

**1999 HOUSE FINANCE AND TAXATION**

**HB 1454**

1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1454

House Finance and Taxation Committee

Conference Committee

Hearing Date February 8, 1999

Tape Number	Side A	Side B	Meter #
1	x		1.2
Committee Clerk Signature <i>Janice Stein</i>			

Minutes:

REP. RENNERFELDT, VICE-CHAIRMAN, Opened the hearing.

REP. WES BELTER, DIST. 22, Introduced the bill. See written testimony.

He also shared a letter from Vicky Steiner stating the coal conversion counties were in support of the bill. See attached copy.

Rep. Belter also submitted amendments to the bill.

HEIDI HEITKAMP, ATTORNEY GENERAL, Testified in support of the bill. She submitted handouts, one was the district court decision which was received from Judge Jorgensen from the South Central Judicial District, and the other handout was a copy of the original statutory changes which were made. It is difficult to follow this bill without these documents. She gave a little history on the coal tax of North Dakota. She went through the amendments which housed the bill. She stated when the bill was drafted, they had not had an opinion from the court.

She also went over the fiscal note because of its negative impact.

REP. WARNER The fiscal note refers to a seventy seven cent tax per ton, and the amendments are for a seventy five cent tax per ton.

HEIDI HEITKAMP She stated the fiscal note was prepared by an earlier set of amendments, the fiscal note will need to be amended but it will remain negative.

RICK CLAYBURGH, STATE TAX COMMISSIONER, Stated they would prepare a revised fiscal note if the bill is hog housed. He stated he supported the bill and the amendments to the bill. He disagreed with Judge Jorgenson's opinion.

REP. WINRICH Is there any particular rationale for using seventy five cents versus seventy seven cents per ton?

RICH CLAYBURGH It deals with two cents which goes into the Lignite Research Fund.

JOHN RISCH, RAILROAD WORKERS ACROSS THE STATE OF NORTH DAKOTA,  
Testified in opposition of the bill. See written testimony.

HEIDI HEITKAMP Stated that she visited with Rep. Delvin & Mahoney and Sen. Christmann and they worked very closely in the development of this package and are supportive of this.

With no further testimony, the hearing was closed.

COMMITTEE ACTION

REP. GROSZ Made a motion to adopt the amendments as presented.

REP. GRANDE Second the motion. MOTION CARRIED BY VOICE VOTE

REP. GROSZ Made a motion for a DO PASS AS AMENDED

REP. GRANDE Second the motion. MOTION CARRIED

12 Yes 0 No 3 Absent

REP. GRANDE Was given the floor assignment

## FISCAL NOTE

Return original and 14 copies)

Bill/Resolution No.: \_\_\_\_\_

Amendment to: HB 1454

Requested by Legislative Council

Date of Request: 2/10/99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

**Narrative:** If enacted as amended, HB 1454 is expected to have the fiscal impact shown below:

2. State fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>			-\$50,000 to -\$75,000	-\$15,000 to -\$22,500		
<b>Expenditures</b>						

3. What, if any, is the effect of this measure on the budget for your agency or department:

a. For rest of 1997-99 biennium: \_\_\_\_\_

**(Indicate the portion of this amount included in the 1999-2001 executive budget:)**

b. For the 1999-2001 biennium: \_\_\_\_\_

**(Indicate the portion of this amount included in the 1999-2001 executive budget:)**

c. For the 2001-03 biennium: \_\_\_\_\_

4. County, city, and school district fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
			-\$35,000 to -\$52,500					

If additional space is needed  
attach a supplemental sheet.

Signed: *Kathryn L. Strombeck*

Typed Name: Kathryn L. Strombeck

Department: Tax

Date Prepared: February 11, 1999

Phone Number: 328-3402

## FISCAL NOTE

Turn original and 14 copies)

Bill/Resolution No.: HB 1454

Amendment to: \_\_\_\_\_

Requested by Legislative Council

Date of Request: 1/20/99

1. Please estimate the fiscal impact (in dollar amounts) of the above measure for state general or special funds, counties, cities, and school districts. Please provide breakdowns, if appropriate, showing salaries and wages, operating expenses, equipment, or other details to assist in the budget process. In a word processing format, add lines or space as needed or attach a supplemental sheet to adequately address the fiscal impact of the measure.

**Narrative:** If enacted, and upon a final unappealable order by the court, HB 1454 replaces the 6¢ per million BTU sales and use tax on coal with a 77¢ per ton tax. This is estimated to result in a loss of approximately \$100,000 to \$150,000 (plus a gain of \$8,000 to \$12,000 for the Lignite Research Fund) during the 1999-2001 biennium, as shown below:

2. State fiscal effect in dollar amounts:

	1997-99 Biennium		1999-2001 Biennium		2001-03 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>			-\$50,000 to -\$75,000	-\$7,000 to -\$10,500		
<b>Expenditures</b>						

3. What, if any, is the effect of this measure on the budget for your agency or department:

a. For rest of 1997-99 biennium: \_\_\_\_\_

(Indicate the portion of this amount included in the 1999-2001 executive budget:)

b. For the 1999-2001 biennium: \_\_\_\_\_

(Indicate the portion of this amount included in the 1999-2001 executive budget:)

c. For the 2001-03 biennium: \_\_\_\_\_

4. County, city, and school district fiscal effect in dollar amounts:

1997-99 Biennium			1999-2001 Biennium			2001-03 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
			-\$35,000 to -\$52,500					

If additional space is needed  
attach a supplemental sheet.

Signed: *Kathryn L. Strombeck*

Typed Name: Kathryn L. Strombeck

Department: Tax

Date Prepared: February 5, 1999

Phone Number: 328-3402

Please type or use black pen to complete

Date 2-8-99  
Roll call vote # 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1454

House HOUSE FINANCE & TAX Committee

- Subcommittee on \_\_\_\_\_
  - Conference Committee
- } Identify or check where appropriate

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do pass as amended

Motion Made By Rep. Grosz Seconded By Rep. Grande

Representatives	Yes	No	Representatives	Yes	No
BELTER	✓		WINRICH	✓	
RENNERFELDT	✓				
CLARK	✓				
FROELICH	✓				
GRANDE	✓				
GROSZ	✓				
HERBEL	✓				
KROEBER	✓				
MICKELSON	A				
NICHOLAS	A				
RENNER	A				
SCHMIDT	✓				
WARNER	✓				
WIKENHEISER	✓				

Total 12 0  
(Yes) (No)

Absent 3

Floor Assignment Rep. Grande

If the vote is on an amendment, briefly indicate intent:

DO NOT USE HIGHLIGHTER ON ANY FORMS

**REPORT OF STANDING COMMITTEE**

**HB 1454: Finance and Taxation Committee (Rep. Belter, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1454 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subsection 3 of section 57-39.2-02.1, subsection 9 of section 57-40.2-01, and subsection 3 of section 57-40.2-02.1 of the North Dakota Century Code, relating to sales and use taxes on coal and allocation of tax revenues; to repeal section 57-61-01.8 of the North Dakota Century Code, relating to a reduced severance tax for coal burned in small boilers; to provide a statement of legislative intent; to provide an effective date; and to declare an emergency.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Subsection 3 of section 57-39.2-02.1 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. There is imposed a tax of ~~six cents per million British thermal units~~ seventy-five cents per ton of two thousand pounds [907.18 kilograms] on all sales at retail of coal, except for coal used for heating buildings in this state and coal used in agricultural processing or sugar beet refining plants located within this state or adjacent states.

**SECTION 2. AMENDMENT.** Subsection 9 of section 57-40.2-01 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

9. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership or possession of that property, including the storage, use, or consumption of that property in this state, except that it does not include processing, or the sale of that property in the regular course of business. "Use" also means the severing of sand or gravel, or coal from the soil of this state for use within or outside this state.

**SECTION 3. AMENDMENT.** Subsection 3 of section 57-40.2-02.1 of the 1997 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. An excise tax is imposed on the storage, use, or consumption in this state of coal at the rate of ~~six cents per million British thermal units~~ seventy-five cents per ton of two thousand pounds [907.18 kilograms], except for coal used for heating buildings in this state and coal used in agricultural processing or sugar beet refining plants located within this state or adjacent states.

**SECTION 4. REPEAL.** Section 57-61-01.8 of the 1997 Supplement to the North Dakota Century Code is repealed.

**SECTION 5. LEGISLATIVE INTENT.** It is the intent of the legislative assembly that sections 57-39.2-02.1, 57-39.2-26.1, and 57-40.2-02.1 remain effective, except as amended by this Act.

**SECTION 6. EFFECTIVE DATE.** Section 4 of this Act is effective July 1, 2003.

**SECTION 7. EMERGENCY.** This Act is declared to be an emergency measure."

**1999 SENATE FINANCE AND TAXATION**

**HB 1454**



1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1454

Senate Finance and Taxation Committee

Conference Committee

Hearing Date 3-16-99

Tape Number	Side A	Side B	Meter #
HB 1454	X		0-1071
Committee Clerk Signature <i>Shila Wald</i>			

Minutes:

Sen Urlacher opened the hearing, roll taken. A BILL RELATING TO A REDUCED SEVERANCE TAX FOR COAL BURNED IN SMALL BOILERS, TO PROVIDE A STATEMENT OF LEG. INTENT.

Rep. Belter - This bill introduced to address litigation on imported coal into ND. This bill would set a flat tax of 75 cents, per ton sales, and use tax on imported coal.

Heidi Heitkamp - Testimony submitted and attached. When the original severance tax was passed on coal, there was a disagreement and debate whether coal used to generate electricity was subject to sales tax. The Leg. at that time (1997) resolved the issue by saying the severance tax was in lieu of a sales tax. What is exempt is the materials which end up becoming an intrigal part of the product. Any energy input, are subject to sales tax. Natural gas is subject to sales tax.

What this bill does, is basically corrects the problem that the District Court found in the 1997 statute. The Court didn't see it the way I saw it and that is why we are here today. The bill is in essence of the 1997 bill, with a change to a per ton amount, so it is 75 cents. Does this fix the problem, I don't think so. Bill takes a step and puts us right with the District Court.

Sen. Wardner - What else would they go after if we pass this bill and we are on tonnage, are there other issues out there?

Heidi Heitkamp - It may be discriminatory, given they pay a severance tax in Montana, and then have to pay a sales tax here in ND.

Rick Clayburgh - State Tax Commissioner - We support this bill.

Sen. Wardner - Montana, do they have a severance tax on the coal?

Rick Clayburgh - They do have a severance tax. If you have your red book, you may look it up. 5% flat tax on proceeds.

Sen. Urlacher - any further questions or testimony. CLOSED THE HEARING.

DISCUSSION 3-17-99 TAPE A #1, 0-1070. SEN. CHRISTMANN MADE A MOTION TO DO PASS AND SECONDED BY SEN SCHOBINGER. VOTE 6-0-1. CARRIER SEN. CHRISTMANN.

Date: 3/17/99  
Roll Call Vote #: ①

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1454

Senate Senate Finance and Taxation Committee

Subcommittee on \_\_\_\_\_

or

Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken No Pass

Motion Made By Sen. Christmann Seconded By Sen. Schobinger

Senators	Yes	No	Senators	Yes	No
SENATOR URLACHER	✓				
SENATOR CHRISTMANN	✓				
SENATOR SCHOBINGER	✓				
SENATOR STENEHJEM	✓				
SENATOR WARDNER	✓				
SENATOR KINNOIN	✓				
SENATOR KROEPLIN					

Total (Yes) 6 No 0

Absent 1

Floor Assignment Sen. Christmann

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)  
March 17, 1999 11:51 a.m.

Module No: SR-48-4981  
Carrier: Christmann  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

**HB 1454, as engrossed: Finance and Taxation Committee (Sen. Urlacher, Chairman)**  
recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).  
Engrossed HB 1454 was placed on the Fourteenth order on the calendar.

1999 TESTIMONY

HB 1454

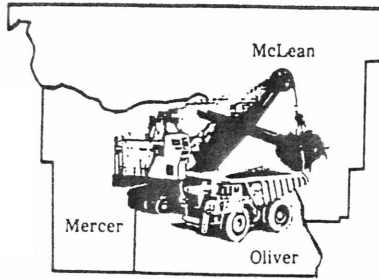
February 8, 1999

**Testimony of Rep. Wes Belter  
Chairman, House Finance & Taxation Committee  
Regarding HB 1454**

For the record, I am Rep. Wes Belter, District 22. Very briefly, HB 1454 has been introduced to address litigation that challenges the existing Btu tax on imported coal that is sold and used in the State of North Dakota. By way of background, the Btu tax on imported coal was adopted by the 1997 Legislature but was recently held unconstitutional by the North Dakota District Court in the South Central Judicial District. HB 1454 would remedy this situation by providing for a flat 75¢ per ton sales/use tax on imported coal, the same per ton rate that exists for domestic coal.

At the request of the Attorney General and the Tax Commissioner, I have had some amendments prepared to HB 1454 that they will outline for you.

At the conclusion of their testimony, I will be happy to answer any questions the Committee may have.



# Coal Conversion Counties

*McLean, Mercer and Oliver Counties*

**P.O. Box 717 • Hazen, ND 58545**

**February 8, 1999**

**Dear Chairman Wes Belter:**

**Please inform your House Finance and Taxation Committee that our Coal Conversion Counties Association is in favor of House Bill 1454.**

**Our membership consists of counties, cities and school districts in the three coal conversion counties: McLean, Mercer and Oliver.**

**The additional revenues generated under this new law would be used for the continued maintenance of infrastructure in our political subdivisions.**

**Please give this bill a do-pass recommendation.**

**Thank you.**

**Sincerely,**

A handwritten signature in cursive script that reads "Vicky Steiner".

**Vicky Steiner  
Executive Director  
Lobby badge #228**

Heidi Heitkamp  
HB 1454

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Kennecott Energy Company,  
a Delaware corporation, and  
Spring Creek Coal Company,  
a Montana corporation,

Civil No. 97-C-2747

Plaintiffs,

vs.

MEMORANDUM OPINION

The State of North Dakota,  
by and through its Tax  
Commissioner, Ray Clayburgh,

Defendants.

The above-entitled litigation was commenced by co-counsel for the plaintiffs, Attorneys William P. Pearce, Bismarck, North Dakota, and R. R. McMahan, Chicago, Illinois, therein seeking a declaratory judgment under North Dakota Century Code Section 32-23-02. Plaintiffs' prayer for relief seeks a judgment of the court declaring certain provisions of "an act to create and enact a new subsection to Section 57-39.2-04 and a new section to Chapter 57-61 of the North Dakota Century Code, relating to an exemption for sales of coal used in agricultural processing or sugar beet refining plants and a reduction of the severance tax for coal burned in small boilers; and to amend and reenact Sections 57-39.2-02.1, 57-39.2-26.1 and 57-40.2-02.1 of the North Dakota Century Code, relating to the imposition of sales and use taxes on coal in the allocation of sales and use tax revenues from coal," H.B. 1467, 1997 North Dakota Legislative Service 279 (referred to as the "Coal Sales Tax Act") as

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Clk. of Cr. Burleigh Co.

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repugnant to the Commerce Clause of the Constitution of the United States, U.S. Const. Art. I, Section 8, CL. 3, and therefore unconstitutional.

The defendant by and through its legal counsel, Special Assistant Attorney General Kathryn Alfson, Bismarck, North Dakota, has filed and served the defendant's Answer, admitting and acknowledging this Court's jurisdiction to hear and determine a declaratory action, and admitting the statutory enactment referred to as the Coal Sales Tax Act, and denying plaintiff's factual allegations and constitutional challenge.

Now pending before the Court is the plaintiff's motion for summary judgment under Rule 56 of the North Dakota Rules of Civil Procedure and the defendant's cross-motion for summary judgment. Legal counsel have submitted their respective written briefs and attachments, with the same submitted pursuant to Rule 3.2 of the North Dakota Rules of Court, absent request for oral argument.

#### ISSUE

Whether the Coal Sales/Use Tax Act as enacted in 1997, which has a discriminatory impact on coal produced in Montana and sold in North Dakota, is in violation of the commerce clause of the United States Constitution.

#### UNDISPUTED FACTS

1. From the pleadings, motions of the respective parties, briefs, affidavits and exhibits, the Court finds there are no disputed material facts which would preclude the Court from the entry of judgment under Rule 56 of the North Dakota Rules of Civil Procedure, and finds the undisputed facts as follows:

(a) Section 1 of the Coal Sales/Use Tax Act amended N.D.C.C. Ch. 57-39.2 to impose a sales tax of 6 cents per million British thermal units ("Btu") on retail sales of coal in North Dakota. Section 4 of the Act amended N.D.C.C. Ch. 57-40.02 to impose a tax in the same amount on the storage, use or consumption of coal in North Dakota. Coal used to heat buildings and used in agricultural processing and sugar beet refining plants is exempted from these taxes by subsection 3 of Section 1 and subsection 3 of Section 4. Beginning in 1999, Section 5 of H.B. 1467 exempts coal used in small boilers, as defined in that section, from 50% of the severance tax, sales tax and use tax.

(b) Plaintiff Kennecott Energy Company (herein after referred to as "KEC") is a Delaware corporation headquartered in Gillette, Wyoming. KEC is a wholly-owned subsidiary of Kennecott Management Services Company, a Delaware corporation, which in turn is a wholly-owned subsidiary of Rio Tinto America Inc., a Delaware corporation. Plaintiff KEC provides marketing and other services for the coal producing subsidiaries of Kennecott Energy and Coal Company (hereinafter referred to as "KECC"), a Delaware corporation, which also is a wholly-owned subsidiary of Rio Tinto America, Inc. KECC, through its subsidiaries, is engaged in the business of mining, processing and marketing coal. Affidavit of Shannon S. Crompton (Exhibit 10, Paragraphs 3-7); Affidavit of Ronald N. Boesen (Exhibit 12, Paragraph 2.

(c) Plaintiff Coal Creek Coal Company (hereinafter referred to as "Spring Creek") is a Montana corporation headquartered in Decker, Montana. Spring Creek is an indirect, wholly-owned subsidiary of KECC. Spring Creek owns and operates the Spring Creek Mine, a coal mining, processing and loading

facility located at Decker, Montana. Plaintiff KEC markets the coal produced at the mine on behalf of Spring Creek. Affidavit of Shannon. Crompton (Exhibit 10, Paragraphs 8-10); Affidavit of Ronald N. Boesen (Exhibit 12, Paragraph 3).

(d) The federal Energy Information Administration (hereinafter referred to as "EIA") is the independent statistical and analytical agency within the United States Department of Energy. The EIA was created by the *Department of Energy Organization Act of 1977*, PL. 95-51, Title II, Section 205, 91 Stat. 572 (1977), codified at 42 U.S.C.A. Section 7135. Pursuant to its duties, obligations and authority under that Act; the EIA has published, among other things, the following periodicals and reports; *Annual Energy Outlook 1997*, *Coal Industry Annual 1996*, *Electric Power Annual 1996*, *Monthly Energy Review*, *Cost and Quality of Fuels for Electric Utility Plants 1996 Tables*, *U.S. Coal Reserves: A Review and Update*, *The Changing Structure of the U.S. Coal Industry: An Update* (Exhibits 2).

(e) Coal is an important source of fuel for the nation's electric utilities, providing over 55% of the fuel used to generate electricity. Nearly all the electricity generating facilities located in North Dakota are fueled by coal. In the year 1996, North Dakota utilities purchased 23 million tons of coal. EIA, *Monthly Energy Review* (Dec. 1997), p. 23 (Exhibit 4); EIA, *Cost and Quality of Fuels for Electric Utility Plants 1996 Tables* (May 1997), p. 32 (Exhibit 6).

(f) Plaintiff KEC markets the Spring Creek Mine's entire annual production of coal nationally and internationally. In the year 1996, KEC marketed 9 million tons of Spring Creek coal to nine States and three countries, approximately 8 million

tons of which was purchased as fuel for power generation.  
Affidavit of Ronald N. Boesen (Exhibit 12, Paragraphs 5, 6).

(g) Virtually all sales of Spring Creek coal to power companies are made FOB the mine-mouth, Decker, Montana.  
Affidavit of Ronald N. Boesen (Exhibit 12, paragraph 5).

(h) Spring Creek coal has an average heat content of 18.6 million Btu per ton. Affidavit of Ronald N. Boesen (Exhibit 12, paragraph 4). Coal produced and sold in North Dakota has an average heat content of 12.9 million Btus per ton. North Dakota Legislative Counsel, *1997 Senate Standing Committee Minutes: Senate Finance and Taxation Committee, Hearing on HB 1467, march 10-March 18, 1997* (Group Exhibit 14A).

(i) Coal produced and sold from the Spring Creek Mine is subject to the following Montana taxes:

- (1) a severance tax of 15% of its per-ton contract sales price (Mont. Code Ann., Sections 15-35-103,
- (2) a gross proceeds tax of 5% of its per-ton contract sales price (Mont. Code Ann, Sections 155-23-703) and
- (3) a resource indemnity trust tax of 0.4% of the gross value of the Mine's total annual production calculated on the per-ton contract sales price (Mont. Code Ann. Section 15-38-104).

At Spring Creek's 1997 year-to-date average contract sales price, these taxes amount to, approximately, 64 cents, 22 cents, and 2 cents per ton, respectively. The North Dakota Coal Sales/Use Tax Act would add an additional \$1.12 per ton tax burden to the coal. Affidavit of Ronald N. Boesen (Exhibit 12,

paragraphs 8, 9).

(j) Coal mined in North Dakota is, with certain exceptions, subject to a severance tax of 77 cents per ton, which tax is in lieu of any sales or use taxes imposed by law. N.D.C.C. 57-61-01 and 57-61-01.5.

(k) The intent of the Coal Sales/Use Tax Act was to protect State and local revenues, the North Dakota lignite mining industry and North Dakota jobs in coal mining by discouraging North Dakota electric utilities from purchasing out-of-state coal instead of lignite mined in North Dakota. North Dakota Legislative Council, *1997 House Standing Committee Minutes: House Finance and Taxation Committee, Hearing on HB 1467, Feb. 3, 1997* (Group Exhibit 13); North Dakota Legislative Council, *1997 Senate Standing Committee Minutes: Senate Finance and Taxation Committee, Hearing on HB 1467, March 10-March 18, 1997* (Group Exhibit 14).

#### DECISION

This litigation centers upon the competition of coal of unequal quality and the impact of taxation thereon. There is no disagreement that the coal mined and produced by Spring Creek from the State of Montana has an average energy content of 18.6 million Btus per ton, while the coal mined and produced in North Dakota has an average energy content of 12.9 million Btu per ton.

Coal mined and produced in North Dakota is subject to a severance tax total of 77 cents per ton. Coal mined and produced from Montana which is sold and/or used in North Dakota is subject to a sales tax of 6 cents per million Btus. Coal produced from North Dakota mines and sold to North Dakota utilities is exempt from all North Dakota sales and use taxes, while the sale to or

use by North Dakota utilities of out-of-state coal is subject to the sales tax of 6 cents per million Btu.

The legislative history of H.B. 1467, demonstrates that said legislation was enacted in part out of concern for lost tax revenues and concern that North Dakota power plants might switch from North Dakota produced coal to the higher quality coal produced in other states, including Montana.

State legislative measures that patently entail differential treatment of in-state and out-of-state goods or products are virtually per se invalid. A discriminatory structure can only survive if the state adopting the statute can demonstrate that the statute is narrowly tailored to accomplish a legitimate local public welfare purpose, or that the statute satisfies the standards of the "compensatory tax" doctrine.

Herein the defendant argues to the Court that the impact of H.B. 1467 does meet the standards of the "compensatory tax" doctrine. In support of said argument, the defendant offers a collective tax impact comparison upon North Dakota coal and that coal with an origin outside of North Dakota. This comparison was adopted by the United States Supreme Court in Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). Therein the Court identified the necessary conditions to be satisfied for a valid compensatory tax:

First, a state must as a threshold matter, identify the intrastate tax burden for which the State is attempting to compensate. Second, the tax on interstate commerce must be shown roughly to approximate -- but not exceed -- the amount of the tax on interstate commerce. Finally, the events on which the interstate and intrastate taxes are imposed

must be "substantially equivalent;" that is, they must be sufficiently similar in substance to serve as mutually exclusive "proxies" for each other. (Citations omitted.)

The intrastate tax identified by H.B. 1467, is that of an intrastate coal severance tax at 77 cents per ton, which is in lieu of sales or use taxes imposed by the State of North Dakota.

The tax on interstate commerce is not based upon a per ton assessment, but rather is imposed upon an energy content basis, namely Btu content at 6 cents per million Btus. The defendant offers no justification for this substantial difference in the base unit method of tax assessment, but rather seeks to offer that the tax application is substantially equivalent when energy content of the competing coal is compared. The defendant further argues that because it takes 1.44 tons of North Dakota coal to equal the energy content of one ton of Montana coal, the tax burden is substantially the same.

The plaintiff argues to the Court that the net effect of H.B. 1467, is to employ a tax structure which would "level the playing field" between unequal and competing natural resources. Plaintiff further offers to the Court that the differential basis upon which the tax is based, serves no purpose other than to preserve preferential treatment of in-state coal production.

In Mapco, Inc. v. Grunder, 470 F.Supp. 401 (N.D. Ohio 1979), the Court was confronted with a similar discriminatory tax on coal based upon sulphur content. The State of Ohio produced predominantly higher sulphur coal which was compelled to compete with a low sulphur out-of-state coal. Ohio adopted a tax structure which discriminated against low sulphur coal and

avored high sulphur coal. The State of Ohio argued to the Court that geographic location of production was immaterial. The Court rejected the State's assertion and stated:

This argument blinks at the undisputed fact that Ohio produces no significant amount of low sulphur coal. The practical operation of the tax is to discriminate out-of-state coal shipped to Ohio consumers, who must pay a higher use tax on the out-of-state low sulphur coal than they pay on the Ohio mined high sulphur coal. The circumstances of the distribution of the nation's natural resources among the states does not legitimize discrimination against interstate commerce in violation of the commerce clause.

The Supreme Court of North Dakota in MCI Telecomms Corp. v Heitkamp, 523 N.W.2d 548 (N.D. 1994), described and defined the presumption of constitutionality of legislation as so strong that a statute should not be declared unconstitutional "unless its invalidity is, in the judgment of the court, beyond a reasonable doubt." Herein, the discriminatory nature of the sales tax imposed upon foreign coal when premised upon energy content while in-state production of coal is premised upon tonnage, cannot reasonably be disputed. State statutes that patently or facially involve differential treatment of in-state and out-of-state goods or products are virtually per se invalid. Wyoming v. Oklahoma, 502 U.S. 437 (1992). To salvage differential treatment of in-state and out-of-state goods or products, a state must be able to prove upon strictest scrutiny, that the statute is narrowly tailored to accomplish a legitimate local public welfare purpose or is warranted by the "compensatory tax" doctrine. Oregon Waste Systems, Inc. v. Dept. of ENVTL. Quality of Oregon, 511 U.S. 93 (1994). The compensatory tax



doctrine, however, is only to be applied to equalize competition between in-state products and out-of-state products, where the in-state product is at a competitive disadvantage solely due to greater tax burdens upon in-state products than out-of-state products. Associated Indus. Of Missouri v Lohman, 511 U.S. 641 (1994). The compensatory tax doctrine assumes that competing products are of equal quality and that consumers might choose the foreign product over that of the domestic product solely to avoid paying the tax burden on the domestic product. Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987). The compensatory tax doctrine has never been recognized as a method to equalize competition between in-state products and out-of-state products, where there is a measurable disparity in the quality of the same.

It is the defendant's effort to justify the sales tax based upon energy content, which is persuasive in this Court's judgment as to the unconstitutional interference with interstate commerce created by H.B. 1467. If North Dakota were inundated with extremely inexpensive out-of-state coal with an energy content of 6 million Btus per ton, it is difficult to believe that H.B. 1467 would have been predicated upon the energy content of foreign production.

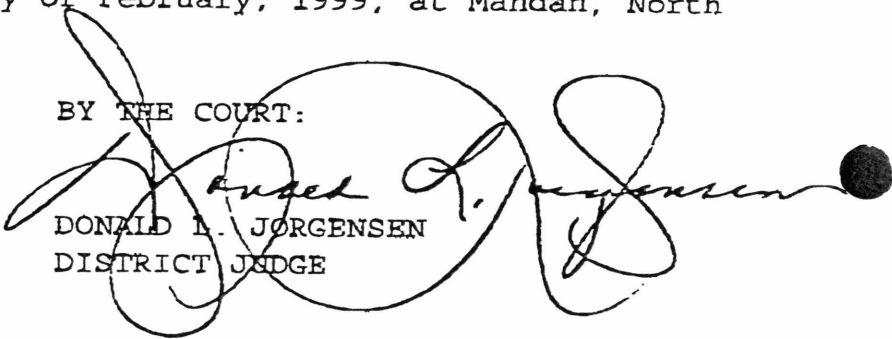
The commerce clause of the United States Constitution seeks to preserve a national unitary market where consumer choices remain free from the influence of state taxes. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994). As such, the compensatory tax doctrine was created to avoid situations where consumer choices between two otherwise equal products was determined or influenced by state tax considerations. The net

effect of the amendments to Sections 57-39.2-02.1, 57-39.2-26.1 and 57-40.2-02.1 of the North Dakota Century Code relating to the imposition of a sales/use tax on coal and the allocation of sales/use tax revenues from coal are herewith determined by this court to be repugnant to the commerce clause of the Constitution of the United States. U.S. Const. Art. I, Section 8, CL. 3, and are therefore unconstitutional.

IT IS THEREFORE THE DETERMINATION OF THIS COURT that there are no disputed material facts which would preclude the entry of judgment herein under Rule 56 of the North Dakota Rules of Civil Procedure and that the plaintiffs herein are entitled to a declaratory judgment as set forth above.

Dated this 1st day of February, 1999, at Mandan, North Dakota.

BY THE COURT:

  
DONALD L. JORGENSEN  
DISTRICT JUDGE

cc: Kathryn Alfson  
William P. Pearce  
R. R. McMahan

HOUSE BILL NO. 1467  
(Representatives Mahoney, Kempenich)

COAL SALES AND USE TAX

AN ACT to create and enact a new subsection to section 57-39.2-04 and a new section to chapter 57-61 of the North Dakota Century Code, relating to an exemption for sales of coal used in agricultural processing or sugar beet refining plants and a reduction of the severance tax for coal burned in small boilers; and to amend and reenact sections 57-39.2-02.1, 57-39.2-26.1, and 57-40.2-02.1 of the North Dakota Century Code, relating to the imposition of a sales and use tax on coal and the allocation of sales and use tax revenues from coal.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 57-39.2-02.1 of the North Dakota Century Code is amended and reenacted as follows:

57-39.2-02.1. Sales tax imposed.

1. Except as otherwise expressly provided in ~~subsection~~ subsections 2 and 3 for sales of mobile homes used for residential or business purposes ~~and~~; for sales of farm machinery, farm machinery repair parts, and irrigation equipment used exclusively for agricultural purposes; ~~and for sales of coal,~~ and except as otherwise expressly provided in this chapter, there is imposed a tax of five percent upon the gross receipts of retailers from all sales at retail including the leasing or renting of tangible personal property as provided in this section, within ~~the~~ this state of North Dakota of the following to consumers or users:
  - a. Tangible personal property, consisting of goods, wares, or merchandise, except mobile homes used for residential or business purposes and farm machinery, farm machinery repair parts, and irrigation equipment used exclusively for agricultural purposes.
  - b. The furnishing or service of communication services or steam other than steam used for processing agricultural products.
  - c. Tickets or admissions to places of amusement or entertainment or athletic events, including amounts charged for participation in an amusement, entertainment, or athletic activity, and including the furnishing of bingo cards and the playing of any machine for amusement or entertainment in response to the use of a coin. The tax imposed by this section applies only to eighty percent of the gross receipts collected from coin-operated amusement devices.
  - d. Magazines and other periodicals.
  - e. The leasing or renting of a hotel or motel room or tourist court accommodations.

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f. The leasing or renting of tangible personal property the transfer of title to which has not been subjected to a retail sales tax under this chapter or a use tax under chapter 57-40.2.

g. Coal used for heating buildings in this state and coal used in agricultural processing or sugar beet refining plants located within this state or adjacent states.

2. There is hereby imposed a tax of three percent upon the gross receipts of retailers from all sales at retail of mobile homes used for residential or business purposes, except as provided in subsection 35 of section 57-39.2-04, and of farm machinery, farm machinery repair parts, and irrigation equipment used exclusively for agricultural purposes, including the leasing or renting of farm machinery and irrigation equipment used exclusively for agricultural purposes within the this state of North Dakota to consumers or users.

3. There is imposed a tax of six cents per million British thermal units on all sales at retail of coal, except for coal used for heating buildings in this state and coal used in agricultural processing or sugar beet refining plants located within this state or adjacent states.

4. In the case of a contract for the construction of highways, roads, streets, bridges, and buildings for which the bid was submitted prior to December 9, 1986, the contractor receiving the award is liable only for the sales or use tax at the rate of tax in effect on the date the bid was submitted.

<sup>236</sup> SECTION 2. A new subsection to section 57-39.2-04 of the 1995 Supplement to the North Dakota Century Code is created and enacted as follows:

Gross receipts from all sales of coal used in agricultural processing or sugar beet refining plants located within this state or adjacent states which are exempted from the tax imposed by chapter 57-61.

<sup>237</sup> SECTION 3. AMENDMENT. Section 57-39.2-26.1 of the North Dakota Century Code is amended and reenacted as follows:

57-39.2-26.1. Allocation of sales, use, and motor vehicle excise tax revenues to revenue sharing and personal property tax replacement and coal development fund.

1. Notwithstanding any other provision of law, a portion of sales, use, and motor vehicle excise tax collections, excluding collections allocated under subsection 2, equal to sixty percent of an amount determined by multiplying the quotient of one percent divided by the general sales tax rate, that was in effect when the taxes were collected, times the net sales, use, and motor vehicle excise tax collections under chapters 57-39.2, 57-40.2, and 57-40.3 must be deposited by the state treasurer in the state

<sup>236</sup> Section 57-39.2-04 was also amended by section 1 of Senate Bill No. 2072, chapter 497.

<sup>237</sup> Section 57-39.2-26.1 was also amended by section 2 of House Bill No. 1019, chapter 19.

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aid distribution fund. The state tax commissioner shall certify to the state treasurer the portion of sales, use, and motor vehicle excise tax net revenues that must be deposited in the state aid distribution fund as determined under this section. The state aid distribution fund must be allocated, subject to legislative appropriation, as follows:

1.
  - a. Fifty percent of the revenues must be allocated in the first month subsequent to each quarterly period for state revenue sharing as provided in sections 54-27-20.2 and 54-27-20.3.
  - b. Fifty percent of the revenues must be allocated for personal property tax replacement as provided in section 57-58-01.
2. Notwithstanding any other provision of law, the sales and use tax collections on coal imposed by subsection 3 of section 57-39.2-02.1 and subsection 3 of section 57-40.2-02.1 must be deposited in the coal development fund established under section 57-61-10 and distributed under section 57-62-02.

<sup>238</sup> SECTION 4. AMENDMENT. Section 57-40.2-02.1 of the North Dakota Century Code is amended and reenacted as follows:

57-40.2-02.1. Use tax imposed.

1. Except as otherwise expressly provided in ~~subsection~~ subsections 2 and 3 for purchases of mobile homes used for residential or business purposes ~~and~~, for purchases of farm machinery, farm machinery repair parts, and irrigation equipment used exclusively for agricultural purposes, and for purchases of coal used for heating buildings in this state and used in agricultural processing or sugar beet refining plants located within this state or adjacent states, an excise tax is imposed on the storage, use, or consumption in this state of tangible personal property purchased at retail for storage, use, or consumption in this state, at the rate of five percent of the purchase price of the property. Except as limited by section 57-40.2-11, an excise tax is imposed on the storage, use, or consumption in this state of tangible personal property not originally purchased for storage, use, or consumption in this state at the rate of five percent of the fair market value of the property at the time it was brought into this state.
2. An excise tax is imposed on the storage, use, or consumption in this state of mobile homes used for residential or business purposes, except as provided in subsection 19 of section 57-40.2-04, and of farm machinery, farm machinery repair parts, and irrigation equipment used exclusively for agricultural purposes purchased at retail for storage, use, or consumption in this state at the rate of three percent of the purchase price thereof. Except as limited by section 57-40.2-11, and except as provided in subsection 35 of section 57-39.2-04, an excise tax is imposed on the storage, use, or consumption in this state of mobile homes used for residential or business purposes and of farm machinery, farm

<sup>238</sup> Section 57-40.2-02.1 was also amended by section 2 of Senate Bill No. 2072, chapter 497.

machinery repair parts, and irrigation equipment used exclusively for agricultural purposes not originally purchased for storage, use, or consumption in this state at the rate of three percent of the fair market value of mobile homes used for residential or business purposes and of farm machinery, farm machinery repair parts, and irrigation equipment used exclusively for agricultural purposes at the time it was brought into this state.

3. An excise tax is imposed on the storage, use, or consumption in this state of coal at the rate of six cents per million British thermal units, except for coal used for heating buildings in this state and coal used in agricultural processing or sugar beet refining plants located within this state or adjacent states.
4. In the case of a contract awarded for the construction of highways, roads, streets, bridges, and buildings prior to December 1, 1986, the contractor receiving the award shall be liable only for the sales or use tax at the rate of tax in effect on the date of contract.

SECTION 5. A new section to chapter 57-61 of the North Dakota Century Code is created and enacted as follows:

Tax reduction for coal burned in small boilers. For coal subject to taxes under this title which is burned in coal-fired boilers within this state or adjacent states in which the generating station has a total capacity of not more than two hundred ten megawatts, after June 30, 1999:

1. The coal is exempt from fifty percent of the taxes imposed under sections 57-61-01, 57-39.2-02.1, and 57-40.2-02.1;
2. The coal is subject to fifteen percent of the taxes imposed under section 57-61-01 and the entire revenue under this subsection must be deposited in the coal development trust fund for use as provided in subsection 1 of section 57-62-02 and allocated to the lignite research fund as provided in subsection 2 of section 57-61-01.5;
3. In addition to the taxes under subsection 2, the coal is subject to thirty-five percent of the severance taxes imposed under section 57-61-01, and an exemption from a portion of the tax imposed by this subsection may be granted by a city, school district, or the board of county commissioners of the county in which the coal is mined. The board of county commissioners, governing body of a city, or school board of a school district, by resolution, may grant to an operator of a mine that supplies coal to such a small coal-fired generating station, a partial or complete exemption from that county's, city's, or school district's share of revenues from the severance tax for all such coal. Any tax revenue from full or partial taxation under this subsection must be allocated as provided in subsection 2 of section 57-62-02, except that a political subdivision that has granted a partial or complete exemption from its share of severance tax revenues must be omitted from the allocation or have its allocation adjusted to reflect the reduction it has granted; and

4. Taxes imposed under section 57-61-01.5 apply to coal subject to this section and must be allocated as provided in that section.

Approved April 4, 1997  
Filed April 4, 1997

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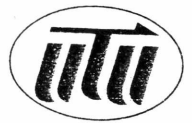
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# united transportation union



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 JOHN RISCH  
Legislative Director  
DAKOTA LEGISLATIVE BOARD

Testimony of John Risch  
Before the House Committee on  
Finance and Taxation  
In Opposition to of  
House Bill 1454  
February 8, 1999

Mr. Chairman and members of the committee, my name is John Risch. I am the North Dakota Legislative Director of the United Transportation Union. The UTU is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen and yardmasters.

House Bill 1454 is similar to legislation passed in the 1997 legislative session and is an attempt to keep clean burning, high BTU out-of-state coal from entering North Dakota for use in our power plants.

Allowing out-of-state coal to be used in North Dakota is not such a bad thing. Low sulfur, Powder River Basin coal from Wyoming burns cleaner and hotter and actually creates new jobs for North Dakota.

Those who look only at the lignite mining jobs that may be lost by burning out-of-state-coal are failing to look at the more important big picture.

As federal clean air standards stiffen, older North Dakota power plants may not be able to comply with those standards unless they can burn cleaner coal. The only other option for older plants may be to install multi-million dollar scrubbers, which often are not economically feasible.

So if the legislature passes legislation that forces electrical generating plants to burn inferior lignite they may well be hastening the closing of some power-producing plants. In that situation we lose not only the coal mining jobs, but the plant jobs as well.

While clean coal can make our power plants more competitive, it's also better for our state's air quality. The more we burn clean coal rather than lignite the cleaner our air becomes and the less we have to tear up North Dakota's countryside and then worry about putting the land back in an environmentally sound manner.



It's true that if North Dakota increases its use of out of state coal we could lose some North Dakota mining jobs. While no one likes to see any jobs lost, many of those jobs will likely to be offset by additional transportation jobs. Instead of transporting coal from the mine to the adjacent power plant, clean high BTU coal needs to be shipped some 500 miles, requiring a number of good paying railroad jobs to accomplish it.

If there were an increase in out-of-state coal being burned in North Dakota, we'd witness an increase of coal traffic on the branch line from Mandan to Beulah, where most of our power plants are located. More traffic on that rail line will require the railroad to invest more money in that line.

Those improvements would have a positive impact for all concerned, including the grain elevators at Beulah and Hazen and the Great Plains Coal Gasification Plant which relies on this line to ship many of their byproducts.

I'm a North Dakotan and I want our state to prosper, but trying to protect lignite from clean burning coal is not good for our state overall.

If this bill passes, perhaps other industries will ask for similar protection. Maybe we could enact a law prohibiting the sale of New Holland and John Deer skidsteer loaders since Melroe Bobcats are produced in our state? While that might sound a bit farfetched it follows the same line of logic that we see in HB 1454.

Because we want our state's power plants to remain competitive. Because we think clean air is a good thing and because us "rails" like to ship coal we urge this committee to recommend a "DO NOT PASS" for HB 1454.