

**OPINION**  
**65-203**

May 4, 1965 (OPINION)

Mr. Kenneth E. Raschke

Commissioner

Higher Education

RE: Native Fuel - Higher Education - Use of Natural Gas

This is in reply to your letter of April 28, 1965, relative to section 48-05-02 of the North Dakota Century Code, as amended by House Bill No. 706 enacted by the Thirty-ninth Legislative Assembly. You state the following facts and questions:

"The Board of Higher Education is soon to take bids on boiler facilities at the University of North Dakota. Engineers' estimates indicate that some \$200,000 saving in capital investment would accrue to the university and the state if oil-gas fired equipment is installed in place of lignite fired equipment. There are at present oil fired units in operation at Ellendale, Mayville, Wahpeton, and Bottineau.

"Because of the above, the Board of Higher Education respectfully requests an opinion as to whether it has the authority under chapter 48-05-02 of the North Dakota Century Code as amended by the 1965 legislature, to install boiler facilities fired by combination oil and natural gas burners at the University of North Dakota at Grand Forks, North Dakota. Further, if it should be determined that such authority is present under the statute, could the Board of Higher Education elect to burn native or non-native natural gas when this fuel is cheaper than native fuel oil?

"Could the University of North Dakota be considered a 'public school building' under the provision of House Bill 706 which specifically exempts public school buildings from the provisions of the law?"

Section 48-05-02 of the North Dakota Century Code presently provides:

PUBLIC INSTITUTIONS TO USE NATIVE FUEL PRODUCTS. The various state institutions, county buildings, and public schoolhouses in this state shall use North Dakota native or lignite coal or lignite coal products. North Dakota native natural oil, or North Dakota native natural gas, for fuel. No officer shall purchase for use in such institutions, county buildings, and public schools any fuel other than that taken from the mines or wells within the boundaries of this state. This section shall not be construed, however, as prohibiting the use of coal or wood from outside the state when such coal or wood can be obtained at a cost less than North Dakota native fuel products,

or the use of coal other than North Dakota native lignite coal or lignite coal products, or other native fuel at such public schools as are located six miles or more from any mine or railroad station within the boundaries of this state, if the comparative cost of such fuel is not greater than that of the native fuel products."

House Bill No. 706, enacted by the Thirty-ninth Legislative Assembly, amends and reenacts section 48-05-02 and becomes effective July 1, 1965. Section 48-05-02, as amended by House Bill No. 706, would provide:

"48-05-02. PUBLIC INSTITUTIONS TO USE NATIVE FUEL PRODUCTS.) The various state institutions in this state shall use North Dakota native fuel products for fuel, except where the competitive price bid on a British Thermal Unit basis of purchasing non-native fuel is not greater than the cost of purchasing native fuel products. County buildings and public school buildings are specifically exempted from the provisions of this section."

This bill, as originally introduced into the Thirty-ninth Legislative Assembly, would have required the various state institutions, county buildings and public school houses in this state to use North Dakota native fuel products for fuel except where the cost of using non-native fuel is not greater than the cost of using native fuel products. At one time amendments were adopted to completely repeal section 48-05-02. The bill finally adopted by the legislature is in the form heretofore quoted.

The question relative to a "public school building" would, if answered in the affirmative, render the other questions inapplicable and we will consider this question first.

The question relative to a "public school building" would, if answered in the affirmative, render the other questions inapplicable and we will consider this question first.

The term "public school buildings" is a broad term and would ordinarily include buildings at the institutions of higher learning as well as school buildings owned by local school districts. The only distinction is that the buildings at the institutions of higher learning are owned by the state while the local school district holds title to the school buildings which it operates. We must, however, consider the term as it is used with the other language contained in House Bill No. 706. In this connection it is to be noted the bill requires the use of North Dakota native fuel products for fuel in "the various state institutions" in this state. The term "various state institutions" would appear to be all inclusive and would include those institutions under the Board of Administration as well as those institutions under the control of the Board of Higher Education and those institutions under the control and jurisdiction of other state agencies. In this connection it is to be noted that section 15-10-01 of the North Dakota Century Code uses the following terminology: "The 'State Board of Higher Education' shall have the control and administration of the following state educational institutions, to wit: \* \* \*." (Emphasis supplied.) Thus the

institutions of higher education are considered "state educational institutions" by the legislature and, by using the term "various state institutions" in House Bill No. 706, it appears they intended to include all state institutions, educational and otherwise. See also Article 54 of the North Dakota Constitution.

We would also note that the term "public school buildings" is found in the exemption provision in House Bill No. 706. A general rule of statutory construction is that exemptions from a statutory requirement are to be strictly construed and all doubts should be resolved in favor of the general provision rather than the exception. See 83 C.J.S. 893, Statutes, section 382.

It is therefore our opinion that the buildings located on the campus of the University of North Dakota and other institutions under the control of the Board of Higher Education would not be considered "public school buildings" under the provisions of House Bill No. 706, which specifically exempt such public school buildings from the provisions of the law requiring the use of North Dakota native fuel products.

With respect to the question of the installation of boiler facilities fired by combination oil and natural gas burners, House Bill No. 706 requires the use of North Dakota native fuel products. It does not specifically govern the type of apparatus which may be installed to burn such fuel. It is common knowledge that oil is produced in North Dakota and that fuel products made from such oil are native to North Dakota. This office has previously held that oil may be used as fuel by institutions of higher learning under the present provisions of section 48-05-02. See opinion issued to Dr. A.E. Mead, Commissioner of Higher Education on November 13, 1959, a copy of which is attached hereto.

It is also common knowledge that natural gas for fuel is produced in North Dakota but that such gas is not, at the present time, available in the Grand Forks, North Dakota, area. Natural gas which is available for fuel in the Grand Forks area is, at the present time, made available by pipeline from Canada and the gas transported by such pipeline is, to the best of our knowledge, produced in Canada.

While we are not aware of the technical problems involved it would not seem realistic to install a boiler which could be fired by any and all North Dakota native fuel products, including coal, wood, etc., at any given time, dependent upon which native fuel product might cost less at any given time. Cost factors of the various native fuel products may well change. The installation of a boiler is a permanent installation and cannot be altered on a year to year basis.

Both oil and gas fuel products are native to North Dakota. Native oil fuel products, at least, are available to the University of North Dakota and other institutions of higher learning under the control of the Board of Higher Education. House Bill No. 706 does not require a distinction be made among the native fuel products on a cost basis. As long as the fuel products used are produced in North Dakota, the requirements of the statute have been met. The decision as to which native fuel product to use or to be used would appear to

be within the discretion of the Board of Higher Education in this instance.

We do not mean to imply that the board could or should install a boiler fired by burners which would use some fuel which is not native to the state and which there is no foreseeable possibility or probability will be native to the state. However, since oil and natural gas are both native to the state of North Dakota, it is our opinion that the Board of Higher Education may, in their discretion, install boiler facilities fired by combination oil and natural gas burners at the institutions of higher learning under its control as well as any other facilities which will burn fuel products native to North Dakota.

We have determined that the authority is present under House Bill No. 706 to install boiler facilities fired by combination oil and natural gas burners at the institutions under the control of the Board of Higher Education. We will now consider the remaining question, i.e., whether the Board of Higher Education may elect to burn native or non-native natural gas when this fuel is cheaper than native fuel oil. There is, of course, no question that native natural gas may be burned regardless of whether this fuel is cheaper than native fuel oil. As long as the natural gas is produced in North Dakota the requirements of House Bill No. 706 will have been met. However the question of burning non-native natural gas poses a more difficult question.

House Bill No. 706, as previously noted, provides that if the competitive price bid on a British Thermal Unit basis of purchasing non-native fuel is not greater than the cost of purchasing native fuel products, such non-native fuel products may be used. The question is, of course, does this include all native fuel products, i.e., must the cost of the non-native fuel be not greater than any native fuel product (including coal, wood, etc.) before the non-native fuel may be used? As stated above, it would not appear realistic to require an institution to install a boiler fired by burners which would burn any and all native fuels at any given time, depending upon the cost of such fuel at such time. We therefore held the board could, in their discretion, install boilers fired by oil and natural gas burners. If such burners are installed it would, of necessity, foreclose the possibility of using any other fuel products. Therefore the only matter to be considered is whether the cost of native oil and/or natural gas is less expensive than non-native oil and/or natural gas. If either the native oil or natural gas is less expensive on a competitive price bid on a British Thermal Unit basis, such native oil or natural gas must be used. However, if, for example, the cost of non-native oil would be less expensive, on such basis, than the cost of either native oil or natural gas, the non-native oil fuel products could be used. If, for example, the cost of non-native natural gas would be less expensive, on such basis, than the cost of either native oil or natural gas, the non-native natural gas could be used.

It is therefore our opinion that the Board of Higher Education may elect to burn native or non-native natural gas when this fuel is cheaper than native fuel oil as disclosed by a competitive price bid on a British Thermal Unit basis.

HELGI JOHANNESON

Attorney General