

**LETTER OPINION
2012-L-10**

September 17, 2012

The Honorable Robert R. Peterson
State Auditor
600 East Boulevard Avenue, Dept 117
Bismarck, ND 58505

Dear Mr. Peterson:

Thank you for your letter requesting my opinion on whether the State Treasurer's distribution of federal funds allocated to North Dakota is in accordance with both state and federal law. For the reasons indicated below, it is my opinion that the State Treasurer's distribution of federal funds is in accordance with both state and federal law.

ANALYSIS

Due to destructive floods, in the 1930's and 1940's the federal government acquired rights to thousands of acres of lands lying along and under rivers and lakes in North Dakota and other states in order to construct dams necessary for flood control.¹ Consequently, the federal government acquired certain property rights, including the mineral rights attached to the land.²

In 1941, the federal government passed 33 U.S.C. § 701c-3 to distribute a percentage of the moneys received from the mineral leases of these flood control lands to the states "to be expended as the State legislature[s] may prescribe for the benefit of public schools and public roads of the county, or counties, in which such property is situated."³

¹ See 33 U.S.C. § 701c-1.

² The federal government receives revenue from bonuses, royalties and rentals from mineral leases issued under the authority of the Mineral Leasing Act for Acquired Lands or from mineral leases that were in existence at the time of the acquisition of the land by the United States.

³ 33 U.S.C. § 701c-3.

In 1949, North Dakota enacted what is now N.D.C.C. § 21-06-10 to distribute the flood control lease revenue allocated to North Dakota under 33 U.S.C. § 701c-3.⁴ Section 21-06-10, N.D.C.C., provides in part:

The state treasurer shall pay the moneys allocated to the state under 33 U.S.C. 701(c)(3) to the counties entitled to receive them in proportion to the area of the land in the county acquired by the United States for which compensation is being provided under 33 U.S.C. 701(c)(3) as that area bears to the total of these federal lands in the state.

The State Treasurer has historically⁵ interpreted N.D.C.C. § 21-06-10, specifically the words “counties entitled to receive them” and “these federal lands” to mean that the federal lease revenue should be distributed to only those counties which generate revenue. Thus, the Treasurer’s distribution formula considers the amount of lease revenue and the “area” the leased property which produced the revenue. The funds are then distributed to the counties which produced the revenue, in proportion to the area of the leases.

You indicate in your letter that you “feel the state law could be interpreted as intending that all counties affected by [Corp of Engineers] Flood Control purchases should receive a proportional share of the revenue,” regardless of whether the lands are leased and produce revenue. Thus, you question whether or not the Treasurer’s distribution of the flood control moneys to only the revenue producing counties complies with N.D.C.C. § 21-06-10.⁶

The primary objective of statutory interpretation is to determine the intent of the Legislature by first looking at the plain language of the statute.⁷ Words in a statute are given their plain, ordinary, and commonly understood meaning.⁸ If the statutory language is clear and unambiguous, that language cannot be disregarded under the pretext of pursuing the legislative intent because the intent is presumed to be clear from the face of the statute.⁹ Additionally, as I explained in N.D.A.G. 2008-L-15, an agency’s construction of a statute

⁴ 1949 N.D. Sess. Laws ch. 187, § 1.

⁵ The State Treasurer has distributed these particular funds by this manner for fifteen years.

⁶ Prior to 2009, the total of these distributions in North Dakota was relatively immaterial. However, for the last several years, four to five oil and gas producing counties have been receiving a fairly significant revenue stream.

⁷ Arnegard v. Cayko, 782 N.W.2d 54, 58 (N.D. 2010) (citations omitted).

⁸ N.D.C.C. § 1-02-02.

⁹ Dist. One Republican Comm. v. Dist. One Democrat Comm., 466 N.W.2d 820, 824-25 (N.D. 1991).

may be entitled to some deference if that interpretation does not contradict clear and unambiguous statutory language.¹⁰

Your argument is based on the language in N.D.C.C. § 21-06-10 that provides that the funds are to be distributed only to the counties “for which compensation is being provided under 33 U.S.C. 701(c)(3) as that area bears to the total of these federal lands in the state.” You argue that “these federal lands” could mean that the compensation provided pursuant to 33 U.S.C. 701c-3 is to be spread among all of the counties that contain federally acquired lands within the state and not just to the counties that have federal land that generates revenue.

Section 21-06-10, N.D.C.C., was written to accomplish the purpose of 33 U.S.C. § 701c-3, which was to return a percentage of the lease money to the states. Therefore, N.D.C.C. § 21-06-10 must be interpreted consistently with 33 U.S.C. § 701c-3. The language in N.D.C.C. § 21-06-10 directs the State Treasurer to “pay the moneys allocated to the state under 33 U.S.C. 701(c)(3) to the counties entitled to receive them...”¹¹ Thus, in order to determine what counties are entitled to receive the moneys, we must look to 33 U.S.C. § 701c-3, which provides as follows:

75 per centum of all moneys received and deposited in the Treasury of the United States during any fiscal year on account of the leasing of lands acquired by the United States for flood control, navigation, and allied purposes, including the development of hydroelectric power, shall be paid at the end of such year by the Secretary of the Treasury to the State in which such property is situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county, or counties, in which such property is situated, or for defraying any of the expenses of county government in such county or counties, including public obligations of levee and drainage districts for flood control and drainage improvements: *Provided*, That when such property is situated in more than one State or county, the distributive share to each from the proceeds of such property shall be proportional to its area therein. For the purposes of this section, the term “money” includes, but is not limited to, such bonuses, royalties and rentals (and any interest or other charge paid to the United States by reason of the late payment of any royalty, rent, bonus or other amount due to the United States) paid to the United States from a mineral lease issued under the authority of the Mineral Leasing Act for Acquired Lands [30 U.S.C. § 351 et seq.] or paid to the United States from a mineral

¹⁰ Teigen v. State, 749 N.W.2d 505, 514 (N.D. 2008); N.D.C.C. § 1-02-39(6) (administrative construction of statute may be considered if statute ambiguous).

¹¹ 33 U.S.C. § 701c-3.

lease in existence at the time of the acquisition of the land by the United States.¹²

As the underlined portion indicates, the plain language of section 701c-3 provides that the moneys received on account of leasing of lands acquired by the United States for flood control is to be returned to the state for the benefit of the county or counties, in which “such property” is situated.¹³ The use of the demonstrative adjective “such property,” refers to those federal flood control lands which are leased and generate revenue. The federal law specifically directs that the state use the money for the benefit of the counties that generate lease revenue. Beyond that direction, the state has the discretion to legislate how the money is divided between public schools and public roads within the revenue generating counties, just as the North Dakota Legislature has done in N.D.C.C. § 21-06-10.¹⁴

In addition, 33 U.S.C. § 701c-3 provides direction regarding the distribution of revenue in instances where the leased land crosses state or county lines. Such direction would not be necessary if the revenue was spread across all counties containing federal flood control lands. Accordingly, the law provides that when a lease is situated in more than one state or county, the revenue is to be proportionally split according to area “therein.”

The Treasurer’s interpretation of state and federal law is also consistent with the method by which the federal government reports lease revenue to the state. The U.S. Department of Interior, Office of Natural Resources, generates a report identifying only the county or counties which produced revenue from lands taken for flood control, the amount of the revenue, and the state’s share of the revenue¹⁵ The Treasurer only distributes the flood control lease moneys to the county or counties which are listed by the federal government.

Finally, the Treasurer’s interpretation is supported by an explanation of flood control lease revenue contained in the Fiscal Year 2012 Appendix Budget of the U.S. Government.¹⁶ In the 2012 Budget Estimate¹⁷ for the Department of the Interior,¹⁸ there is a section entitled,

¹² 33 U.S.C. § 701c-3. (Emphasis added.)

¹³ Id.

¹⁴ See State ex rel. Lakeview Local Sch. Dist. Bd of Educ. v. Trumbull Cnty Bd. of Comm’rs, 846 N.E.2d 847 (Ohio 2006). N.D.C.C. § 21-06-10 distributes half of the revenue to school districts, a quarter to the county for road purposes, and a quarter to townships that have land that generates revenue.

¹⁵ For the last fifteen years, the report has been provided by the Interior Department to the Auditor’s Office, which then provides a copy of this report to the Treasurer’s Office.

¹⁶ See <http://www.gpo.gov/fdsys/pkg/BUDGET-2012-APP/pdf/BUDGET-2012-APP.pdf> (last visited Sept. 14, 2012).

¹⁷ Id.

“Leases of Lands Acquired for Flood Control, Navigation, and Allied Purposes” which contains the following statement:

Flood control payments to States are shared according to the Flood Control Act of 1936 (33 USC 701 et seq.) which provides that 75 percent of revenue collected be shared with the State in which it was collected. These funds are to be expended as the State legislature may prescribe for the benefit of the public schools and roads in the county from which the revenue was collected or for defraying any of the expenses of county government. These expenses include public obligations of levee and drainage districts for flood control and drainage improvements.¹⁹

Although the budget document is not a binding legal determination upon the state, it supports the Treasurer’s interpretation that Congress’ intent is to distribute flood control revenues only to the counties where leased federal flood control lands are situated.

In support of your position, you indicate that “[i]f the intent was that only those counties that had COE Flood Control lands that produce revenue should share in the revenue it [N.D.C.C. § 21-06-10] would be worded in that manner.” Although the federal and state laws could be worded more clearly, when both are read together, the language indicates that only the counties that have leased federal flood control land are to receive flood control lease revenue.

Therefore, it is my opinion that the State Treasurer has been distributing the flood control moneys to the counties in accordance with N.D.C.C. § 21-06-10 and 33 U.S.C. § 701c-3.

Sincerely,

Wayne Stenehjem
Attorney General

lm/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.²⁰

¹⁸ The Department of the Interior is the federal agency that provides the Auditor’s office with the monthly report of which counties produced lease revenue.

¹⁹ Fiscal Year 2012 Appendix Budget of the U.S. Government, p. 682.

²⁰ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).