

LETTER OPINION
94-L-251

October 4, 1994

Mr. Bryan R. Dvirnak
North Dakota Future Fund
1333 East Bismarck Expressway
Bismarck, ND 58504

Dear Mr. Dvirnak:

Thank you for your letter concerning the status of the North Dakota Future Fund, Inc. ("Future Fund"). Specifically, you ask whether the Future Fund constitutes a nonprofit development corporation, an agency of the state of North Dakota, or a combination thereof.

The Future Fund was established under North Dakota Century Code (N.D.C.C.) ch. 10-30.3. N.D.C.C. ? 10-30.3-04 directs that the Future Fund "must be organized as a nonprofit corporation under [N.D.C.C. ch. 10-24]." The Future Fund is authorized to exercise the powers in N.D.C.C. ch. 10-24 and additionally has the authority to "[c]ooperate and contract with state agencies, colleges, universities, other private and public academic and research sources, agencies and organizations of the federal government, and all public or private entities [and] [r]eceive appropriations from the legislative assembly and other public moneys as well as contributions from other public agencies, private individuals, companies, and other contributors." N.D.C.C. ? 10-30.3-04. The Future Fund, additionally, has "the authority to take equity positions in, to provide loans to, or to use other innovative financing mechanisms to provide capital for new or expanding businesses in North Dakota, or relocating businesses to North Dakota." N.D.C.C. ? 10-30.3-02.

Bryan R. Dvirnak
October 4, 1994
Page 2

The Future Fund's "principal mission is the development and expansion of primary sector business in North Dakota." Id. The Future Fund is managed by a board of directors consisting of eight members. N.D.C.C. ? 10-30.3-03. The Governor appoints the members and considers representatives for five positions who serve in executive capacities in the areas of private sector manufacturing, finance, and exported services. Id. Additionally, the Governor appoints "one member who is enrolled in a federally recognized North Dakota tribe . . . , the director of economic development and finance, and one member from a rural area, on the board of directors." Id. The board of directors administers the primary sector fund established pursuant to N.D.C.C. ? 10-30.3-10 and the regional rural development revolving loan fund established pursuant to N.D.C.C. ? 10-30.3-12.

By statutory design, the Future Fund is established as a statewide nonprofit development corporation, managed by a board of directors, and granted the authority of a nonprofit corporation. Thus, it is my opinion that the Future Fund operates, in part, as a nonprofit development corporation. The second part of your question is whether the Future Fund constitutes an agency of the state of North Dakota.

The applicable test to determine whether an entity constitutes an agency of the state of North Dakota was explained by the North Dakota Supreme Court in Leadbetter v. Rose, 467 N.W.2d 431, 432 (N.D. 1991). The court noted that "[t]he most important circumstance in determining the status of [an entity] is whether a judgment against that [entity] will be paid from the state treasury." Id. The court listed other relevant circumstances as: "(1) whether the [entity] is performing a governmental or proprietary function, (2) whether the [entity] is separately incorporated, (3) whether the [entity] can sue and be sued and enter into contracts, (4) whether the state controls the [entity's] operations, and (5) whether the state has immunized itself from responsibility for the [entity's] operations." Id.

Bryan R. Dvirnak
October 4, 1994
Page 3

In an earlier opinion, this office concluded that Technology Transfer, Inc. was an agency of the state of North Dakota. N.D. Op. Att'y Gen. 92-06 (copy attached). The creation of Technology Transfer, Inc. is remarkably similar to the creation of the Future Fund. Compare N.D.C.C. ch. 10-30.3 with N.D.C.C. ch. 10-30.4. Because of the similarity, I believe that the 1992 Attorney General opinion addressing the status of the Technology Transfer, Inc. applies equally well to the status of the Future Fund. However, for the sake of additional clarity, I will elaborate on the most important circumstance, namely, whether a judgment against the Future Fund would be paid from the State Treasury.

The Future Fund oversees the operation and investment of the primary sector fund established under N.D.C.C. ? 10-30.3-10 and the regional rural development revolving loan fund under N.D.C.C. ? 10-30.3-12. Apart from the operation of these two funds, the Future Fund's ability to satisfy a judgment is severely limited. These funds were established largely through legislative appropriation and transfer. See 1991 N.D. Sess. Laws ch. 95 and 1993 N.D. Sess. Laws ch. 42. Consistent with Breen v. Mortgage Comm'n of State of New York, 35 N.E.2d 25, 27 (N.Y. 1941), the moneys in the funds would constitute property of the state. The general rule is that "[w]here a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside." 81A C.J.S. States ? 228, p. 800 (1994). See also McGraw v. Hansbarger, 301 S.E.2d 848, 858 (W.Va. 1983).

The Future Fund has no authority to use moneys in the funds which it administers to satisfy a judgment that may be brought against it. Accordingly, it is my opinion that a judgment against the Future Fund would be a judgment against the state to be paid by the state treasury. Accord Breen v. Mortgage Comm'n of State of New York, 35 N.E.2d 25, 27 (N.Y. 1941); Rodrigues Diaz v. Sierra Martinez, 717 F.Supp. 27, 30 (D.Puerto Rico 1989); Bell v. New York Higher Educ. Assistance Corp., 526 N.Y.S.2d 316, 318 (N.Y. Sup. Ct. 1987), aff'd 538 N.Y.S.2d 451 (N.Y. App. Div.), appeal dismissed in part and denied in part (N.Y. 1989).

Bryan R. Dvirnak
October 4, 1994
Page 4

Although the Future Fund is separately "incorporated" and has a separate juridical personality, it is nonetheless an integral part of the state of North Dakota receiving periodic legislative appropriations, continual board of director appointments by the Governor, and performs a governmental function. See Wilson v. Connecticut Prod. Dev. Corp., 355 A.2d 72, 76 (Conn. 1974). The reason for separate incorporation was aptly explained by the court in Rodrigues Diaz, 717 F.Supp. at 30, to provide the state created corporation "certain flexibility and adaptability characteristic[s] of private commercial enterprises" that many state agencies do not enjoy. Thus, it is my opinion that the Future Fund constitutes a state agency operating, in part, as a statewide nonprofit development corporation.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

dec\jfl