistakenly supposed, to be resorted to in every case where in a statute a general expression follows a particular enumeration."<sup>24</sup> Courts do not give it "unthinking reliance."<sup>25</sup> It is "not a dispositive" doctrine but a "helpful guide."<sup>26</sup> The doctrine is "but 'a mere suggestion'" and other rules, particularly the primary rule that legislative intent is to be found in the ordinary meaning of the words, can "sweep[] aside the doctrine of eiusdem generis."<sup>27</sup>

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<sup>22</sup> Ali v. Fed. Bur. of Prisons, 552 U.S. 214, 227 (citing Harrison v. PPG Indus., Inc., 446 U.S. 578, 589, n.6 (1980)).

<sup>23</sup> Fort Stewart Schs. v. FLRA, 495 U.S. 641, 646 (1990).

<sup>24</sup> Klingensmith v. Siegal, 224 N.W. 680, 682 (N.D. 1929).

<sup>25</sup> United States v. Amato, 540 F.3d 153, 160 (2nd Cir. 2008).

<sup>26</sup> Id.; see also Klingensmith, 224 N.W. at 683 (it is "a mere servant of the courts in aiding them to ascertain the legislative intention").

<sup>27</sup> State v. McGillic, 141 N.W. 82, 84 (N.D. 1913).

LETTER OPINION 2011-L-09  
October 18, 2011  
Page 6

A plain reading of N.D.C.C. § 55-08-07 and the Department's interpretation and application of the statute support the position that the Legislature has established a broad reading of section 55-08-07 in relation to where the Department places its revenue.<sup>28</sup> The "legislature is presumed to know the construction of its statutes by the executive departments of the State and the failure to amend the statute indicates legislative acquiescence."<sup>29</sup> Considering all of the above, it appears that the ejusdem generis doctrine is unsuitable to this analysis.

It is my opinion, therefore, that the phrase "or otherwise" as it is used in section 55-08-07 should be given its ordinary and broad meaning allowing the Department to place mineral revenue in the state park fund.

Sincerely,

Wayne Stenehjem  
Attorney General

zbs/vkk

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>30</sup>

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<sup>28</sup> See Effertz v. N.D. Workers Comp. Bureau, 525 N.W.2d 691, 693 (N.D. 1994); State ex rel. Clayburgh v. Am. W. Cmty. Promotions, Inc., 645 N.W.2d 196.

<sup>29</sup> Effertz, 525 N.W.2d at 693.

<sup>30</sup> See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).