

LETTER OPINION
94-L-208

August 17, 1994

Mr. Jay V. Brovold
Billings County State's Attorney
P.O. Box 187
Medora, ND 58645-0187

Dear Mr. Brovold:

Thank you for your June 28, 1994, letter concerning North Dakota's oil and gas gross production tax and the distribution of tax proceeds by the county treasurer based on student average daily attendance.

You described the circumstances of Billings County as being one wherein the boundaries of the county and the boundaries of the school district are the same. Therefore, if a student residing in Billings County attends school in an adjoining school district, the student necessarily will be attending school in a school district, no part of which lies in the county of residence.

North Dakota's oil and gas gross production tax, imposed by N.D.C.C. ?? 57-51-02 and 57-51-02.2, is a tax that is "in lieu of all ad valorem taxes by the state, counties, cities, towns, townships, school districts, and other municipalities, upon any property rights attached to or inherent in the right to producing oil or gas, upon producing oil or gas leases, upon machinery, appliances, and equipment used in and around any well producing oil or gas and actually used in the operation of such well, and also upon oil and gas produced in the state upon which gross production taxes have been paid, and upon any investment in any property hereinbefore in this paragraph mentioned or described." N.D.C.C. ? 57-51-03.

N.D.C.C. ? 57-51-15 provides for apportionment of the oil and gas gross production tax proceeds to the state and counties, and further apportionment by county treasurers to political subdivisions within the

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county. Subsection 2 of N.D.C.C. ? 57-51-15 provides for the manner of determining how much of the tax will be apportioned to each county. Subsection 3 of N.D.C.C. ? 57-51-15 provides for 35% of all gross production tax revenues allocated to a county to be apportioned by the county treasurer to "school districts within the county on the average daily attendance distribution basis, as certified to him by the county superintendent of schools." N.D.C.C. ? 57-51-15(3) (emphasis supplied). There are further limitations on the amount that may be apportioned to school districts based on average daily attendance or county school census information as certified to the county treasurer by the county superintendent of schools by July 1 of each year. N.D.C.C. ? 57-51-15(3).

Although North Dakota statutes do not provide a definition of the method of calculating "average daily attendance," I understand the calculation of that number is provided to the Department of Public Instruction, along with average daily membership (N.D.C.C. ? 15-40.1-09), on North Dakota school district financial report forms and North Dakota school district pupil membership report forms provided by the Superintendent of Public Instruction (N.D.C.C. ? 15-40.1-19). However, where the school district boundary and the county boundary is coextensive, that is, there is only one school district for the entire county, it is my opinion that there is no need to perform any apportionment calculation based on average daily attendance under N.D.C.C. ? 57-51-15(3) because the one school district covering the entire county is entitled to the full amount of the allocation for that county.

As noted above, the oil and gas gross production tax proceeds apportioned to counties wherein the oil is produced is an "in lieu tax" designed to compensate those political subdivisions in and including the county for otherwise available ad valorem taxes. This tax revenue, like any other tax revenue available to the political subdivisions, is designed to provide for

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their support and the conduct of their lawful operations. One of those lawful operations, in the case of school districts, is to send students into adjoining school districts pursuant to agreement and upon the payment of tuition to the adjoining district under N.D.C.C. ch. 15-40.2. In order to pay that tuition, the resident school district, in this case Billings County School District, must have the financial wherewithal to pay the tuition calculated under N.D.C.C. ? 15-40.2-03. Part of that financial wherewithal comes from taxes. Consequently, when the Billings County School District sends a resident student to an adjacent county and adjacent school district, the tax revenue, part of which derives from the oil and gas gross production tax, does "follow" the student to the adjoining district. However, it does so as a result of the payment of school tuition, and not because the adjacent county or adjacent school district is entitled to any portion of Billings County's allocation of the oil and gas gross production tax. Naturally, where tuition is waived (N.D.C.C. ? 15-40.2-04(1)(b)) or where it is inapplicable (N.D.C.C. ? 15-40.3-03), then a county's oil and gas gross production tax revenue would not "follow" a student attending school outside the county in any way.

It is therefore my opinion that, where the school district boundary and the county boundary is coextensive, no part of the oil and gas gross production tax allocated to a county is to be shared with a school district lying entirely outside the county.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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