

**FISCAL NOTE**  
**Requested by Legislative Council**  
**03/27/2019**

Revised

Amendment to: Engrossed SB 2362

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

SB 2362 adds language to 57-51.1-07 which requires the state's share of oil extraction tax revenue from a state/tribal agreement be allocated pursuant to the formula spelled out in this chapter. It also modifies the formula and includes a contingent appropriation to the common schools trust fund.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

**Section 1:**

Based on interpretation of the current statute, the state's share of tribal oil extraction tax revenue is allocated directly to the state share buckets spelled out in NDCC 57-51.1-07.5. This new language would require 10% of the state's share amount be allocated to the common schools trust fund, 10% to the foundation aid stabilization fund, and 20% to the resources trust fund. It would also add an additional 0.5% to the resources trust fund beginning with the distributions to be made in August 2019.

The following estimated fiscal impacts are derived using the March 2019 legislative forecast for total oil and gas tax revenue and applying the same percentage of tribal revenues that have been seen during the current biennium to determine an estimated state share of tribal extraction tax revenue:

**2017-2019 Biennium:**

This bill includes an emergency clause that, if carried, would make this change effective for the month after it is filed with the SOS. Assuming this goes into effect for allocations beginning in May 2019, the estimated fiscal changes for the remainder of the 2017-2019 biennium would be as follows:

- Strategic Investment & Improvements Fund - (\$10.2M)
- Common Schools Trust Fund - \$2.55M
- Foundation Aid Stabilization Fund - \$2.55M
- Resources Trust Fund - \$5.1M

**2019-2021 Biennium:**

If passed, it is estimated this bill would cause the following changes to fund allocations in the 2019-2021 biennium:

- Strategic Investment & Improvements Fund - (\$99.9M)
- Common Schools Trust Fund - \$22.3M

- Foundation Aid Stabilization Fund - \$22.3M
- Resources Trust Fund - \$44.6M
- Add'l Resources Trust Fund - \$10.7M

With all of these funds being considered "other funds", there would be no net change included in the other funds columns above.

Section 2:

Section 2 of SB 2362 includes a contingent appropriation to the common schools trust fund. If the actual legacy fund earnings transferred to the general fund for the 19-21 biennium exceed the legislative estimate by at least \$64,370,000, the bill calls for a transfer of \$64,370,000 from the general fund to the common schools trust fund.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*
- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

**Name:** Ryan Skor

**Agency:** Office of State Treasurer

**Telephone:** (701)328-2643

**Date Prepared:** 03/28/2019

**FISCAL NOTE**  
**Requested by Legislative Council**  
**03/27/2019**

Amendment to: Engrossed SB 2362

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Based on interpretation of the current statute, the state's share of tribal oil extraction tax revenue is allocated directly to the state share buckets spelled out in NDCC 57-51.1-07.5. This new language would require 10% of the state's share amount be allocated to the common schools trust fund, 10% to the foundation aid stabilization fund, and 20% to the resources trust fund. It would also add an additional 0.5% to the resources trust fund.

The following estimated fiscal impacts are derived using the March 2019 legislative forecast for total oil and gas tax revenue and applying the same percentage of tribal revenues that have been seen during the current biennium to determine an estimated state share of tribal extraction tax revenue:

2017-2019 Biennium:

This bill includes an emergency clause that, if carried, would make this change effective for the month after it is filed with the SOS. Assuming this goes into effect for allocations beginning in May 2019, the estimated fiscal changes for the remainder of the 2017-2019 biennium would be as follows:

- Strategic Investment & Improvements Fund - (\$11.3M)
- Common Schools Trust Fund - \$2.55M
- Foundation Aid Stabilization Fund - \$2.55M
- Resources Trust Fund - \$5.1M
- Add'l Resources Trust Fund - \$1.1M

2019-2021 Biennium:

If passed, it is estimated this bill would cause the following changes to fund allocations in the 2019-2021 biennium:

- Strategic Investment & Improvements Fund - (\$99.9M)
- Common Schools Trust Fund - \$22.3M

- Foundation Aid Stabilization Fund - \$22.3M
- Resources Trust Fund - \$44.6M
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**Name:** Ryan Skor

**Agency:** Office of State Treasurer

**Telephone:** (701)328-2643

**Date Prepared:** 03/28/2019



**FISCAL NOTE**  
**Requested by Legislative Council**  
**03/07/2019**

Bill/Resolution No.: SB 2362

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
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Cities			
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- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Senate Bill 2362 adds language to NDCC 57-51.1-07 which requires the state's share of oil extraction tax revenue from a state/tribal agreement be allocated pursuant to the formula spelled out in this chapter.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Based on interpretation of the current statute, the state's share of tribal oil extraction tax revenue is allocated directly to the state share buckets spelled out in NDCC 57-51.1-07.5. This new language would require 10% of the state's share amount be allocated to the common schools trust fund, 10% to the foundation aid stabilization fund, and 20% to the resources trust fund.

The following estimated fiscal impacts are derived using the January 2019 legislative forecast for total oil and gas tax revenue and applying the same percentage of tribal revenues that have been seen during the current biennium to determine an estimated state share of tribal extraction tax revenue:

**2017-2019 Biennium:**

This bill includes an emergency clause that, if carried, would make this change effective for the month after it is filed with the SOS. Assuming this goes into effect for allocations beginning in May 2019, the estimated fiscal changes for the remainder of the 2017-2019 biennium would be as follows:

- Strategic Investment & Improvements Fund - (\$10.2M)
- Common Schools Trust Fund - \$2.55M
- Foundation Aid Stabilization Fund - \$2.55M
- Resources Trust Fund - \$5.1M

**2019-2021 Biennium:**

If passed, it is estimated this bill would cause the following changes to fund allocations in the 2019-2021 biennium:

- Strategic Investment & Improvements Fund - (\$80.4M)
- Common Schools Trust Fund - \$20.1M
- Foundation Aid Stabilization Fund - \$20.1M
- Resources Trust Fund - \$40.2M

With all of these funds being considered "other funds", there would be no net change included in the other funds columns above.

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**Name:** Ryan Skor

**Agency:** Office of State Treasurer

**Telephone:** (701)328-2643

**Date Prepared:** 03/11/2019

**2019 SENATE FINANCE AND TAXATION**

**SB 2362**

# 2019 SENATE STANDING COMMITTEE MINUTES

## Finance and Taxation Committee Lewis and Clark Room, State Capitol

SB 2362  
3/13/2019  
Job #33622

- ☐ Subcommittee  
☐ Conference Committee

Committee Clerk: Alicia Larsgaard
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### Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact section 57-51.1-07 of the North Dakota Century Code, relating to the allocation of oil extraction tax; to provide an effective date; and to declare an emergency.

### Minutes:

Attachments: 12
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**Chairman Cook:** Called the hearing to order on SB 2362.

**(0:13) Chairman Cook:** Introduced the bill. I want to explain what this bill is about. Distributed attachment #1. I want to give you history on how this all came about. A month ago, Jodi Smith from the Land Department came to me and asked me to help her resolve a problem she said she had with money that was not flowing into the common schools trust fund that should. She had been up at the council trying to get a bill drafted and they gave her my name.

After that, I met with the Attorney General and the Treasurer of the state and I soon came to the conclusion that that was not our problem. The problem was really that we had ambiguous language and that language that two intelligent people could read and come out with different interpretations.

If you look at the top page of the handout I just gave you, you can see a hand drafted line in red that comes from the 50% revenue share that we get from taxes derived off of the Fort Berthold Indian Reservation. That 30% of that 50% tax goes straight to the Legacy Fund. The other 70% goes to the state share and eventually goes down into the state buckets. Because we generally fill up all the buckets, that money ends up in the SIF Fund.

Jodi's point was that that 70% share after the 30% is taking out, should go through the Common Schools Trust Fund and also through the Foundation Aid Stabilization Fund and the Resources Trust Fund with the remainder going through the General Fund. The bill you have before you will change the way we are doing it and put it through the funds as she requests it.

The amendments I have here would amend the bill to continue to do it the way we have been doing. The decision of how we do this is definitely going to be a legislative decision. If you

turn the page, you will see the definitions we have in the Constitution that people read and come up with different interpretations of.

I just want to point out that 1 and 2 is the ten percent revenue from oil extraction taxes from taxable oil produced in this state that must be deposited into the Common Schools Trust Fund. The next one must be deposited into the Foundation Aid Stabilization Fund. What does “produced” in this state mean? Does it include oil derived off of the reservation? That is one of the disputed areas. Down in section 26, you will see the language dealing with the Legacy Fund revenue and that is different language.

If you turn the page, you will see an email that was written by Edward Erickson who is the Assistant Attorney General who represented the State Treasurer through an auditor. This is in reference raised by an audit on whether or not the Treasurer was footing the money through the right funds. You will see it is an old email. It was dated in 2012. The email recollects a hallway conversation with the Assistant Attorney General and the Assistant Treasurer a year before this.

At the bottom of the first paragraph you will see a highlighted sentence. My understanding is that a legislative solution was offered on an amendment the next session. The bill got killed. That is where the issue has sat since. There has been no legislative fix and the issue has never risen before as far as I know until this session. It is time we have a piece of legislation to remove the ambiguity. That is the intent of SB 2362, to do what should have been done a long time ago.

As I have gone through this and worked with it, I have spent a lot of time up in Legislative Council. Emily Thompson will give you more information on this. She has done a thorough job and has put many hours into this. When she presents, you will see there has not been any misappropriation of funds. There has been a simple misunderstanding of what the language says.

**Emily Thompson, Code Reviser, Legislative Council:** Testified neutrally for the bill. Distributed attachment #2 and #3. I am going to give a little history on this. I have made a spread sheet that shows the statutes that were in place at that time. I have also included another document that our office puts out. It is kind of a map of the world as far as oil and gas distributions go.

The bill is to clarify the language. That is being done by providing allocations for those constitutional buckets going forward. There are not any retroactive provisions in this. If you flip to page 2 of the bill, it specifies that money that is deposited in the Oil Extraction Tax Development Fund from revenue collected under the oil extraction tax chapter and oil extraction tax revenue allocated to the state, under the terms of an agreement, entered pursuant to the tribal agreement chapter. That is where you see some of these buckets. You have the 20% to the Resource Trust Fund, 20% to Common Schools and Foundation Aid – that is a 10 and 10 split – and 30% to the Legacy Fund with the last 30% going to the General Fund.

The issue came up with Foundation Aid and Common Schools. It was discovered that those funds were not going in that direction. Attachment #3 walks you through 2005-2017 and all

of the statutory and constitutional provisions that were in place just pertaining to the oil extraction tax. It does not talk about the gross production tax because the constitutional allocations for Common Schools and Foundation Aid only come from oil extraction. They do not come from that gross production tax side.

I started with 2005 because that was the year before we had any kind of tribal sharing agreement on the radar. I wanted to demonstrate what the Treasurer's office was looking at when they were distributing funds as far as statutory language back in 2005. (11:10) Emily walked the committee through the chart on attachment #3.

Key Notes:

- "State Share" was referred to as the "General Fund" (2007)
- When drafting the tribal agreements, the constitutional allocations were not mentioned. It is unclear why. (2007)
- All of the state's cut off oil produced from the reservation was transferred to repay the Permanent Oil Tax Trust Fund to get it up to that \$700,000 cap for the tribally controlled community colleges. (2009)
- From January 2010 through the end of the biennium, the remainder of the state's portion of the state's cut of that tribal tax was deposited into the Permanent Oil Tax Trust Fund. (2009)

I will not continue to walk through the rest of the chart because the ambiguity that I wanted to address really started in the beginning years. I will be happy to address any questions of the committee.

**Chairman Cook:** Thank you for this. It is very thorough and a wonderful explanation. Because of this issue, have property taxes in the state risen?

**Emily Thompson:** This is something that is an independent issue. If you look at how the Common Schools Trust Fund and Foundation Aid is used, my property tax would go down if more money had gone to these funds. That is not an accurate statement. Common Schools and Foundation Aid are payment sources for the school payment. A very easy way to explain this is if you think of the state aid payments for schools, it is \$10,000 per pupil.

At the end of the day the state is guaranteeing a certain amount per pupil. The state will write a check for a certain amount. That Common Schools Trust Fund has money they could take as well as Foundation Aid and the General Fund. You are writing the same dollar amount on the check that is going to be paying that per pupil payment. It is just which source is funding it.

As far as property tax, the intent for oil extraction was to fund the schools at 70%. If you think of the 70%, 30% is that local contribution. You are not really shifting that per pupil payment just because the account you are drawing the money to write your check from would change balances.

**Chairman Cook:** Most of page 1 and 2 of this bill is language that is struck out. That is language that one person could read and say the money has to go through the Common Schools and the Foundation Aid, correct?

**Emily Thompson:** Correct. There are two duplicate sections just because it has different effective dates. They could read that as all of these allocations that must be drawn from for the full amount places in the Oil Extraction Tax Development Fund. The tribes share is being placed in the OETD Fund.

**Chairman Cook:** The rest of the bill basically says the same thing only it is re-written.

**Emily Thompson:** Correct. It does specify what we are starting with. It clarifies the bucket we are flowing those percentages out of.

**Chairman Cook:** The question I am working towards is after this explanation, is this the only area where we really have some ambiguity or do we have to go further? Is there another place where we should clean up?

**Emily Thompson:** Potentially. Any area that could be cleaned up is 57-51.106. That section talks about the deposits that are placed in that fund. If you look over at the gross production tax side of the formula, they do not have this similar type of holding fund where the money comes out of. They have the imposition sections for the tax and then all of their buckets. On the oil extraction tax side, we have the imposition sections of law. Then we have this fund that we put before all of these buckets. That might be where a little of the confusion is coming from.

Right now, it sights that the money deposited in that from the exact pin sighted section of law where oil extraction tax is imposed might contain some confusion regarding if it is to be deposited there? Is that tribal revenue intended to be deposited there? Is that imposed under that exact section in the oil extraction tax chapter, or is the revenue being imposed on the Fort Berthold reservation a separate animal and its own tax that has been agreed too. In the tribal agreement chapter, they note that it is to mirror the state's tax as far as regulation and they state the rate it cannot exceed.

In a few sessions past, the oil extraction tax rate was lowered. There was the whole question of, are we tracking with the oil extraction tax chapter when we are looking at these tribal agreements? Should that automatically be lowered or does it have to be in the agreement and be lowered by both parties?

If you look at the contract that was signed, there is language that says the rate may not be lowered unless both parties agree to lower the rate. You have an agreement that to say it specifically tracks with the oil extraction tax chapter and if that is valid or not.

**Kelly Schmidt, State Treasurer:** Testified in favor of the bill. See attachment #4.

**(39:20) Senator Unruh:** We have an email from the AG's office that was dated 2012 but you had previously received some guidance from them on the matter. This is just confirming that. When did you receive that previous guidance?

**Kelly Schmidt:** March of 2009 is when the initial discussion began. The final draft is the one you have that was sent specifically to the auditor's office and that is the one that is dated August 12.

**Chairman Cook:** Senator Unruh, I handed out an email from Carly McCloud who was the deputy at this time. I think that the email I handed out, is in reference to that conversation.

**Senator Unruh:** That email is dated on September of 2010. I believe at the end of 2009 your office changed the way your office distributed the dollars. Can you explain what happened during that time?

**Kelly Schmidt:** I am going to defer to Ryan for that question.

**Ryan Skor, Director of Finance, Treasurer's Office:** In response to the email questions, the one that is in front of you says September of 2010. The initial email that started that chain was back in March of 2010 where she asked the question. In response to your question about what changed in that time, the repayment of that \$700,000 to the Permanent Oil Tax Trust Fund related to the tribal colleges. That repayment was being made and it was finally filled as the end of 2009. When it was rolled over and beginning to full state share and not repayments being made was when the determination was made on how to accurately distribute that money among the state share.

**Jodi Smith, Commissioner and Secretary, Board of University and School Lands:** Testified in favor of the bill. See attachment #5.

**(56:10) Senator Dotzenrod:** In the work you have done here to put this together and try to figure out what has happened, how did you run across this. What brought it to your attention that something was not right.

**Jodi Smith:** I am new. This is my first session. I have had to ask a lot of questions. We track a lot of bills that are going through the session because we manage land, minerals, assets, and the SIF Fund within our department. As we were researching some of the bills that came through, I asked questions about how the potential shift from a 50-50 allocation to an 80-20 allocation would have an impact on the common schools trust fund. I did not get a clear answer. It was dependent upon who I asked the question to. That was concerning to me because that should've been a yes or no question. If you read the fiscal note that is attached to the bill, it states there will be an impact of the Common Schools Trust Fund and yet I was hearing from others that there wouldn't be an impact. Going through that process, we determined that we have not been receiving that percentage off of those extraction taxes from the reservation. At that point, I engaged other people around me to assist in this process.

**Chairman Cook:** You join the fray that has been going on through 2007-2009 about ambiguous language.

**Jodi Smith:** Yes, sir.

**Senator Dotzenrod:** One thing the committee has to look at is this email from Edward Erickson. His statement in this email in this paragraph is that his advice was for the State Treasurer's Office to continue making distributions of the state share tribal oil extraction revenue pursuant to their reasonable interpretation of these ambiguous statutes. It is hard for me to understand that when you lay out the constitutional requirements that are completely unambiguous and very demanding. You cannot even be temporarily held back.



I am puzzled why someone who is an attorney and making an interpretation of what should be the proper course would not have the training to go back and look at what the demands are of the Constitution. It looks like he is basing his decisions on a reading of the statutes and not including what the Constitution says. Maybe I am wrong about that. Do you think that is a correct way of looking at what happened here?

**Jodi Smith:** I have a different way of looking at it. Our board was developed on the Constitution and we are directed by the Constitution more than any other board or agency within the state. We fall back on the Constitution almost on a normal basis.

As far as the email, I am aware of it and I have read it. It would be irresponsible of me to stand up here and tell you how someone else interpreted that email. I am in constant contact with the attorney general office. We have an assistant attorney general assigned to us. At some point in time, our assistant AG takes it up to the AG and runs it by them. Sometimes he does not. I do not know if this actually went to the AG. My concern with this issue is an AG's opinion has not been issued on this.

Part of my process in learning and understanding was talking with the attorney general and I asked him what the process was. His response was that you can ask for one but you are going to get it back in the end of April and you are going to need a legislative fix. So, he said the proper thing to do is to bring it forward and take that legislative fix. That is how we ended up here with you today. Like Senator Cook alluded to, at one point in time, I started conversing with him about seeking some clarification and a resolution to the concerns of the board.

**Chairman Cook:** Senator Dotzenrod, have you ever seen two attorneys read the same language and come to different opinions? Jodi, has the board ever waited on this before?

**Jodi Smith:** Before I brought it forward, it came in February and the board voted on it this week. We did have a conversation in executive session at a previous board meeting.

**Chairman Cook:** In the years past, is there any record of the board communicating to anyone on this issue?

**Jodi Smith:** As far as I know, the board was not aware that we were not receiving those extraction taxes off of the reservation.

**Garland Erbele, ND State Engineer, Chief Engineer – Secretary of ND State Water Commission:** Testified in favor of the bill. See attachment #6.

**Chairman Cook:** The resources trust fund is the constitutional fund?

**Garland Erbele:** That is correct. It receives 20% of the oil extraction tax.

**Chairman Cook:** Is the number 20 constitutional or is that statutory?

**Garland Erbele:** Statutory.

**Senator Dotzenrod:** If we were to go back and try to restore the funds to make it current through 2008, would that dollar amount be \$125 M?

**Garland Erbele:** It is approximately \$125 M, yes.

**Eric Volk, Executive Director, ND Rural Water Systems Association:** Testified in favor of the bill. See attachment #7. Any bit of money that can be put into the Resources Trust Fund helps immensely.

**Lance Gaebe, Executive Director, ND Water Coalition:** Testified in favor of the bill. See attachment #8. We support a correction in the clarification of how the extraction tax is deposited in the resources trust fund. This has been a valuable resource to help with our water projects. While we also support the bill as written, we would advocate that the committee and the legislature consider the restoration of \$125 M to help restore funding for these critical water projects. We have identified over \$700 M shovel ready critical projects all across the state that control water supply, regional and rural water systems, irrigation infrastructure and broad resource development, and local flood control efforts. There is about \$350 M available for grants and capital projects. With that, we support the bill as prepared but would also urge the consideration to restore the funds that could have been deposited in the resources trust fund. I will stand for questions.

**Chad Oban, ND United:** Testified in favor of the bill. See attachment #9 – Testimony of Nick Archuleta. We agree with the land board that we should retroactively pay the constitutional funds the money that is owed to them. I will stand for questions.

**Lisa Feldner, ND Council of Educational Leaders:** Testified in favor of the bill. See attachment #10 – Testimony of Aimee Copas. We are fully supportive of the land board and the bill to correct the distribution of funds and we also would support the replenishment of the funds in the Common Schools Trust Fund and the Stabilization Fund.

**Alexis Baxly, Executive Director, ND School Boards Association:** Testified in favor of the bill. We support the bill and this body's work to clarify the language and direct those extraction tax dollars towards the Common Schools Trust Fund and the State Aid Stabilization Fund. We also would support refilling those buckets as funds allow. I will stand for questions.

**Roscoe Streyle, Tax Payer of ND, Minot:** Testified in favor of the bill. It is clear in the Constitution that there is no ambiguity. I do not get why this bill is even necessary. This is essentially a banking error. You do not just say we will pay you interest going forward, you go back and fix that error. That is what this is.

Minot has tremendous flood needs. This \$128 M plus \$40 M going forward can have a huge impact on communities. The way it looks without this money, there will not be enough put in. I would argue that maybe you should just kill the bill, have the land board sue, win, and ask for punitive damages. I think there are damages here. It was proven in the \$12 M in interest. That is just on the 1 portion of it. You factor in the opportunity costs of getting projects done and this is a \$20 - \$30 M mistake.

As far as the water resources part of it and the 20% not being constitutional is true but the legislature has not passed anything to say it should be less than that. I think you have a legal and a constitutional obligation to make the whole. I would ask that you amend this bill to make it right. I will stand for questions.

**Ken Hall, Lobbyist, Three Affiliated Tribes:** Testified in favor of the bill. I like the history here that Emily has put together. So far, since the agreement has been agreed to, our tribe has donated over \$1 B. I think the language is unclear. When you look at it going to the counties, it only goes from there to New Town and Parshall because they are considered municipalities. As everyone knows, we have 6 communities on the reservation. The other 2 are not consider municipalities. They are communities. That would be something to think about in the language so there is an equal distribution to the communities.

Chairman Fox has mentioned there is over \$1 B in need for the communities when talking about safety, roads, and infrastructure. One thing that our community was keen on is safety. Law enforcement is a need for the communities out there. The need goes on and on.

Back in 2017, we did not sign that agreement. The initial agreement was that both parties had to agree before any changes were made. That was clear. The Governor signed it but our Chairman did not sign it. Fast forward to this session and they both signed it a week ago. There are still lots of things that need answers. I support this. I think it needs to be clear and transparent to everyone in ND and our tribe. We have questions all the time. A big question we have asked is what do we get in return? We hope there are changes in the language that support what we do.

**Chairman Cook:** Any further testimony in favor? Any opposed?

**Charles Tuttle, Minot Citizen:** Testified in opposition of the bill. I am opposed of the bill because the Constitution is very specific. This bill is not necessary. There is no need to make legislation when you have constitutionality that is that clear. One thing I have discovered is that no one had a problem finding out the constitutionality of the Legacy Fund. There was obviously a reason for this being left off the table.

I am opposing this because the bill that should be here is the bill to replenish this. This is a Constitutional crisis if we do not. Once the oil is in the state's hands, the revenue from the oil is in their hands too. It has to be allocated per the constitution. There is no ambiguity. Once it is in the state's possession. It has to be distributed per the constitution.

Sometimes the legislature makes mistakes and passes laws. I was just working on a case where we got \$200 M back into the state. It is possible that legislation is not constitutional and that is something that this committee should think about. This is not necessary. We need to bring the funds back that belong to the school lands trust. I would help the water people. I know their allocation is not constitutional but I would argue that if there was legislation passed that was partially unconstitutional, that would make it all unconstitutional. That would protect them as far as getting the revenue back for them. I will stand for questions.

**Chairman Cook:** Any further testimony on this bill? Hearing none, we will close the hearing on SB 2362.

**Additional testimony was submitted to the clerk after the hearing. See attachment 11.**

**Senator Cook distributed proposed amendment 19.1156.01002 to the committee after the hearing was adjourned. See attachment #12.**

# 2019 SENATE STANDING COMMITTEE MINUTES

## Finance and Taxation Committee Lewis and Clark Room, State Capitol

SB 2362  
3/27/2019  
Job #34270

- ☐ Subcommittee  
☐ Conference Committee

Committee Clerk: Alicia Larsgaard
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### Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact a new section to chapter 57-39.2 and a new subdivision to subsection 4 of section 57-40.2-03.3 of the North Dakota Century Code, relating to a sales tax exemption for materials used to construct a straddle plant , a fractionator, or qualified associated infrastructure; to amend and reenact subsection 2 of section 57-39.2-04.15 of the North Dakota Century Code, relating to a sales and use tax exemption for materials used to construct a fertilizer or chemical processing facility; to provide an effective date; and to provide an expiration date.

### Minutes:

Attachments: 1
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**Chairman Cook:** Called the committee to order on HB 1205.

**Senator Rich Wardner, District 37, Dickinson:** Distributed proposed amendments. See attachment #1. To begin, in the bill, we have made an adjustment. We want to change the way this money is allocated as it comes off of the state share of the extraction tax coming off of the Fort Berthold Reservation. We know exactly what we are talking about. In this biennium, it is considered to be around \$219 M. It could be more or less depending on the actuals that come out. That is the estimated. As we look forward, I want to talk about going forward before I talk about going back and taking care of what some feel we are to do. Going forward, we will be taking 10% of this new money that will now go into the Foundation Aid Stabilization Fund. We will take 10% going into the Common Schools Trust Fund, and we will take 20% to go into the Resources Trust Fund. That will amount to around \$91 M per biennium. That money would normally have gone to the SIF Fund. People ask me all the time about where this money is coming from. It would continue on and end up in the SIF. Going back, I think we are doing this out of the goodness of our heart because we have people who feel like it should be put in and others feel that what happened, happened. We are going to bring this compromise forward.

First, I would like to talk about the Foundation Aid Stabilization Fund. That takes 10%. Up until about 4 years ago, that money was locked up tight in a constitutional fund and it couldn't be used unless there was a short fall. It would then be used to keep k-12 whole. It is still a constitutional fund. It was well over \$650 M just lying in there. We put it on the ballot and the people agreed to keep 15% of whatever we are spending in General Fund money on k-12

education. The rest, we could use for education. That is what has happened in the last two biennia. We are using that money for funding Foundation Aid for K-12. In this amendment, it is silent on that because we can put the money in, and then we can take it right out and use it again. There is no need to play a shell game here. It doesn't need to be put in code. That is what is happening. I want everyone to know, on the record, we can put it in and take it out because we are using it. We have always used. No matter what we say about education, it has never been shortage. However, we always set our bar on Foundation Aid school funding, and then we go to these funds to fill in the gaps. If we need more, we take it from the General Fund.

Next, I want to talk about the earnings on the Common Schools Trust Fund. That money also is used in the payment of this K-12 school funding. We would put that money in and we can take it right out and put it to use. This amendment is silent on that. If you are wondering about those two, it doesn't say anything about them because they are already being used and would be if we put them in.

We go to the principle of the Common Schools Trust Fund. In the amendment, that money of \$64 M, would be replaced in whole, at the end of this biennium on June 30, 2021. That is when the Legacy money comes. We take it out of the Legacy earnings and pay it off. That \$64 M would be taken care of right away.

The last fund, is the Resources Trust Fund. Currently, that takes 20%. That money is used. There is no interest there. It would be approximately \$128 M. We would add one half of a percent. Instead of 20%, it would be 20.5%. That .5 would stay on until it generated \$128 M. Yes, that will take a while. We also have other issues we need to take care of. This puts about \$10 M - \$11 M into Resources Trust Fund extra, each biennium.

I will stand for questions.

**Chairman Cook:** The \$64 M, you said that was a number provided by council. I thought that came from the land department?

**Senator Wardner:** I got it from council. I do not know where they got it but they calculated it.

**Chairman Cook:** You used the phrase of moving shelve around. I think that is what we are doing with all of this. You and I have worked on this since it first surfaced. As I look at this issue and I see a land board, that voted 4-1 to correct this, I wonder why there wasn't a vote for the last 8 years.

**Senator Wardner:** I cannot answer that. I just do not know.

**Chairman Cook:** I know you can't.

**Chairman Cook:** So you are saying we are being nice guys by doing this?

**Senator Wardner:** I think we are being nice guys and taking care of it. The fact is, there are people that had different opinions and the opinion was that we should make this adjustment.

**Chairman Cook:** I understand.

**Senator Dotzenrod:** Reading the timeline in here, it is the transfer on the Common School Trust Fund. That way the amendment is written, it would be at the end of the 19-21 biennium. The transfer would take place very close to the end of this biennium.

**Senator Wardner:** The money from the Legacy Fund is paid on June 30. That is the last day of June 21. You are right. That is when it would be paid.

**Senator Dotzenrod:** The number in here is \$64,370,000. If it falls short of that and the Legacy earning are \$50 M, is there no transfer at all?

**Senator Wardner:** I am not sure how to answer that. There is going to be that amount of money there. However, we would have to then wait and get it out of the next biennium if that were to happen. My calculations and my vision says it will be there.

**Chairman Cook:** Basically, when that transfer is made, we are taking \$64 M and we are putting it into a fund where the principle can never be touched.

**Senator Wardner:** That is correct but there is a formula on the interest.

**Chairman Cook:** We have to give consideration to this. There is a resolution down here that deals with Legacy Fund earnings that basically puts most of them back into the principle. We would have to consider this as we consider that one.

**Senator Unruh:** Moved to adopt amendment 19.1156.01004 to SB 2362.

**Senator Meyer:** Seconded.

**Chairman Cook:** Any Discussion?

**Senator Dotzenrod:** The amendments we have do not refer to the Stabilization fund. I think the argument I heard Senator Wardner make is that that fund did not get the distributions it should, but all that is, is a pass through savings account that after the voters approved the change, it becomes a holding spot for funds for Foundation Aid. If we are short, we will put money in there. If there is extra, we will spend it. That is the impression I got. He is making the argument that even though they didn't get their distributions, it is irrelevant. If that money showed up in other places, it would have been available to put in or use in the same way money is deposited.

**Chairman Cook:** We could spend anything over 15% and apparently it is at 15%. We could put money in there and with the next bill, take it out. No, K-12 is going to be shorted or get any more or any less.

**A Voice Vote Was Taken**

**Motion Carried**

Senate Finance and Taxation Committee  
SB 2362  
March 27, 2019  
Page 4

**Senator Unruh: Moved a Do Pass on SB 2362 as Amended and Refer to Appropriations.**

**Senator Meyer: Seconded.**

**Chairman Cook: Any Discussion?**

**A Roll Call Vote Was Taken: 4 yeas, 1 nay, 1 absent**

**Motion Carried**

**Senator Unruh will carry the bill.**



810  
3/27/19  
18

PROPOSED AMENDMENTS TO SENATE BILL NO. 2362

Page 1, line 2, after the first semicolon insert "to provide a contingent appropriation; to provide for a transfer;"

Page 2, line 27, overstrike "and credited"

Page 3, line 23, after "2." insert "One-half of one percent must be allocated to the resources trust fund beginning with allocations made by the state treasurer in August 2019 and continuing until the combined allocations under this subsection total one hundred twenty-eight million seven hundred forty thousand dollars, after which the state treasurer shall discontinue making allocations under this subsection.

3."

Page 3, line 28, overstrike "Thirty percent" and insert immediately thereafter "The remainder"

Page 3, line 28, overstrike "and credited"

Page 3, after line 28, insert:

**"SECTION 2. CONTINGENT APPROPRIATION - TRANSFER - GENERAL FUND TO COMMON SCHOOLS TRUST FUND.** If the actual legacy fund earnings transferred to the general fund at the end of the 2019-21 biennium in accordance with section 26 of article X of the Constitution of North Dakota exceed the estimate made by the sixty-sixth legislative assembly by at least \$64,370,000, there is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of \$64,370,000, which the state treasurer shall immediately transfer to the common schools trust fund, for the biennium beginning July 1, 2019, and ending June 30, 2021."

Renumber accordingly

Date: 3.27.19  
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. *2362*

Senate	Finance and Taxation	Committee
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☐ Subcommittee

Amendment LC# or Description: 19.1156.01004

Recommendation: ☒ Adopt Amendment

☐ Do Pass    ☐ Do Not Pass    ☐ Without Committee Recommendation

☐ As Amended    ☐ Rerefer to Appropriations

☐ Place on Consent Calendar

Other Actions: ☐ Reconsider    ☐

Motion Made By Unruh Seconded By Meyer

[illegible]

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent

## Floor Assignment

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

Date: 3-27-19  
Roll Call Vote #: 2

2019 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 2362

Senate Finance and Taxation Committee

☐ Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation: ☐ Adopt Amendment  
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☒ As Amended ☒ Rerefer to Appropriations  
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Unruh Seconded By Meyer

Senators	Yes	No	Senators	Yes	No
Chairman Cook		<input checked="" type="checkbox"/>	Senator Dotzenrod	<input checked="" type="checkbox"/>	
Vice Chairman Kannianen	<input checked="" type="checkbox"/>				
Senator Meyer	<input checked="" type="checkbox"/>				
Senator Patten					
Senator Unruh	<input checked="" type="checkbox"/>				

Total (Yes) 4 No 1

Absent 1

Floor Assignment Unruh

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

**REPORT OF STANDING COMMITTEE**

**SB 2362: Finance and Taxation Committee (Sen. Cook, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (4 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). SB 2362 was placed on the Sixth order on the calendar.

Page 1, line 2, after the first semicolon insert "to provide a contingent appropriation; to provide for a transfer;"

Page 2, line 27, overstrike "and credited"

Page 3, line 23, after "2." insert "One-half of one percent must be allocated to the resources trust fund beginning with allocations made by the state treasurer in August 2019 and continuing until the combined allocations under this subsection total one hundred twenty-eight million seven hundred forty thousand dollars, after which the state treasurer shall discontinue making allocations under this subsection."

3."

Page 3, line 28, overstrike "Thirty percent" and insert immediately thereafter "The remainder"

Page 3, line 28, overstrike "and credited"

Page 3, after line 28, insert:

**"SECTION 2. CONTINGENT APPROPRIATION - TRANSFER - GENERAL FUND TO COMMON SCHOOLS TRUST FUND.** If the actual legacy fund earnings transferred to the general fund at the end of the 2019-21 biennium in accordance with section 26 of article X of the Constitution of North Dakota exceed the estimate made by the sixty-sixth legislative assembly by at least \$64,370,000, there is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of \$64,370,000, which the state treasurer shall immediately transfer to the common schools trust fund, for the biennium beginning July 1, 2019, and ending June 30, 2021."

Renumber accordingly

**2019 SENATE APPROPRIATIONS**

**SB 2362**

# 2019 SENATE STANDING COMMITTEE MINUTES

## Appropriations Committee Harvest Room, State Capitol

SB 2362  
3/29/2019  
Job # 34372

☐ Subcommittee  
☐ Conference Committee

Committee Clerk: Rose Laning / Carie Winings
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### Explanation or reason for introduction of bill/resolution:

Relating to the allocation of oil extraction tax.

### Minutes:

Testimony # 1 - 6
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Legislative Council: Adam Mathiak  
OMB: Becky Keller

**Chairman Holmberg:** Called the committee to order on SB 2362.

### **Senator Rich Wardner, District 37, Majority Leader, North Dakota State Senate:**

Oil and Gas Extraction Tax - Attached # 1.

State Buckets and Legacy Fund – Attached # 2.

Legacy Earnings - Attached # 3.

SB 2362 - Christmas Tree version – Attached # 4.

Noting the amounts written in the middle of Page 1, Attachment #1, we are looking at money that was not being tapped for a contribution to these three constitutional funds before. This is what the bill did. I said that in the Common Schools Trust, Foundation Aid Stabilization, and the Resources Trust Fund going forward, starting as soon as it is signed by the Governor, it will start contributing to these funds. It was an error as far as people did not know about it. There are differences of opinion that what happened, happened. Going forward everyone felt we should make the adjustment, but the question was on the retroactive. Remember that the Common Schools Trust Fund will pick up another \$22.5 million approximately. It depends on price and production. The foundation Aid Stabilization Fund will pick up approximately the same amount, and the Resources Trust Fund will receive an additional \$45 million going forward. That is in the bill and it has nothing to do with the amendment. The amendment put on by the Finance and Tax Committee is on Page 4 of the bill. It talks about putting the money back in. The money puts the money in its entirety back in at the end of this coming biennium. It takes it out of the legacy fund earnings.

**(Moves to Attachment #3)** It has been a concern, but we have enough to cover it. Taking a look at legacy earnings, it would be paid by June 30<sup>th</sup>, 2021. My assumption is that it is a 3.5% earning. It's running much higher than that. That is a very conservative number. The money will be there and if it isn't, we have a lot more problems than taking care of this. That money would be put in, and that is on Page 4.

(6:50) So we have the Common Schools Trust Fund taken care of. If you are wondering about the Foundation Aid Stabilization; we can put language in, but it goes in but then we'll take it out and use it. That fund is not really effected. There is no interest or anything like that.

If you recall, what we need to do is make sure that we keep 15% of whatever we are spending in General Fund dollars for K-12 education. The last one is the Resources Trust Fund. I put ½% per biennium. If you take a look and go back to the colored sheets again, you will see the \$65 million which is a lump sum and then down below is the 5% for the Resources Trust Fund will be about \$11 million a biennium. When you put it together with the \$45 million, that means the Resources Trust Fund, which is a fund that everyone is interested in in the state that has water issues, will put in close to \$60 million over the course of a biennium if the price of oil stays where it is at. Why would I only propose only 1.2%? The red box of \$674.2M is going to all the buckets. These numbers are not on forecast, but the point is that you know that the \$674.2 million is going to go to the buckets. **(Referring to Attachment #2)** When you look at the buckets, it is also going to effect the extraction tax. When you look at the bottom you see that it will affect the SIIF fund when we take the money out earlier. Above that you can see that we are protecting the prairie dog. In the forecast, the blue (SIIF) will fill up with about \$90 million. We're ok but you never know what will happen.

**(10:42) Senator Mathern:** To your comments on those amounts being conservative, why don't you just put in a trigger so the Resources Trust Fund actually gets reimbursed faster. If the scenario that you paint happens, wouldn't that just give everyone a little more comfort that the money will be there?

**Senator Wardner:** I like to get things paid off as quickly as we can. I think that next session, if it looks like we have the money, we can put a lump sum in there to get it caught up. This is statutory. I do agree with you somewhat, because as we go forward, the pressure on water funding is going to be great. I am not sure where to put the trigger though. I spend a lot of time going over the budget and I would rather we react when we see the issue rather than a trigger because sometime with a trigger we don't have any control over it. I want to make sure we are doing what we want to do.

**(13:02) Kelly Schmidt, State Treasurer:** Testimony attached # 5.

**(18:55) Eric Volk, ND Rural Water:** Testified in support of SB 2362. This reallocation and clarification would help the enormous water needs across the state. In just the small section that we work with in the rural water systems, there is a 10 year need of about \$300 million and a 20 year need of \$600 million. We fully support this bill with the amendments.

**(18:50) Blake Crosby, Executive Director, ND League of Cities:** Testified in support of SB 2362. This is one of those sort of "me too" testimonies. We strongly support the bill as amended. As you all are aware of, some of the Resources Trust Fund is distributed to my cities for water infrastructure. So, any extra funds that we can get into that fund would be very much appreciated.

**(19:35) Lance Gaebe, Executive Director, North Dakota Water Coalition:**  
Testimony in support of SB 2362 - Attached # 6.

**Chairman Holmberg:** Closed the hearing on SB 2362.

# 2019 SENATE STANDING COMMITTEE MINUTES

**Appropriations Committee**  
Harvest Room, State Capitol

SB 2362  
3/29/2019  
Job # 34375

☐ Subcommittee  
☐ Conference Committee

Committee Clerk: Rose Laning
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**Explanation or reason for introduction of bill/resolution:**

Relating to the allocation of oil extraction tax.

**Minutes:**

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Legislative Council: Adam Mathiak  
OMB: Becky Keller

**Chairman Holmberg** opened discussion on SB 2362.

**Senator Robinson: Moved a Do Pass on SB 2362.**

**Senator Wanzek: Seconded the motion.**

**A Roll Call Vote Was Taken: 13 yeas, 1 nays, 0 absent.**  
**Motion carried.**

**The bill goes back to the Finance & Tax committee and Senator Unruh will carry the bill.**



Date: 3-29-19Roll Call Vote #: 1

**2019 SENATE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. SB. 2362**

Senate Appropriations Committee☐ Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation: ☐ Adopt Amendment  
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☐ As Amended ☐ Rerefer to Appropriations  
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Robinson Seconded By Wanzek

Senators	Yes	No	Senators	Yes	No
Senator Holmberg	✓		Senator Mathern	✓	
Senator Krebsbach	✓		Senator Grabinger	✓	
Senator Wanzek	✓		Senator Robinson	✓	
Senator Erbele	✓				
Senator Poolman	✓				
Senator Bekkedahl	✓				
Senator G. Lee	✓				
Senator Dever	✓				
Senator Sorvaag	✓				
Senator Oehlke	✓				
Senator Hogue		✓			

Total (Yes) 13 No 1Absent 0Floor Assignment Sen. (Wanzek) Finance & Tax

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

**REPORT OF STANDING COMMITTEE**

**SB 2362, as engrossed: Appropriations Committee (Sen. Holmberg, Chairman)**  
recommends **DO PASS** (13 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING).  
Engrossed SB 2362 was placed on the Eleventh order on the calendar.

**2019 HOUSE FINANCE AND TAXATION**

**SB 2362**

# 2019 HOUSE STANDING COMMITTEE MINUTES

## Finance and Taxation Committee Fort Totten Room, State Capitol

SB 2362  
4/2/2019  
34446

- ☐ Subcommittee  
☐ Conference Committee

Committee Clerk: Mary Brucker
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### Explanation or reason for introduction of bill/resolution:

A bill relating to the allocation of oil extraction tax; to provide a contingent appropriation; to provide for a transfer; to provide an effective date; and to declare an emergency.

### Minutes:

Attachments 1-3
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**Chairman Headland:** Opened hearing.

**Jodi Smith, Commissioner and Secretary for the Board of University of School Lands (Board):** Introduced bill. Distributed written testimony, see attachment 1. Ended testimony at 10:49.

**Chairman Headland:** We're talking about the state's share or 50% of the extraction tax collected on the Fort Berthold Reservation.

**Jodi Smith:** That's correct.

**Representative Trottier:** Clarity keeps coming up. Wasn't there clarity before?

**Jodi Smith:** There was ambiguity within the statute that caused this misallocation.

**Kelly Schmidt, State Treasurer:** Distributed written testimony, see attachment 2. Ended testimony at 18:05.

**Chairman Headland:** Do you have a copy of the HB 1268 that you could share with us?

**Kelly Schmidt:** I have a large packet including the copy and all the amendments that go with that. I can copy it for you if you wish.

**Representative Steiner:** What was the reason it was killed in conference committee?

**Kelly Schmidt:** HB 1268 took on a new approach; the bill took on a completely different view. It became related to the flood dollars being inputted. The federal fund monies we got were being inputted into the oil grant program which became the overall theme of the bill.

This subject was a change in a few words that brought clarity but because the whole bill was killed on something completely different. Rep. Shirley Meier said there's important pieces in the bill that shouldn't be lost. After 10 conference committees it was killed.

**Chairman Headland:** In your handout there's an email from Edward Erickson speaking to the introduction of subsection five stating it's only oil and gas production taxes. It then references subsection one stating the agreement covered both oil and gas production and that oil extraction. Is that where you feel you were doing it as the legislature intended?

**Kelly Schmidt:** When one goes back and reads all the history it is very evident that in the discussions related to oil and gas the production and extraction are convoluted in that discussion. It's not unusual to have them worded and discussed as being interactive but in our world they truly aren't. As we look forward that is one thing that we noticed was that discussion became one.

**Chairman Headland:** Do you believe that would have been in conflict with the Constitution?

**Kelly Schmidt:** When you look at the Constitution it states in Section 24 of Article X 10% of the revenue from oil extraction from taxable oil produced in the state. In section 26 it says total revenue which includes tribal and state share. It's two separate pieces in our world. If we looked at what was earned in the tribe as being state share, then why do we have a compact. We saw it as what is produced on the tribal share is the tribe's share and they share it with us. When produced in the state it's the state's share which is the state's. In my office words matter. One or two words can change the entire distribution. In this case that is what happened. When you look at these sections we're going back to 2007 when this decision was made because we didn't have the legacy fund then. The legacy fund constitution says total revenue. That's where the ambiguity and the conflict comes. We make the best decision we can with the information we have when we have to make it. Looking back from 2019 set of glasses it's different than looking at it from a 2007 set of lenses. The determination is up to the legislative body; you're the appropriators so you're the ones who are determining where we send the dollars.

**Chairman Headland:** Do you support the amended version of SB 2362 that the Senate sent us?

**Kelly Schmidt:** Yes I do.

**Chairman Headland:** Is there further testimony in support?

**Nick Archuletta, President of North Dakota United:** We believe SB 2362 is a great step in the right direction.

**Amy Copas, Executive Director for the North Dakota Council of Educational Leaders:** We are in support of this bill. We appreciate your hard work on this.

**Chairman Headland:** Further testimony in support? Is there any opposition? Emily, could you tell us the history you found so we can be clear on how we got to where we are?

**Emily Thompson, Code Revisor for Legislative Council:** Neutral testimony. Distributed testimony, see attachment 3. When this was first introduced it was to show the complexity behind the oil extraction tax formula and the history of that. In 2005 before the tribal agreement was in place the oil extraction tax revenue was deposited into three buckets; 20% Resources Trust Fund, 20% evenly between Common Schools and Foundation Aid (10% each), and the last 60% went to the General Fund up unto a \$71 million threshold. Everything over that \$71 million would flow into another bucket; the Permanent Oil Tax Trust Fund, which was seen as the baby Legacy Fund before we had the Legacy Fund. There was also another split off into the Oil and Gas Research Fund; 2% of the state's share of oil and gas was deposited into that fund up to a cap of \$1.3 million. In 2007 the tribal agreement chapter was enacted. At the time the committee was discussing the enactment of the tribal agreement chapter there was another committee, Education committee, that was talking about grants to tribally controlled community colleges. There was an appropriation in that bill of \$700,000 that was going to be taken out of that baby Legacy Fund. That committee thought they could repay that \$700,000 we would have been taken out of that baby Legacy Fund with the state's share of oil and gas revenue that's coming out of any agreement that might be signed. That went into legislation. At that time the treasurer's office had a provision that said, "Notwithstanding any other provision of law the state treasurer shall mandatory transfer to the Permanent Oil Tax Trust Fund the first \$700,000 of the state's share of oil extraction tax revenue from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation drilled and completed after June of 2007." Before we had this agreement in 2005 everything over \$71 million, that last 60% General Fund bucket would spill over into the Permanent Oil Tax Trust Fund. Assuming at that time there was already \$71 million in that last bucket so logically all that spill over would be going to that Permanent Oil Tax Trust Fund. There were a lot of provisions and distributions in play. In the tribal agreement chapter there was no discussion of the Common Schools Foundation Aid or Resource Trust Fund allocations. There's some ambiguity there as well to whether that was an oversight or whether that was intentional when they didn't foresee that going to these funds and there wasn't any legislative instruction for the money to go to those constitutional buckets. There was some vague language and a lot of different statutes at play.

**Representative Steiner:** It is logical to think that non-tribal is not state's share. Now you're saying we're going to go back and consider the tribal compact which is going to be considered state oil money as well and we should fill these funds. Is that where this is going?

**Emily Thompson:** The bill draft before you is considering the state's share of revenue coming off tribal lands to be considered state funds that would flow through the buckets. Just the state's share will go through those buckets. On the bottom of the handout there is a list of all those statutory provisions from 2005 to 2017. There are the constitutional provisions listed as well.

**Chairman Headland:** The way the amended bill came over it will appropriate \$64,370,000 of General Fund into the Common Schools Trust Fund. Do you believe we should also transfer that amount into the Foundation Aid Stabilization Fund even though the Constitution speaks to the size of what that fund needs to be so the money would not be needed there to meet its constitutional obligation? If we need to cover constitutional requirements for one does that same requirement apply to the other?

**Emily Thompson:** There is a distinguishable difference. The language in the Resources Trust Fund provision of the constitution doesn't specify that amount. That's at the discretion of the legislative body on how to handle that. The stronger argument for refilling buckets would lie in the other two constitutional provisions rather than Resources Trust Fund.

**Chairman Headland:** As far as specifically the Foundation Aid Stabilization Fund the bill doesn't really address because constitutionally there's enough money already there. The obligation that requires the 10% to flow there, we're going to make that up in the Common Schools Trust Fund but we're not in the Foundation Aid. Even though the Constitution says it has enough money into it then it could be a transfer in and right back out. Are we obligated to do it?

**Emily Thompson:** There are possible legal arguments that could be made.

**Chairman Headland:** If we're to cover against any litigation to protect ourselves and everyone involved should we just do it?

**Emily Thompson:** There are considerations. You have the argument of refilling the funds. There's a bit of difference with the Foundation Aid Fund because that is something that would offset with General Fund dollars. Common schools are more of a lock box. Foundation Aid and General Fund, if you're using more Foundation Aid you'd be using less General Fund while if you're losing less Foundation Aid you'd be using more General Fund. Are you then just making a shell game of moving money around. When you get into the realm of legal arguments it really differs based on which of those constitutional funds you're looking at. There's an argument if the recipients of that Foundation Aid Fund were harmed if someone would sue and ask for that money. There's a question of how that argument would play out. It's tricky in this case of how this would turn out in court because there are a lot of issues at play and there are differences between each one of these funds.

**Representative Mitskog:** Was payback plus interest ever part of the discussion?

**Emily Thompson:** Interest was discussed. I don't know how all those numbers were prepared. The committee may want to look at those numbers if you're looking at adjusting those numbers to see if those documents were audited and how that interest was calculated. The tribal agreements have changed so it would take some heavy lifting to audit an exact figure for what would be the payback number.

**Chairman Headland:** Are there any other questions? Seeing none we will close the hearing on SB 2362. The bill is in pretty good shape as it came over from the Senate. I believe we are covering what we're responsible to do.

**Representative Dockter:** Made a motion for a Do Pass.

**Representative Mitskog:** Seconded.

**Chairman Headland:** Discussion?

**Representative Ertelt:** On page 3, the new language, is that to say that it's being transferred just one time once it meets that or is it on a biennial basis?

**Chairman Headland:** I think that speaks to the fact that the fund was replenished with what it lacked from deposits from the vague interpretation. Once it's replenished we're going to quit assessing that half percent and the treasurer is going to continue making those allocations. **We need to rerefer this to Appropriations.**

**Roll Call Vote on a Do Pass and Rerefer to Appropriations: 12 Yes 0 No 2 Absent**

**Motion carried.**

**Representative Dockter will carry this bill.**



Date: 4-2-19  
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. 2362

House Finance and Taxation Committee

☐ Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation: ☐ Adopt Amendment  
☒ ~~No~~ Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☐ As Amended ☒ Rerefer to Appropriations  
☐ Place on Consent Calendar  
Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Rep. Dockter Seconded By Rep. Mitskog

Representatives	Yes	No	Representatives	Yes	No
Chairman Headland	X		Representative Eidson	X	
Vice Chairman Grueneich	X		Representative Mitskog	X	
Representative Blum	X				
Representative Dockter	X				
Representative Ertelt	X				
Representative Fisher	X				
Representative Hatlestad	X				
Representative Kading	X				
Representative Koppelman	X				
Representative Steiner	X				
Representative Toman	X				
Representative Trottier	X				

Total (Yes) 12 No 0

Absent 2

Floor Assignment Rep. Dockter

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

**REPORT OF STANDING COMMITTEE**

**SB 2362, as engrossed: Finance and Taxation Committee (Rep. Headland, Chairman)** recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed SB 2362 was rereferred to the **Appropriations Committee**.

**2019 HOUSE APPROPRIATIONS**

**SB 2362**

# 2019 HOUSE STANDING COMMITTEE MINUTES

**Appropriations Committee**  
Roughrider Room, State Capitol

SB 2362  
4/3/2019  
34493

☐ Subcommittee  
☐ Conference Committee

Committee Clerk: Risa Bergquist
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**Explanation or reason for introduction of bill/resolution:**

**Minutes:**

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**2:20 Chairman Delzer:** Called the meeting to order for SB 2362, came out of Finance and Tax.

**Representative Headland:** This is the bill that is going to make whole some of the constitutional funds that through some ambiguous language wasn't receiving the perceived dollars they should have been. The bill came over in the same was as we passed it out. It will in the end appropriate out 64.370 million out at the end of the 2019/2021 fiscal year to the common schools trust fund. It will also add ½ percent of what flows into the resources trust fund until that fund has been replenished as well. In committee we question several of those that testified about the financial aid stabilization fund, they told us they already had enough money.

**4:50 Chairman Delzer:** We went through this a few times about what this is going to do. The appropriation in section 2, did you ask what they consider the estimate made by the 66<sup>th</sup> Legislative Assembly to be? Are they considering the 100 million that we are probably going to have to use of next times Legacy earnings to balance the books this time?

**Representative Headland:** We did not ask that question.

**Brady Larson, Legislative Council:** It would be based on the 100 million dollars that is currently in place now.

**Representative Bellew:** Page 3 subsection 2; ½ of 1% how long is that going to take?

**Representative headland:** That would be depending on production, I think it was 20 years.

**Chairman Delzer:** It would probably take about 5 biennia.

**Representative Bellew:** Wouldn't that be 10 biennia?

**Chairman Delzer:** Yes, but doing this also puts an extra 40 million each biennium in to the resources trust fund because you are doing the 10% of our current. It's an increase of what's currently going into the resources trust fund. Anybody have anything you want to change on the bill that is before us?

**10:00 Representative Monson:** I would move a **Do Pass**

**Representative Howe: Second**

**Chairman Delzer:** Any further discussion on the motion? Seeing none we will call the roll.

**A Roll Call vote was taken. Yea: 17      Nay: 3      Absent: 1**

**Representative Dockter will carry the bill.**

**Chairman Delzer:** With that we will close this meeting.

Date: 4/3/2019  
Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE  
ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2362**

House Appropriations Committee

☐ Subcommittee

Amendment LC# or Description: \_\_\_\_\_

Recommendation: ☐ Adopt Amendment  
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation  
☐ As Amended ☐ Rerefer to Appropriations  
☐ Place on Consent Calendar  
Other Actions: ☐ Reconsider ☐ \_\_\_\_\_

Motion Made By Representative J. Nelson Seconded By Representative Meier

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer		X			
Representative Kempenich	A				
Representative Anderson	X		Representative Schobinger	X	
Representative Beadle	X		Representative Vigesaa	X	
Representative Bellew		X			
Representative Brandenburg	A				
Representative Howe	X		Representative Boe	X	
Representative Kreidt	X		Representative Holman	X	
Representative Martinson	X		Representative Mock	X	
Representative Meier	X				
Representative Monson	X				
Representative Nathe	X				
Representative J. Nelson	X				
Representative Sanford	A				
Representative Schatz		X			
Representative Schmidt	X				

Total (Yes) 17 No 3

Absent 1

Floor Assignment Representative Dockter

**Motion Carries**

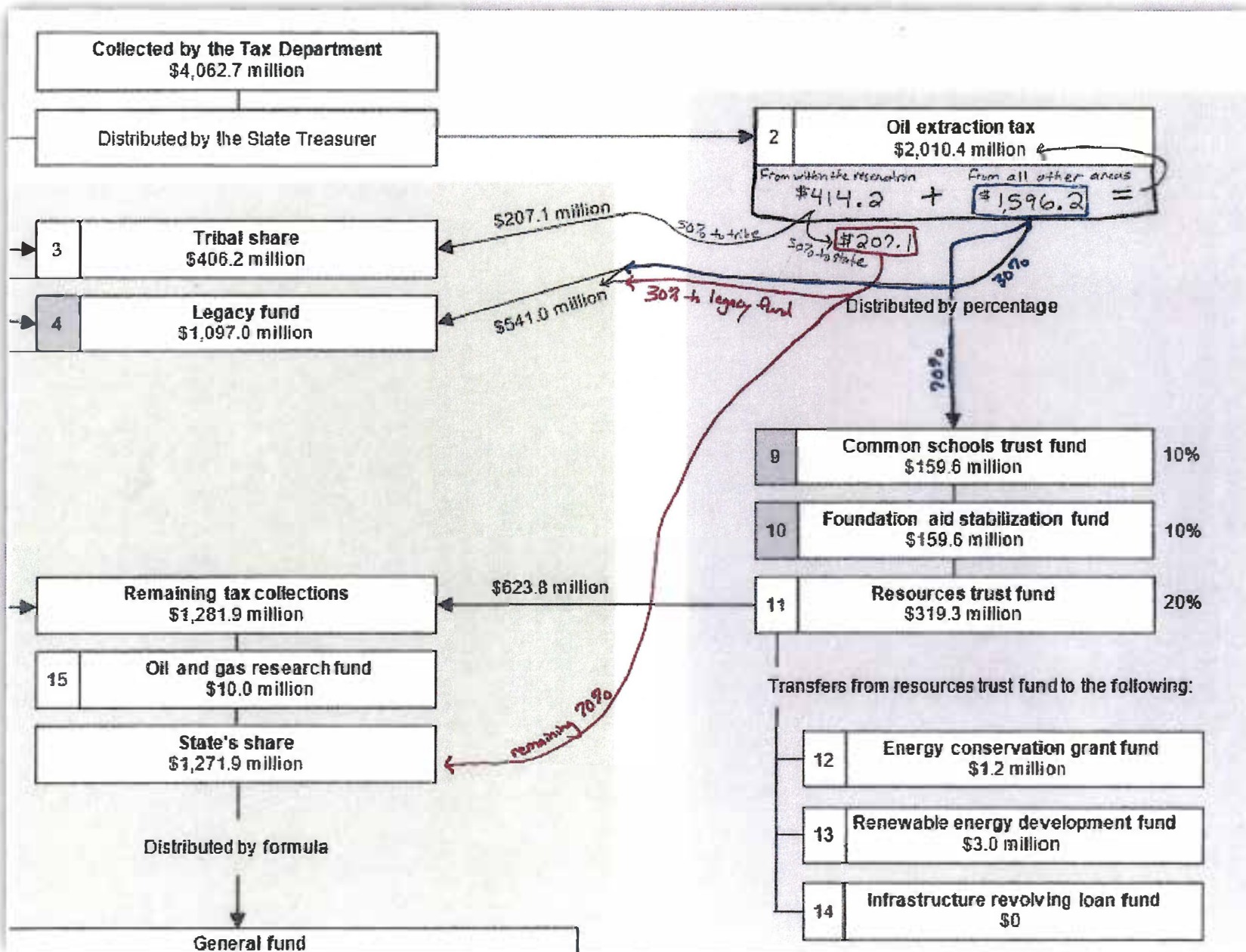
**REPORT OF STANDING COMMITTEE**

**SB 2362, as engrossed: Appropriations Committee (Rep. Delzer, Chairman)**  
recommends **DO PASS** (17 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING).  
Engrossed SB 2362 was placed on the Fourteenth order on the calendar.

**2019 TESTIMONY**

**SB 2362**





3/13 SB 2362 #1 pg. 1

ARTICLE X  
FINANCE AND PUBLIC DEBT

Section 24.

1. Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the common schools trust fund.
2. Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the foundation aid stabilization fund in the state treasury, the interest of which must be transferred to the state general fund on July first of each year.
  - a. Except as otherwise provided, the principal of the foundation aid stabilization fund may be expended upon order of the governor, who may direct such a transfer only to offset reductions in state aid to school districts, which were made by executive action pursuant to law, due to a revenue shortage.
  - b. Whenever the principal balance of the foundation aid stabilization fund exceeds fifteen percent of the general fund appropriation for state aid to school districts, for the most recently completed biennium, as determined by the office of management and budget, the legislative assembly may appropriate or transfer any excess principal balance. Such amount may be used for education-related purposes, as provided by law.

Section 26.

1. Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund. The legislative assembly may transfer funds from any source into the legacy fund and such transfers become part of the principal of the legacy fund.
2. The principal and earnings of the legacy fund may not be expended until after June 30, 2017, and an expenditure of principal after that date requires a vote of at least two-thirds of the members elected to each house of the legislative assembly. Not more than fifteen percent of the principal of the legacy fund may be expended during a biennium.
3. Statutory programs, in existence as a result of legislation enacted through 2009, providing for impact grants, direct revenue allocations to political subdivisions, and deposits in the oil and gas research fund must remain in effect but the legislative assembly may adjust statutory allocations for those purposes.

The state investment board shall invest the principal of the North Dakota legacy fund. The state treasurer shall transfer earnings of the North Dakota legacy fund accruing after June 30, 2017, to the state general fund at the end of each biennium.

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2

Oehlke, Jeb D.

From: Erickson, Edward E.  
Sent: Tuesday, August 07, 2012 4:52 PM  
To: Scherbenske, Kevin J.  
Cc: Oehlke, Jeb D.; Mickelson, Lori S.  
Subject: Tribal Oil Extraction Tax Allocation

Kevin—

It is my understanding that you have asked what advice I gave the State Treasurer's Office on handling the Tribal Oil Extraction Tax distribution in NDCC 57-51.2-02(5)(c) during the 2009-2011 biennium. This was a significantly long time ago, and my final advice was given in a conversation. To the best of my present recollection, my analysis was that the statutes involved were ambiguous as a matter of law and that these issues were not clarified by the legislative history nor by the agreement between the Governor and tribal government. Therefore, the STO should continue making distributions as they had and seek a legislative correction to remove the ambiguity.

There is a conflict in the relevant statutes which creates a legal ambiguity. Chapter 57-51.2 allows for the Governor and the Three Affiliated Tribes to agree to apply the State's Oil & Gas Production Tax and the Oil Extraction Tax within the Reservation, with revenues being split between the Tribe and the State. This legislation, and the agreement it permits, resolved a question whether the State could impose taxes on oil & gas production or oil extraction within the boundaries of the Reservation by both parties agreeing to apply the State's taxes and split the revenue between the Tribe and the State. NDCC 57-51.2-02(5)(c) provides, in part: "The state's share of revenue [from application of the oil & gas production tax and from application of the oil extraction tax within the reservation] as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 [oil & gas gross production tax] and 57-51.1 [oil extraction tax]." Under chapter 57-51.1, NDCC 57-51.1-06 requires the "tax imposed by section 57-51.1-02 must be ... credited to ... the oil extraction tax development fund." That fund is distributed according to a formula which, at that time, provided 20% for water development bonds (Resources Trust Fund), 20% under Art. X, sec. 24, NDConst. (Common Schools Trust Fund and Foundation Aid Stabilization Fund), and 60% to the state General Fund. Of these three items, arguably only the amount allocated to the General Fund appears to be described by the term "state's share" as used in NDCC 57-52.2-02(5)(c).

However, the Tribal Oil Extraction tax is not taxed under section 57-51.1-02 as required by section ~~57-51.1-06~~, instead it is taxed under section 57-51.2-02. The STO was authorized to resolve any conflict between chapter 57-51.2 and chapters 57-51 and 57-51.1 in favor of the provision in chapter 57-51.2 by section 57-51.2-03, which provides "This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions." Therefore, it is my recollection of a conversation with the then-Deputy State Treasurer that the STO resolved this conflict by deeming the "state's share" of the Tribal Oil Extraction Tax as entirely intended to go to the state General Fund because the other funds receiving distributions in chapter 57-51.1 did not direct money toward the State and thus those provisions did not address the "state's share."

Further, during the 2009-2011 biennium, the following statute directed the distribution of the state's share under chapter 57-51.1:

**57-51.1-07.2. (Contingent repeal - See note) Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula.**

The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent



3/13 SB 2362 #1 pg 4

oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

Please note that NDCC 57-51.1-07.2 also included a provision for the Director of the Budget to adjust the \$71 million figure, meaning that the actual cap may have been different.

It is my understanding from the STO that for the first three months in which the STO made distributions of the Tribal Oil Extraction Tax (September, October, and November of 2009), the STO followed the direction in 57-51.1-07.4 (since repealed), which stated "Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009." During the month of December 2009 (distribution of Extraction taxes collected in November on oil produced in October) the \$700,000 cap in 57-51.1-07.4 was met. During this month the total amount retained by the State (after the split with the tribal government) of the Tribal Oil Extraction tax was \$317,421.79. The STO deposited \$235,529.65 directly into the Permanent Oil Tax Fund which met the cap requirement in 57-51.1-07.4. With the remaining \$81,892.14, the STO followed the requirements of 57-51.1-07 and performed the split which allocated 20% to the Resources Trust Fund, 20% evenly divided between the Common Schools Trust Fund and the Foundation Aid Stabilization Fund, and the 60% state share went into the Permanent Oil Tax Fund since the general fund cap had already been met. In each month following this, for the remainder of the biennium, the STO performed the distribution of these funds in the manner in which it interpreted NDCC 57-51.2-02(5)(c) by depositing the entire amount of the Tribal Oil Extraction Tax retained by the state into the Permanent Oil Tax Fund.

The legal standard applicable to this issue is that "[T]he construction of a statute by an administrative agency charged with [its] execution is entitled to weight and [the court] will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language." Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999). The State Treasurer's Office is charged with administering the revenue distributions under these chapters. Under this standard, when faced with an ambiguous statute, the STO's determination of the best method to resolve the conflict will be recognized by the courts. Further, as noted above, section 57-51.2-03 directs that any conflict between chapter 57-51.2 and chapters 57-51 or 57-51.1 must be resolved by favoring the provision in chapter 57-51.2. In my opinion, the STO's resolution of this conflict does not contradict clear and unambiguous statutory language, and is consistent with the intent shown by the legislative history and section 57-51.2-03.

Therefore, my advice was for the STO to continue making distributions of the state's share of tribal oil extraction tax revenue pursuant to their reasonable interpretation of these ambiguous statutes, and to seek a corrective amendment in the next legislative session. It is my understanding that the STO sought and received an amendment in 2011 HB 1268 in an attempt to address some of the ambiguities in these chapters, but the bill ultimately failed in favor of similar legislation which did not contain the corrective amendment. Also, the STO worked with the Legislature on other bills affecting these chapters, including 2011 HB 1451 which eliminated the Permanent Oil Tax Trust Fund and directed where state revenues were to be deposited.

--Edward.

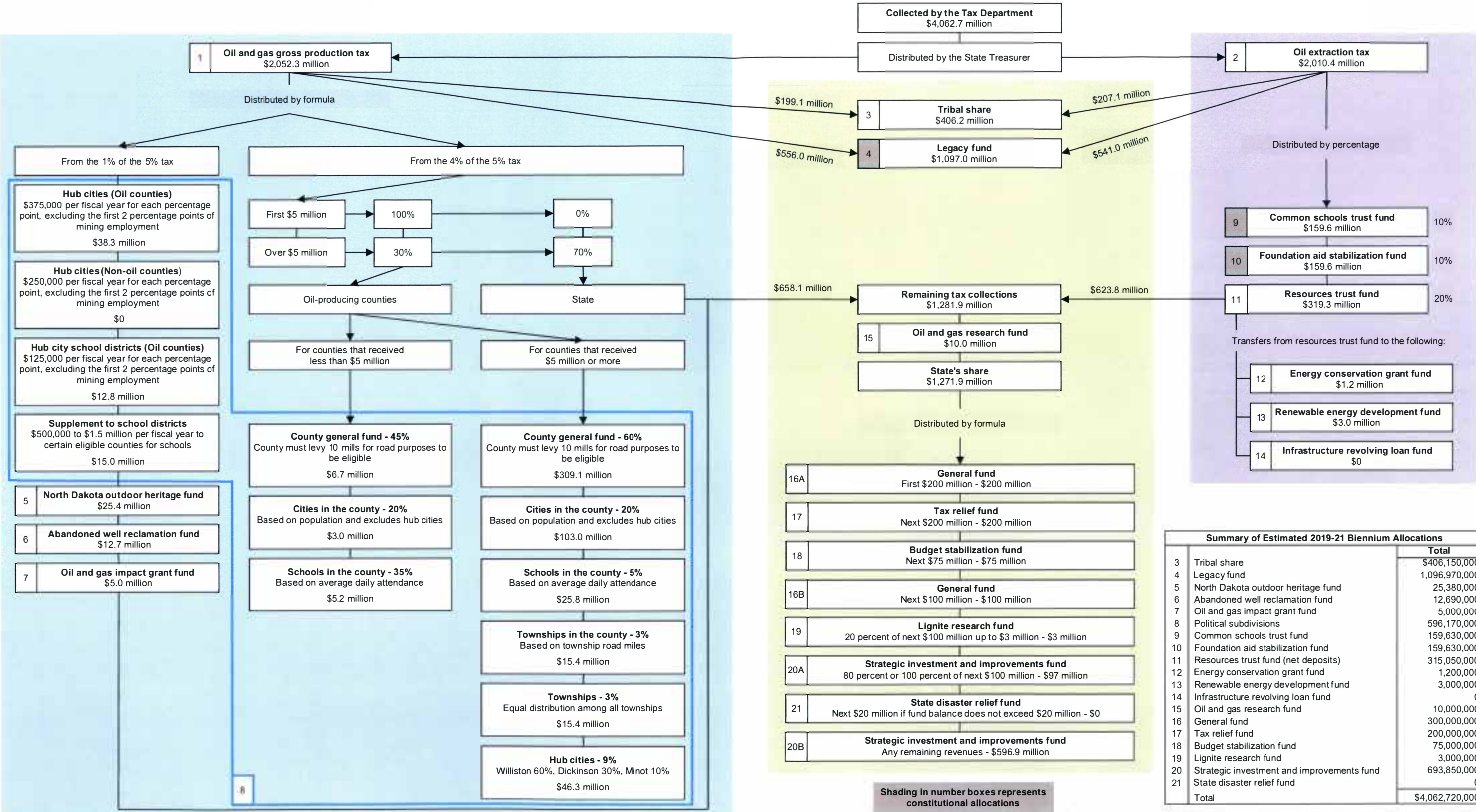
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OIL AND GAS TAX REVENUE ALLOCATION FLOWCHART - 2019-21 BIENNIUM

3/13 SB 2862 #2 pg.1

This memorandum provides information on the estimated allocation of oil and gas tax collections for the 2019-21 biennium based on current law allocation formulas and the January 2019 revenue forecast adopted by the Appropriations Committees. The amounts reflect oil prices averaging \$42.50 per barrel and oil production remaining at 1.35 million barrels per day. A description of each of the funds is included on the second page.

ESTIMATED 2019-21 BIENNIUM ALLOCATIONS - JANUARY 2019 REVENUE FORECAST



NOTE: The amounts reflected in these schedules are preliminary estimates for August 2019 through July 2021. The actual amounts allocated for the 2019-21 biennium may differ significantly from these amounts based on actual oil price and oil production.



The schedule below provides a brief description of the taxes and funds included in the flowchart on the previous page.

Box	Tax/Fund	Description
1	Oil and gas gross production tax	North Dakota Century Code Section 57-51-02 provides for a tax of 5 percent of the gross value at the well of oil produced in North Dakota unless exempted, and a tax on gas of four cents times the gas base rate adjustment for each fiscal year as calculated by the Tax Department.
2	Oil extraction tax	Section 57-51.1-02, as amended by House Bill No. 1476 (2015), provides for a tax of 5 percent of the gross value at the well on the extraction of oil unless exempted. Prior to January 1, 2016, the oil extraction tax rate was 6.5 percent.
3	Tribal share	Chapter 57-51.2 provides the requirements for allocating oil and gas tax related to the oil production within the Fort Berthold Reservation. The oil and gas tax revenues are allocated 50 percent to the state and 50 percent to the Three Affiliated Tribes of the Fort Berthold Reservation.
4	Legacy fund	Section 26 of Article X of the Constitution of North Dakota provides for a deposit to the legacy fund of 30 percent of total revenue derived from taxes on oil and gas production and extraction.
5	North Dakota outdoor heritage fund	House Bill No. 1278 (2013) created the North Dakota outdoor heritage fund to preserve natural areas and public lands. House Bill No. 1176 (2015) amended Section 57-51-15 to provide 8 percent of revenues from the first 1 percent of the oil and gas gross production tax, up to \$20 million per fiscal year, be deposited in the fund.
6	Abandoned oil and gas well plugging and site reclamation fund	House Bill No. 1333 (2013) and House Bill No. 1032 (2015) amended Section 57-51-15 to increase the allocations to the abandoned oil and gas well plugging and site reclamation fund. Based on current law, 4 percent of the first 1 percent of oil and gas gross production tax is allocated to the fund not to exceed \$7.5 million per fiscal year and not in an amount that would bring the balance of the fund to more than \$100 million.
7	Oil and gas impact grant fund	Pursuant to House Bill No. 1302 (1989), Section 57-51-15 establishes the oil and gas impact grant fund to provide grants to political subdivisions impacted by oil development. House Bill No. 1176 (2015) amended Section 57-51-15 to provide an allocation from the first 1 percent of the 5 percent oil and gas gross production tax, up to \$140 million for the 2015-17 biennium. Senate Bill No. 2013 (2017) decreased the allocations to provide up to \$25 million per biennium for the 2017-19 biennium, and after the 2017-19 biennium, to provide up to \$5 million per biennium.
8	Political subdivisions	Oil and gas gross production taxes are distributed to political subdivisions under Section 57-51-15 as amended by Senate Bill No. 2013 (2017).
9	Common schools trust fund	Section 1 of Article IX of the Constitution of North Dakota provides for a common schools trust fund to be used to support the common schools of the state. Section 24 of Article X of the Constitution of North Dakota provides for a distribution of 10 percent of oil extraction taxes to the common schools trust fund to become part of the principal of the fund. The earnings are distributed through the state school aid payments.
10	Foundation aid stabilization fund	Section 24 of Article X of the Constitution of North Dakota provides for a distribution of 10 percent of oil extraction taxes to the foundation aid stabilization fund. Section 24, as amended by Senate Concurrent Resolution No. 4003 (2015) and approved by the voters, restricts a portion of the fund to offset state school aid payments due to a revenue shortfall and allows the remainder to be used for educational purposes.
11	Resources trust fund	Section 57-51.1-07 provides for a distribution of 20 percent of oil extraction taxes to the resources trust fund. Section 22 of Article X of the Constitution of North Dakota provides the fund may be used, subject to legislative appropriation, for constructing water-related projects, including rural water systems, and funding of programs for energy conservation.
12	Energy conservation grant fund	Senate Bill No. 2014 (2013) amended Section 57-51.1-07 to provide for a transfer of one-half of 1 percent of the amount credited to the resources trust fund from the resources trust fund into the energy conservation grant fund, up to \$1.2 million per biennium.
13	Renewable energy development fund	Senate Bill No. 2014 (2013) amended Section 57-51.1-07 to provide for a transfer of 5 percent of the amount credited to the resources trust fund from the resources trust fund into the renewable energy development fund, up to \$3 million per biennium. House Bill No. 1020 (2017) decreased the percentage transferred from 5 to 3 percent.
14	Infrastructure revolving loan fund	Senate Bill No. 2233 (2013) created an infrastructure revolving loan fund within the resources trust fund to provide loans for water projects. Ten percent of the oil extraction tax allocations deposited in the fund are designated for the infrastructure revolving loan fund. House Bill No. 1020 (2017) limited the total amount deposited in the infrastructure revolving loan fund to \$26 million.
15	Oil and gas research fund	Section 57-51.1-07.3 (Senate Bill No. 2311(2003)) establishes the oil and gas research fund for the Oil and Gas Research Council to provide grants. Senate Bill No. 2014 (2013) amended Section 57-51.1-07.3 to provide 2 percent of the state's share of the oil and gas tax revenues, up to \$10 million per biennium, is to be deposited into the oil and gas research fund.
16A, 16B	General fund	The general fund is the chief operating fund of the state. Section 57-51.1-07.5, as amended by House Bill No. 1152 (2017), provides for an allocation of \$400 million of the state's share of oil and gas tax revenues to the general fund for the 2017-19 biennium and an allocation of \$300 million after the 2017-19 biennium.
17	Tax relief fund	House Bill No. 1152 (2017) amended Section 57-51.1-07.5 to provide for the allocation of \$200 million of the state's share of oil and gas tax revenues to the tax relief fund each biennium.
18	Lignite research fund	The lignite research fund is established under Section 57-61-01.6 for research, development projects, and marketing activities related to the lignite industry. House Bill No. 1152 (2017) amended Section 57-51.1-07.5 to provide for an allocation of up to \$3 million from the state's share of oil and gas tax revenues.
19	Budget stabilization fund	The budget stabilization fund is established under Section 54-27.2-01. The Governor may order a transfer from the budget stabilization fund to the general fund when certain criteria are met to offset a general fund revenue shortfall. House Bill No. 1152 (2017) amended Section 57-51.1-07.5 to provide for an allocation of up to \$75 million from the state's share of oil and gas tax revenues.
20A, 20B	Strategic investment and improvements fund	Section 15-08.1-08 provides for the strategic investment and improvements fund. The fund is to be used for one-time expenditures to improve state infrastructure or initiatives to improve the efficiency and effectiveness of state government. Section 57-51.1-07.5 provides for the allocation of certain oil tax revenues to the strategic investment and improvements fund.
21	State disaster relief fund	Section 37-17.1-27 provides for the state disaster relief fund to be used for the required state share of funding for expenses associated with presidential-declared disasters. Section 57-51.1-07.5, as amended by House Bill No. 1152 (2017), provides for the distribution of up to \$20 million of oil tax revenues to the state disaster relief fund each biennium, but not in an amount that would bring the balance of the fund to more than \$20 million.

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OIL EXTRACTION TAX REVENUE ALLOCATION HISTORY - 2005-17

3/13 SB 2362 # 3 pg.1

This memorandum provides historical information on the statutory and constitutional provisions in place regarding oil extraction tax allocations from 2005 through 2017.

2005	2007	2009	2011	2013	2015	2017															
<p><b>57-51.1-06. Oil extraction tax development fund.</b> Tax imposed by the oil extraction tax chapter must be credited to this fund and allocated as provided in the oil extraction tax chapter.</p>	<p><b>Chapter 57-51.2. Tribal oil and gas agreements.</b> Legislation created Chapter 57-51.2, which provides the Governor authority to enter agreements with the Three Affiliated Tribes relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation. An agreement entered pursuant to Chapter 57-51.2 must provide a 50/50 revenue split for oil and gas gross production tax and oil extraction tax revenue derived from trust lands. An agreement must provide an 80/20 revenue split, in favor of the state, on oil and gas gross production tax revenue derived from nontrust lands. The chapter provided the state's share of revenue under an agreement is subject to distribution among political subdivisions as provided in Chapters 57-51 and 57-51.1. (2007 Senate Bill No. 2419)</p> <p>An agreement was entered between the state and the Three Affiliated Tribes on June 10, 2008.</p>		<p><b>Tribal oil and gas agreement.</b> Though no statutory changes were made to Chapter 57-51.2, the state and the Three Affiliated Tribes entered a new agreement on January 13, 2010, as the first agreement was effective only for the first 24 months after it was signed.</p>	<p><b>Chapter 57-51.2. Tribal oil and gas agreements.</b> Chapter 57-51.2 was amended to increase the tribal share of revenue allowable under an agreement for production on nontrust lands from 20 percent of oil and gas gross production taxes to 50 percent of total oil and gas gross production and oil extraction taxes. The chapter also was amended to require the Three Affiliated Tribes report annually to the Budget Section regarding investment of revenues. (2013 House Bill No. 1198) Legislation also clarified the state's share of oil and gas gross production tax revenue is subject to distribution among political subdivisions as provided in the gross production tax law. (2013 House Bill No. 1005)</p> <p>A new agreement was entered between the state and the Three Affiliated Tribes on June 21, 2013.</p>	<p><b>57-51.1-06. Oil extraction tax development fund.</b> Legislation added language that revenue collected from prior periods must be considered revenue collections from the period in which the revenue was received for purposes of distributions and allocations made by the State Treasurer. (2015 Senate Bill No. 2172)</p>																
<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> Moneys deposited in the fund must be apportioned quarterly by the State Treasurer as follows:</p> <table><tr><td>20%</td><td>Resources trust fund</td></tr><tr><td>20%</td><td>Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution</td></tr><tr><td>60%</td><td>General fund</td></tr></table>	20%	Resources trust fund	20%	Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution	60%	General fund			<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> The lead-in language requiring quarterly apportionment of the money in the fund was changed to require monthly transfers of the money in the fund. (2009 House Bill No. 1164)</p>	<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> This section was amended to add a 30 percent distribution to the legacy fund. (2011 Senate Bill No. 2129)</p> <table><tr><td>20%</td><td>Resources trust fund</td></tr><tr><td>20%</td><td>Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution</td></tr><tr><td>30%</td><td>Legacy fund</td></tr><tr><td>30%</td><td>General fund</td></tr></table>	20%	Resources trust fund	20%	Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution	30%	Legacy fund	30%	General fund			
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30%	General fund																				
<p><b>57-51.1-07.2. Permanent oil tax trust fund.</b> Oil and gas gross production tax and oil extraction tax revenue deposited in the general fund which exceeds \$71 million per biennium must be transferred to the permanent oil tax trust fund. Earnings are returned to the general fund. The principal may be expended only upon a 2/3 vote of each house.</p>		<p><b>57-51.1-07.2. Permanent oil tax trust fund.</b> The State Treasurer introduced legislation to remove the administrative step of placing revenue exceeding \$71 million into the general fund and then transfer it to the permanent oil tax trust fund. The amendment allowed revenue over \$71 million to be deposited directly in the permanent oil tax trust fund. (2009 House Bill No. 1140)</p>		<p><b>57-51.1-07.2. Permanent oil tax trust fund.</b> This section was repealed. (2011 House Bill No. 1451)</p>																	
<p><b>57-51.1-07.3. Oil and gas research fund.</b> For the 2005-07 biennium and forward, 2 percent of the state's share of oil and gas gross production tax and oil extraction tax revenue deposited into the general fund, up to a cap of \$1.3 million, must be deposited into the oil and gas research fund. The percentage is calculated on the prior 3 months of general fund deposits and is transferred into the oil and gas research fund quarterly.</p>	<p><b>57-51.1-07.3. Oil and gas research fund.</b> Legislation increased the maximum that could be deposited in this fund from \$1.3 million to \$3 million per biennium. (2007 House Bill No. 1128)</p>	<p><b>57-51.1-07.3. Oil and gas research fund.</b> The State Treasurer introduced legislation to clarify the 2 percent calculation under this section was to be calculated independently of the \$71 million calculation under Section 57-51.1-07.2 rather than drawn from the first \$71 million deposited in the general fund under Section 57-51.1-07. (2009 House Bill No. 1126) Legislation also increased the maximum amount that could be deposited in this fund from \$3 million to \$4 million per biennium. (2009 Senate Bill No. 2051)</p>	<p><b>57-51.1-07.3. Oil and gas research fund.</b> This section was created by 2011 House Bill No. 1451 and directed the State Treasurer to deposit revenues designated for deposit in the state general fund under Chapters 57-51 and 57-51.1 as follows:</p> <table><tr><td>First \$200 million - General fund</td></tr><tr><td>Next \$341,790,000 - Property tax relief sustainability fund</td></tr><tr><td>Next \$100 million - General fund</td></tr><tr><td>Next \$100 million - Strategic investment and improvements fund</td></tr><tr><td>Next \$22 million - State disaster relief fund</td></tr><tr><td>Remainder - Strategic investment and improvements fund</td></tr></table>	First \$200 million - General fund	Next \$341,790,000 - Property tax relief sustainability fund	Next \$100 million - General fund	Next \$100 million - Strategic investment and improvements fund	Next \$22 million - State disaster relief fund	Remainder - Strategic investment and improvements fund	<p><b>57-51.1-07.3. Oil and gas research fund.</b> Legislation increased the maximum that could be deposited in this fund from \$4 million to \$10 million per biennium. (2013 Senate Bill No. 2014)</p>											
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	<p><b>57-51.1-07.4. Allocation of state share of collections from reservation development.</b> Legislation provided, notwithstanding any other provision of law, the State Treasurer shall transfer to the permanent oil tax trust fund the first \$700,000 of the state's share of oil extraction tax revenue from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation drilled and completed after June 31, 2007. (2007 House Bill No. 1395)</p>	<p><b>57-51.1-07.4. Allocation of state share of collections from reservation development.</b> The State Treasurer introduced legislation to repeal this section. (2009 Senate Bill No. 2088) The repeal did not go into effect due to language that passed in a separate bill which amended the statute to again transfer the first \$700,000 of revenue during the biennium to the permanent oil tax trust fund. (2009 House Bill No. 1394)</p>	<p><b>57-51.1-07.4. Allocation of state share of collections from reservation development.</b> This section was repealed. (2011 House Bill No. 1451)</p>		<p><b>57-51.1-07.5. State share of oil and gas taxes - Deposits.</b> House Bill No. 1377 (2015) amended the distributions through June 30, 2017, as follows:</p> <table><tr><td>First \$200 million - General fund</td></tr><tr><td>Next \$300 million - Tax relief fund</td></tr><tr><td>Next \$100 million - General fund</td></tr><tr><td>Next \$100 million - Strategic investment and improvements fund</td></tr><tr><td>Next \$22 million - State disaster relief fund</td></tr><tr><td>Remainder - Allocated 70 percent to the strategic investment and improvements fund and 30 percent to the political subdivision allocation fund</td></tr></table>	First \$200 million - General fund	Next \$300 million - Tax relief fund	Next \$100 million - General fund	Next \$100 million - Strategic investment and improvements fund	Next \$22 million - State disaster relief fund	Remainder - Allocated 70 percent to the strategic investment and improvements fund and 30 percent to the political subdivision allocation fund	<p><b>57-51.1-07.5. State share of oil and gas taxes - Deposits.</b> House Bill No. 1152 (2017) amended the distributions after June 30, 2017, as follows:</p> <table><tr><td>First \$200 million - General fund</td></tr><tr><td>Next \$200 million - Tax relief fund</td></tr><tr><td>Next \$75 million - Budget stabilization fund</td></tr><tr><td>Next \$200 million - General fund</td></tr><tr><td>Next \$100 million - Allocated 80 percent to the strategic investment and improvements fund and 20 percent to the lignite research fund until \$3 million is deposited in the lignite research fund, and 100 percent into the strategic investment and improvements fund after \$3 million has been deposited into the lignite research fund.</td></tr><tr><td>Next \$20 million - State disaster relief fund</td></tr><tr><td>Remainder - Strategic investment and improvements fund</td></tr></table>	First \$200 million - General fund	Next \$200 million - Tax relief fund	Next \$75 million - Budget stabilization fund	Next \$200 million - General fund	Next \$100 million - Allocated 80 percent to the strategic investment and improvements fund and 20 percent to the lignite research fund until \$3 million is deposited in the lignite research fund, and 100 percent into the strategic investment and improvements fund after \$3 million has been deposited into the lignite research fund.	Next \$20 million - State disaster relief fund	Remainder - Strategic investment and improvements fund		
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Remainder - Strategic investment and improvements fund																					

Article X, Section 24, Constitution of North Dakota provides "Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the common schools trust fund." and "Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the foundation aid stabilization fund in the state treasury, the interest of which must be transferred to the state general fund on July first of each year."

Article X, Section 26, Constitution of North Dakota provides "Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund."





STATE OF NORTH DAKOTA  
**OFFICE OF STATE TREASURER**  
KELLY L. SCHMIDT, STATE TREASURER

Kelly Schmidt, State Treasurer  
In Support of SB 2362  
Senate Finance & Tax  
Sen. Dwight Cook, Chair  
Sen. Kannianen, Vice-Chair  
March 13, 2019

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pg. 1

Mr. Chairman, members of the committee, I am Kelly Schmidt, State Treasurer. I stand in support of SB 2362 as it would clarify ambiguous statutes relating to the oil extraction tax allocations my office completes each month.

I would like to give you a brief history and the steps the Office of State Treasurer has taken to interpret the statutes and our attempts to clarify the ambiguity.

During the 2009-2011 biennium, as oil activity began to increase on the Fort Berthold Indian Reservation and the state was negotiating tribal agreements associated with this activity, our office thoroughly researched the related statutes within North Dakota Century Code. This was a concerted effort on our behalf to ensure we correctly and accurately allocated the state's share of oil and gas revenue from wells subject to the oil and gas agreement between the Three Affiliated Tribes and the State of North Dakota.

In researching the applicable statutes, the determination was made that the state's share of oil extraction revenue imposed on tribal lands was tribal revenue shared with the state and therefore separate and distinct from the oil extraction tax generated on land within the state. Based on statutory language referencing "state share", an interpretation was made to allocate the state's share of tribal revenue directly to the general fund bucket of the formula.

During our research, it became clear there were numerous conflicts among the related chapters which could lead to differing interpretations of the law. With these conflicts in mind, we sought guidance from the Attorney General's office. Upon reviewing the statutes in question and the pertinent legislative history, the Attorney General's office concluded the statute was indeed ambiguous and multiple conflicting interpretations could be reached. He also determined that we had reached a reasonable conclusion which did not contradict clear and unambiguous statutory language. The Attorney General's Office also advised we continue to make the allocations in this manner until clarification was received from the legislature.

In the 2011 legislative session, we worked diligently with numerous individuals and agencies to obtain clarification. We worked directly with OMB and the Governor's Office. We worked with



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legislators to remedy the inconsistencies. Numerous amendments were proposed and drafted during that session, none of these were included in the final passage of any bill. One bill containing clarifying language was ultimately killed in conference committee. With no changes to the specific statutes relating to this issue, our office continued to allocate these revenues based on our initial interpretation as suggested by the Attorney General's Office.

As part of our fiscal audit for the 2009-2011 biennium, the State Auditor's Office audited the allocation of oil and gas tax revenues and, specifically, our interpretation of the statutes relating to the oil extraction tax from tribal lands. We explained to them our process in making the determination and how we sought guidance directly from the Attorney General's Office on the issue. They subsequently requested confirmation of this guidance from the Attorney General's Office. That August 2012 email is included in your materials.

My office has worked diligently to ensure that all funds are being allocated and distributed correctly based on statute and as intended by the legislature. With the exponential growth of oil and gas revenues to the state and the continual changes made to the distributions and allocations of these funds (one only has to look at the Prairie Dog bill this session), we extend an exorbitant amount of time and talent on oil and gas. My team and I work tirelessly before and during each legislative session to ensure bills containing changes to any of the oil and gas formulas are drafted in such a way that we are able to allocate and distribute the funds exactly as intended by the legislature and that no further conflicts are created. It is after the session we step up again to implement these biennial changes to ensure "the buckets" are filled and our counties, cities, schools, and townships receive their funds accurately.

We fully appreciate the opportunity to clarify this portion of the oil extraction tax allocations and would ask for your support of SB 2362 which provides the much needed clarification of this very ambiguous subject.

Oehlke, Jeb D.

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To:  
Cc:  
Subject:

Erickson, Edward E.  
Tuesday, August 07, 2012 4:52 PM  
Scherbenske, Kevin J.  
Oehlke, Jeb D.; Mickelson, Lori S.  
Tribal Oil Extraction Tax Allocation

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Kevin—

It is my understanding that you have asked what advice I gave the State Treasurer's Office on handling the Tribal Oil Extraction Tax distribution in NDCC 57-51.2-02(5)(c) during the 2009-2011 biennium. This was a significantly long time ago, and my final advice was given in a conversation. To the best of my present recollection, my analysis was that the statutes involved were ambiguous as a matter of law and that these issues were not clarified by the legislative history nor by the agreement between the Governor and tribal government. Therefore, the STO should continue making distributions as they had and seek a legislative correction to remove the ambiguity.

There is a conflict in the relevant statutes which creates a legal ambiguity. Chapter 57-51.2 allows for the Governor and the Three Affiliated Tribes to agree to apply the State's Oil & Gas Production Tax and the Oil Extraction Tax within the Reservation, with revenues being split between the Tribe and the State. This legislation, and the agreement it permits, resolved a question whether the State could impose taxes on oil & gas production or oil extraction within the boundaries of the Reservation by both parties agreeing to apply the State's taxes and split the revenue between the Tribe and the State. NDCC 57-51.2-02(5)(c) provides, in part: "The state's share of revenue [from application of the oil & gas production tax and from application of the oil extraction tax within the reservation] as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 [oil & gas gross production tax] and 57-51.1 [oil extraction tax]." Under chapter 57-51.1, NDCC 57-51.1-06 requires the "tax imposed by section 57-51.1-02 must be ... credited to ... the oil extraction tax development fund." That fund is distributed according to a formula which, at that time, provided 20% for water development bonds (Resources Trust Fund), 20% under Art. X, sec. 24, NDConst. (Common Schools Trust Fund and Foundation Aid Stabilization Fund), and 60% to the state General Fund. Of these three items, arguably only the amount allocated to the General Fund appears to be described by the term "state's share" as used in NDCC 57-52.2-02(5)(c).

However, the Tribal Oil Extraction tax is not taxed under section 57-51.1-02 as required by section 57-51.1-06, instead it is taxed under section 57-51.2-02. The STO was authorized to resolve any conflict between chapter 57-51.2 and chapters 57-51 and 57-51.1 in favor of the provision in chapter 57-51.2 by section 57-51.2-03, which provides "This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions." Therefore, it is my recollection of a conversation with the then-Deputy State Treasurer that the STO resolved this conflict by deeming the "state's share" of the Tribal Oil Extraction Tax as entirely intended to go to the state General Fund because the other funds receiving distributions in chapter 57-51.1 did not direct money toward the State and thus those provisions did not address the "state's share."

Further, during the 2009-2011 biennium, the following statute directed the distribution of the state's share under chapter 57-51.1:

**57-51.1-07.2. (Contingent repeal - See note) Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula.**

The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent

oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

Please note that NDCC 57-51.1-07.2 also included a provision for the Director of the Budget to adjust the \$71 million figure, meaning that the actual cap may have been different.

It is my understanding from the STO that for the first three months in which the STO made distributions of the Tribal Oil Extraction Tax (September, October, and November of 2009), the STO followed the direction in 57-51.1-07.4 (since repealed), which stated "Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009." During the month of December 2009 (distribution of Extraction taxes collected in November on oil produced in October) the \$700,000 cap in 57-51.1-07.4 was met. During this month the total amount retained by the State (after the split with the tribal government) of the Tribal Oil Extraction tax was \$317,421.79. The STO deposited \$235,529.65 directly into the Permanent Oil Tax Fund which met the cap requirement in 57-51.1-07.4. With the remaining \$81,892.14, the STO followed the requirements of 57-51.1-07 and performed the split which allocated 20% to the Resources Trust Fund, 20% evenly divided between the Common Schools Trust Fund and the Foundation Aid Stabilization Fund, and the 60% state share went into the Permanent Oil Tax Fund since the general fund cap had already been met. In each month following this, for the remainder of the biennium, the STO performed the distribution of these funds in the manner in which it interpreted NDCC 57-51.2-02(5)(c) by depositing the entire amount of the Tribal Oil Extraction Tax retained by the state into the Permanent Oil Tax Fund.

The legal standard applicable to this issue is that "[T]he construction of a statute by an administrative agency charged with [its] execution is entitled to weight and [the court] will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language." Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999). The State Treasurer's Office is charged with administering the revenue distributions under these chapters. Under this standard, when faced with an ambiguous statute, the STO's determination of the best method to resolve the conflict will be recognized by the courts. Further, as noted above, section 57-51.2-03 directs that any conflict between chapter 57-51.2 and chapters 57-51 or 57-51.1 must be resolved by favoring the provision in chapter 57-51.2. In my opinion, the STO's resolution of this conflict does not contradict clear and unambiguous statutory language, and is consistent with the intent shown by the legislative history and section 57-51.2-03.

Therefore, my advice was for the STO to continue making distributions of the state's share of tribal oil extraction tax revenue pursuant to their reasonable interpretation of these ambiguous statutes, and to seek a corrective amendment in the next legislative session. It is my understanding that the STO sought and received an amendment in 2011 HB 1268 in an attempt to address some of the ambiguities in these chapters, but the bill ultimately failed in favor of similar legislation which did not contain the corrective amendment. Also, the STO worked with the Legislature on other bills affecting these chapters, including 2011 HB 1451 which eliminated the Permanent Oil Tax Trust Fund and directed where state revenues were to be deposited.

--Edward

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#5 pg.1



Jodi A. Smith, Commissioner

**TESTIMONY OF JODI SMITH  
Commissioner of University and School Lands  
North Dakota Department of Trust Lands**

**Senate Bill 2362**

Senate Finance and Taxation Committee  
March 13, 2019

Chairman Cook and members of the Senate Finance and Taxation Committee, I am Jodi Smith, the Commissioner and Secretary for the Board of University and School Lands (Board). I am here to testify in on Senate Bill 2362.

The Department of Trust Lands (Department) is the administrative arm of the Board, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund (CSTF) and 12 additional permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages four additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, and the Indian Cultural Education Trust.

The Department also administers the responsibilities outlined in the Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.1. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the CSTF.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

**HISTORY**

In 1889, Congress passed the Enabling Act "to provide for the division of Dakota [Territory] into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.



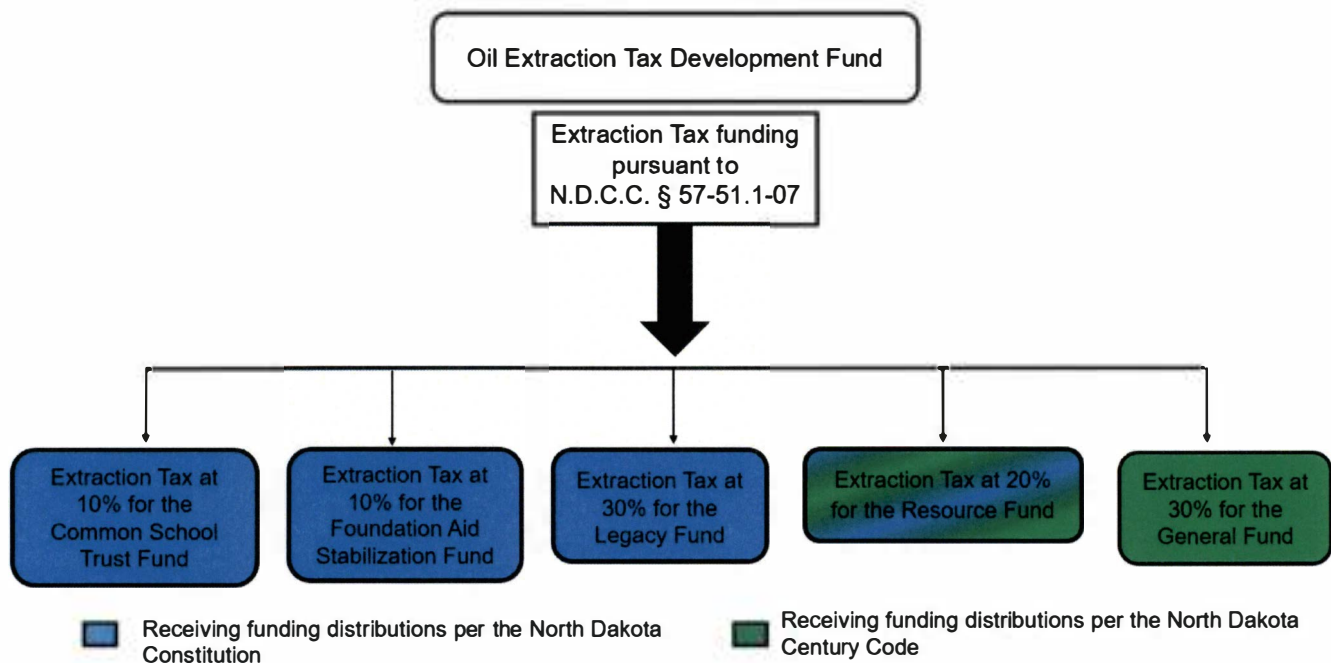
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Section 10 of this Act granted sections 16 and 36 in every township to the new states "for the support of common schools." In cases where portions of sections 16 and 36 had been sold prior to statehood, indemnity or "in lieu" selections were allowed. In North Dakota, this grant of land totaled more than 2.5 million acres.

Sections 12, 14, 16, and 17 of the Enabling Act, and other acts referred to therein, provided further land grants to the State of North Dakota for the support of colleges, universities, the state capitol, and other public institutions. Revenues are generated through the prudent management of trust assets, which assets include approximately 706,600 surface acres and 2.6 million mineral acres.

### ALLOCATION AND HISTORY OF OIL EXTRACTION TAXES

The State of North Dakota imposes production and extraction taxes on all oil produced in the state. The oil extraction tax is imposed on all oil produced in the state pursuant to N.D.C.C. § 57-51.1-02. Oil production subject to this tax includes production attributable to tribal trust lands on the reservation and on tribal trust properties outside reservation boundaries pursuant to N.D.C.C. § 57-51.2-02(3). All taxes imposed under N.D.C.C. ch. 57-51.1-2 are deposited into the oil extraction tax development fund, pursuant to N.D.C.C. ch. 57-51.1-6. N.D.C.C. § 57-51.1-07 allocates these oil extraction taxes to several funds, one of which is the CSTF. Consistent with statute, Article X, § 24 of the North Dakota Constitution (Article X, § 24 ) provides that "[t]en percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited into the common schools trust fund." Below is a chart showing the allocation of moneys in the oil extraction tax development fund (Extraction Tax Allocation).



In 1993, the 53<sup>rd</sup> Legislative Assembly approved Senate Concurrent Resolution (SCR) 4011, entitled "Oil Extraction Tax Revenues – Proposed Constitutional Amendment". The resolution proposed a new section to Article X of the North Dakota Constitution that if passed by the electors, would direct the allocation of oil extraction tax revenue as follows:

- a. 20% of the revenue from oil extraction taxes from taxable oil produced in the state must be allocated to:
  - i. 50% to the common schools trust fund and
  - ii. 50% to the foundation aid stabilization fund; the interest income must be transferred to the general fund on July 1 of each year.

SCR 4011 was approved by the voters in the 1994 general election. Article X, § 24 was effective for oil produced after June 30, 1995.

In 1995, the 54<sup>th</sup> Legislative Assembly amended N.D.C.C. § 57-51.1-07 by allocating 20% of the oil extraction tax revenues in the oil extraction tax development fund, as provided in Article X, § 24. Under Article X, § 24, this allocation was distributed equally to the CSTF and to the Foundation Aid Stabilization Fund (FASF).

In 2011, the 62<sup>nd</sup> Legislative Assembly passed SB 2129, amending N.D.C.C. § 57-51.1-07 to identify by name "the common schools trust fund" and "the foundation aid stabilization fund" as the recipients; however, no change to the allocation was made.

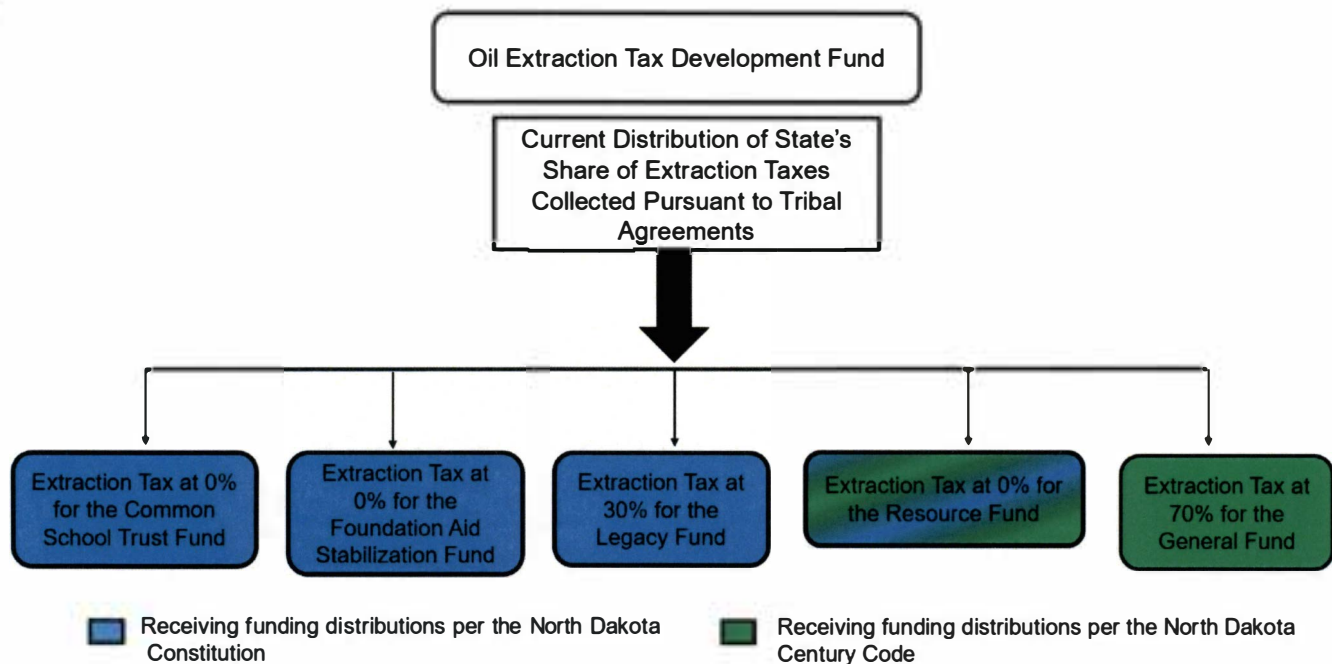
The Legacy Fund was approved by the voters in the 2010 general election. Article X, Section 26 of the Constitution requires: "Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund." In SB 2129, the 62<sup>nd</sup> Legislative Assembly added the Legacy Fund as a recipient of 30% of oil extraction tax revenue.

Amendments to N.D.C.C. § 57-51.1-07 by the 63<sup>rd</sup> and 65<sup>th</sup> Legislative Assemblies resulted in no changes to allocations to the constitutional funds, namely: the CSTF, FASF, and the Legacy Fund.

Despite the amendments to N.D.C.C. § 57-51.1-07 since 1995, the allocations to both the CSTF and the FASF have each remained constant at "[t]en percent of the revenue from oil extraction taxes from taxable oil produced in this state," per Article X, § 24. Similarly, no changes have been made to the 30% allocation to the Legacy Fund since 2011.

Based upon the distributions to these three constitutional funds, it is evident the Legacy Fund has received its 30% share of oil extraction tax revenue as required by the Constitution and N.D.C.C. § 57-51.1-07. It is equally evident that the CSTF and the FASF have not received the combined 20% allocation (10% to each fund) as required by the Constitution and N.D.C.C. § 57-51.1-07.

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### COMMON SCHOOLS TRUST FUND

Per Article IX, Section 2 of the North Dakota Constitution:

Distributions from the [CSTF], together with the net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law. Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution and no part of the fund may ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of the institution, as provided by law.

For the biennium during which this amendment takes effect, distributions from the perpetual trust funds must be the greater of the amount distributed in the preceding biennium or ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. Thereafter, biennial distributions from the perpetual trust funds must be ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. The average value of trust assets is determined by using the assets' ending value for the fiscal year that ends one year before the beginning of the biennium and the assets' ending value for the four preceding fiscal years. Equal amounts must be distributed during each year of the biennium.

Since changes to the Constitution became effective in 2009, trust growth, and trust distributions to beneficiaries, have increased at historic rates. As the following table shows, per pupil distributions to K-12 education have increased from approximately \$400 per pupil per year during the 2009-11 biennium to a projected \$1,319 per student during the 2019-21 biennium. During that same period of time,

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distributions from the CSTF grew from approximately 4.0% of the cost of education to a projected 13.9% of the cost of education.

Biennium	Amount Distributed	Common Schools % of Cost Education	Common Schools \$ / Pupil Distribution
2009-11	\$ 77,178,000	4.0%	\$ 400.96
2011-13	\$ 92,514,000	4.5%	\$ 461.33
2013-15	\$ 130,326,000	6.0%	\$ 643.27
2015-17	\$ 206,134,000	8.6%	\$ 971.69
2017-19	\$ 288,264,000	11.5%	\$ 1,318.88
2019-21	\$ 366,756,000	13.9%	\$ 1,592.35

The table below is another look at the CSTF's impact on education. With the inclusion of the 2019-21 contribution, the CSTF will have supplied nearly \$1 billion (\$991,480,000) to the schools in the last eight years.

Biennium	Formula Payment	Common Schools	Percentage of Formula	Common Schools Increase
2013-15	\$ 1,752,100,000	\$ 130,326,000	7.4%	\$ 37,812,000
2015-17	\$ 1,916,640,000	\$ 206,134,000	10.8%	\$ 75,808,000
2017-19	\$ 1,935,204,163	\$ 288,264,000	14.9%	\$ 82,130,000
2019-21	\$ 2,050,702,333	\$ 366,756,000	17.9%	\$ 78,492,000

#### SENATE BILL 2362

The Board supports the bill insofar as it attempts to bring clarity to the requirement that the CSTF must receive "[t]en percent of the revenue from oil extraction taxes from taxable oil produced in this state," as required under Article X, § 24 of the North Dakota Constitution and North Dakota law. Specifically, the bill clarifies how the extraction tax allocated to the State under any agreement pursuant to N.D.C.C. ch. 57-51.2 is to be distributed.

To date, the CSTF has not received its percentage of the extraction tax allocated to the State under any agreement pursuant to N.D.C.C. ch. 57-51.2. As such, the Board also supports amendments to the bill that would require the CSTF to receive any and all moneys it should have been receiving under the Extraction Tax Allocation. In other words, it is the Board's position that based on Constitutional and statutory requirements regarding tax allocation to the CSTF that have been in place for several years, it is essential to look retroactively to fill the constitutional funds. Article IX, § 2 of the North Dakota Constitution requires that "no part of the fund must ever be diverted, even temporarily."

All revenues received by the CSTF are invested upon receipt. If any amounts underpaid had been invested with the other CSTF assets, additional investment earnings would have been generated throughout the years, resulting in increased funds being available for distribution to fund K-12 education. The underpayment to the CSTF is currently estimated \$62,794,306 in principal and \$11,986,696 in interest earnings for a total of \$74,781,002. The following chart depicts the impact the underpayment has had on past biennial distributions, inclusive of investment earnings. Future distributions presented do not include investment earnings.



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Biennium	Impact on Beginning Assets	Impact on Biennial Distributions
2011-13	\$ 1,544,182	\$ 6,000
2013-15	\$ 11,475,547	\$ 136,000
2015-17	\$ 35,781,439	\$ 852,000
2017-19	\$ 51,417,254	\$ 2,364,000
2019-21	\$ 74,781,003	\$ 4,342,000
2021-23	\$ 74,781,003	\$ 6,130,000
2023-25	\$ 74,781,003	\$ 7,260,000
2025-27	\$ 74,781,003	\$ 7,478,000

\*Impacts for biennia including 2011-13, 2013-15, and 2015-17 include investment earnings

Compounded investment earnings over the course of the next three biennia will add to the impact on biennial distributions. The effect of not retroactively filling the CSTF will have a permanent impact on the State's contribution to the per pupil cost of education in perpetuity.

Simply stated, the Board supports Senate Bill 2362 to create clarity in the statute to ensure that moving forward, it is exceptionally clear how extraction taxes collected within the State are distributed to the CSTF. It is the position of the Board that the CSTF must be made whole by retroactively paying the fund the nearly \$75 million of underpayment and the Board is open to finding a resolution. The effects of not repaying the CSTF will impact education in the State of North Dakota for generations to come.

I look forward to working with the committee on these issues and will answer any questions.

**North Dakota State Water Commission Testimony  
Senate Bill 2362  
Senate Finance & Taxation Committee  
March 13, 2019**

Good morning Chairman Cook, and members of the Senate Finance and Taxation Committee, I am Garland Erbele, North Dakota's State Engineer and Chief Engineer-Secretary to the North Dakota State Water Commission. I am appearing before you today regarding Senate Bill 2362.

Senate Bill 2362 has been developed to more clearly define the distribution and allocation of oil extraction tax revenues. We support this legislation, and the overall effort to provide clarity moving forward.

Of particular interest to the State Water Commission are distributions related to the Resources Trust Fund, which is identified in North Dakota's Constitution as a recipient of oil extraction tax revenues. Currently, by Legislative action, the Resources Trust Fund receives 20 percent of the state's oil extraction tax revenue. This source of funding has become North Dakota's primary revenue stream for water development projects through our agency.

The most recent revenue projection includes approximately \$388 million for the 2019-2021 biennium from oil extraction, into the Resources Trust Fund. During that same time period, we have identified over \$900 million in local project sponsor cost-share funding needs from the state. This large gap is not unique of the upcoming biennium, but rather, has been the norm for the last several biennia. In short, North Dakota has tremendous water infrastructure needs –

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from flood control and water supply projects, to dam repairs and irrigation development.

It is our understanding that since 2008, approximately \$125 million in oil extraction tax revenue that was meant for the Resources Trust Fund was distributed to other funds. Therefore, in consideration of historic and future water development funding needs that exist throughout the state, I respectfully request that language be included in Senate Bill 2362 that would retroactively reestablish alternatively diverted funds, plus interest, back into the Resources Trust Fund.

Mr. Chairman, this concludes my testimony on Senate Bill 2362. If you have any questions, I will do my best to address them.

**Testimony of Eric Volk, Executive Director**

**ND Rural Water Systems Association**

**Senate Bill 2362**

**Senate Finance and Taxation Committee**

**March 13, 2019**

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Chairman Cook and members of the Senate Finance and Taxation Committee, my name is Eric Volk. I am the executive director of the North Dakota Rural Water Systems Association (NDRWSA). Our vision is to ensure all of North Dakota has access to affordable, ample, and quality water. NDRWSA is committed to completing and maintaining North Dakota's water infrastructure for economic growth and quality of life. Today I am submitting testimony in support of SB 2362 as it helps address the critical water needs of North Dakota.

**Rural/Regional Water Facts:**

- Serve over 150,000 rural residents (55,000 connections)
- Provide water to 263 (74%) of North Dakota's 357 incorporated cities
- Furnish water to over 255,000 North Dakota residents
- Provide service through over 40,000 miles of pipe

In addition to the Southwest Pipeline Project, Northwest Area Water System, the Red River Valley Water Supply Project and the Western Area Water Supply Project, there are currently many other rural and regional projects in various stages of development across the state. Some examples of these projects are the completion of the large expansion of the Southeast Water Users District, the further development of the Northeast Regional Water District, and the completion of a county wide expansion of Stutsman Rural Water District, in addition to several others; many of them located in the oil impacted areas of our state. The total cost of these rural and regional projects for the next biennium is nearly \$70 million (\$50 million state grant is needed). (Please see attached spreadsheet and map).

**10-Year Rural Water Funding Need:**

\$320,000,000

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**20-Year Rural Water Funding Need:**

\$616,000,000

With that said, the NDRWSA supports SB 2362. Thank you for giving me the opportunity to provide testimony on behalf of the members of the NDRWSA. Eric Volk,  
[ericvolk@ndrw.org](mailto:ericvolk@ndrw.org)

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# 7 pg. 3
- 1 – **AGASSIZ WATER USERS DISTRICT – GILBY**  
System Expansion and Interconnect Project
  - 2 – **ALL SEASONS WATER USERS DISTRICT – BOTTINEAU**  
Expansion Project
  - 3 – **DAKOTA RURAL WATER DISTRICT – FINLEY**  
User Expansion
  - 4 – **EAST CENTRAL REGIONAL WATER DISTRICT – THOMPSON**  
User, Transmission Pipeline Expansion, Well Expansion and District Interconnect
  - 5 – **GREATER RAMSEY WATER DISTRICT – DEVILS LAKE**  
Expansion Project – Oswald Bay
  - 6 – **MCLEAN SHERIDAN RURAL WATER DISTRICT – TURTLE LAKE**  
System Wide Improvements/Expansion Project
  - 7 – **MISSOURI WEST WATER SYSTEM – MANDAN**  
Harmon Lake Area, North Mandan/Highway 25, and Hwy 1806 - Huff & Fort Rice Expansion
  - 8 – **NORTH CENTRAL REGIONAL WATER DISTRICT – MINOT**  
City of Benedict Water Distribution System
  - 9 – **NORTH PRAIRIE RURAL WATER DISTRICT – MINOT**  
Minot to Velva Hwy 52 Project
  - 10 – **NORTHEAST REGIONAL WATER DISTRICT – CAVALIER**  
Water Loss Infrastructure, User Expansion Phase II, and City of Devils Lake Phase II
  - 11 – **SOUTH CENTRAL REGIONAL WATER DISTRICT – BISMARCK**  
North Burleigh Water Treatment Plant Pretreatment Improvements
  - 12 – **SOUTHEAST WATER USERS DISTRICT – MANTADOR**  
Replacement of Existing 1.5" Glued Pipe, Regionalization Water Treatment Plant, and System Wide Expansion
  - 13 – **STUTSMAN RURAL WATER DISTRICT – JAMESTOWN**  
Water Supply to Streeter, Phase 7 Water Supply
  - 14 – **TRI-COUNTY WATER DISTRICT – PETERSBURG**  
Rural Distribution Pipeline Expansion
  - 15 – **WALSH RURAL WATER DISTRICT – GRAFTON**  
User, Transmission Pipeline Expansion Phase II, Connection to Drayton
  - 16 – **WESTERN AREA WATER SUPPLY – WILLISTON**  
System Wide Distribution Expansion
  - 17 – **SOUTHWEST PIPELINE PROJECT – DICKINSON**  
System Upgrades

New Horizons in Rural Living

**NORTH DAKOTA**  
**Rural Water**  
SYSTEMS ASSOCIATION

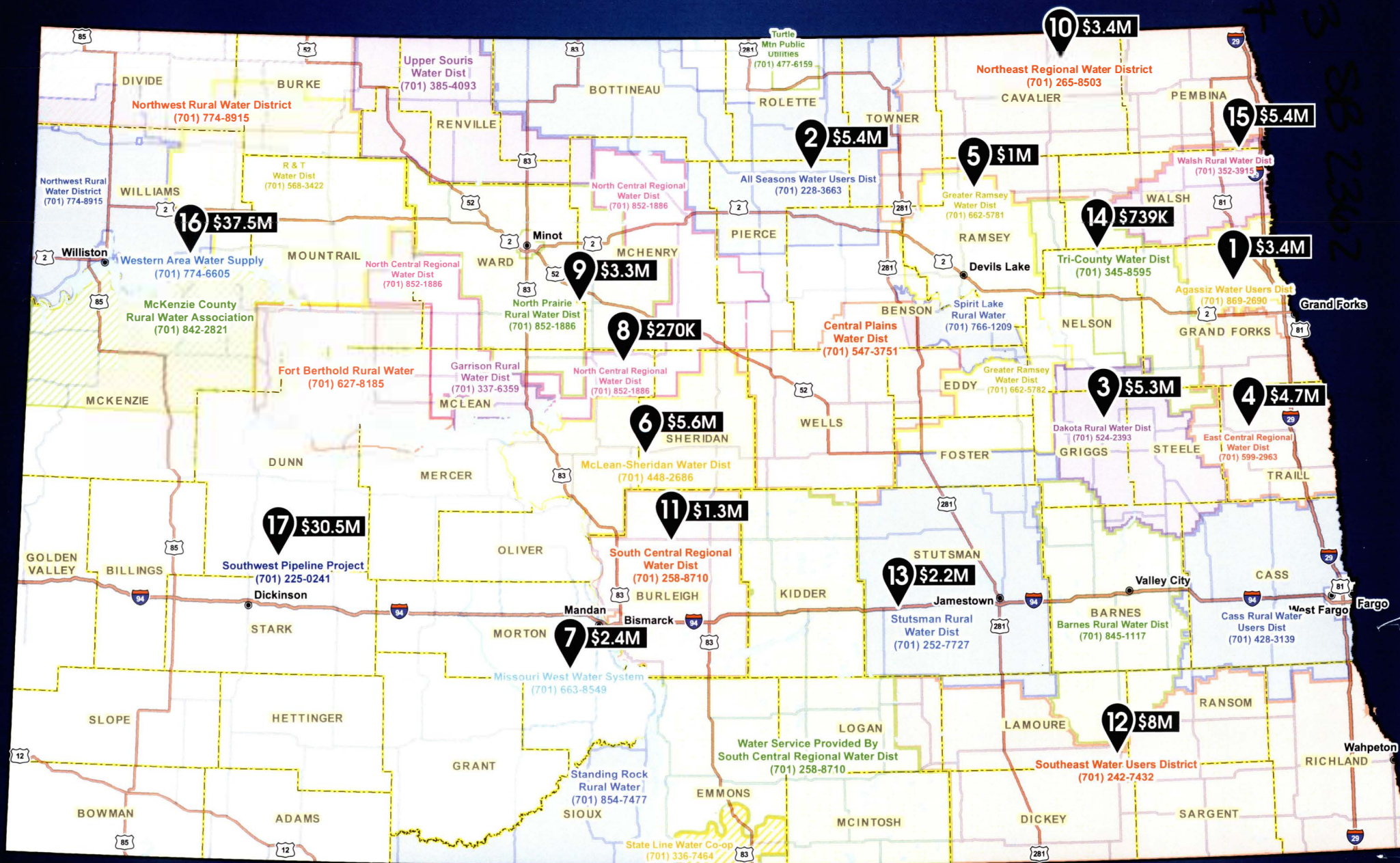
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**OUR VISION**

All of North Dakota has access to  
affordable, ample, and quality water.









# North Dakota WATER COALITION

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Barnes Rural Water District  
Cass County Government  
Cass County Joint Board  
Devils Lake  
Devils Lake Basin Joint Board  
Dickinson  
Fargo  
Garrison Diversion  
Conservancy District  
Grafton  
Grand Forks  
Grand Forks – Traill Water  
District  
Lake Agassiz Water Authority  
Lisbon  
Mandan  
McLean-Sheridan Rural Water  
Mercer County Water Resource  
District  
Minot  
Missouri River Joint Board  
North Central Regional Water  
District  
North Dakota Association of  
Counties  
North Dakota Farmers Union  
North Dakota Irrigation  
Association  
North Dakota League of Cities  
North Dakota Public Finance  
Authority  
North Dakota Rural Water  
Systems Association  
North Dakota Soybean  
Growers Association  
North Dakota State Water  
Commission  
North Dakota Water Resource  
Districts Association  
North Dakota Water Users  
Association  
North Dakota Weather  
Modification Association  
Northeast Regional Water  
District  
Northwest Area Water Supply  
Red River Joint Water Board  
Souris River Joint Board  
South Central Regional Water  
District  
Southwest Water Authority  
Tutman Rural Water District  
Valley City  
West Fargo  
Western Area Water Supply  
Williston

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## Testimony of Lance Gaebe, Executive Director North Dakota Water Coalition In Support of SB 2362 March 13, 2019

Mr. Chairman and members of the Senate Finance and Taxation Committee, my name is Lance Gaebe and I serve as the Executive Director of the North Dakota Water Coalition.

The North Dakota Water Coalition formed in 1994 to advocated for the completion of North Dakota's water infrastructure for economic growth and quality of life. The Water Coalition brings together more than 40 water project sponsors and groups to work toward unity for support of water projects across North Dakota. Collaboration within the water community and building consensus regarding funding needs and priorities are essential in meeting the water resource management needs of North Dakota.

The state funds the State Water Commission's operations, capital projects and grants for water supply, flood control, irrigation and general water management projects across the state from the Resources Trust Fund and the Water Development Trust Fund. Article X of the North Dakota Constitution created the Resources Trust Fund and in Section 22 it stipulates that revenue from taxes imposed on the extraction of oil be allocated to the Resources Trust Fund.

The North Dakota Water Coalition supports Senate Bill 2362 to implement a clarification so the full amount of the oil and gas extraction tax allocated to the Resources Trust Fund is deposited in that fund. We estimate that there is as much as \$125 million over the last decade that should have been deposited in the Resources Trust Fund and used for water infrastructure, but unfortunately it was directed to other funds. Thus, we support a correction of how the monies are deposited going forward and also advocate for the restoration of the \$125 million to the Resources Trust Fund for critically important water projects.

The Water Coalition members appreciate the state's commitment to fund water projects. However, it is difficult to accomplish the large-scale water infrastructure projects with the \$350.7 million currently projected in the Resources Trust Fund in 2019-21. For the upcoming biennium alone, there are over \$700 million in shovel ready-necessary water projects, thus the Water Coalition supports the efforts conceived in SB 2362 to address the interpretation issues of how oil and gas extraction tax revenues generated on the Fort Berthold Indian Reservation are deposited into the Resources Trust Fund. Restoring the monies back into the Resources Trust Fund would help to fund more vital water infrastructure projects, protecting the state and its resources.

North Dakota's water infrastructure projects, which are summarized in the *Meeting the Challenge XI* document, have been and will continue to be driving forces in the future of North Dakota. In order to protect our growing cities and resources, state funding is needed. That is why we support SB 2362 and ask for the full restoration of monies back into the Resources Trust Fund.

We appreciate your past support of water infrastructure and urge your continued support of North Dakota's water infrastructure with the adoption of SB 2362.



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# Meeting the Challenge XI

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North Dakota  
**WATER**  
COALITION

**2019-21 Critical Water Needs Summary**

January 2019



# Meeting the

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## Fargo-Moorhead Area Diversion Project

The Fargo-Moorhead Area Diversion Project will establish in excess of 100-year flood protection for the 30,000 people within its protective boundaries. The federally authorized project reduces flood risk through construction of a 30-mile, 20,000-cubic-feet-per-second diversion channel, upstream retention and an intricate system of in-town levees. The project provides flood risk reduction from six rivers, including the Red, Wild Rice, Sheyenne, Maple, Rush and Lower Rush Rivers. The project includes an embankment and tie-back levee that will temporarily retain flood waters upstream of the metropolitan area in times of extreme flooding to ensure no downstream impacts. In addition to the diversion channel, the project will include in-town levees along the Red River through Fargo. These levees will enable flood waters to safely pass through the metro area, as well as the diversion channel, which will help reduce project impacts and will provide more robust flood risk reduction.

The project was federally authorized in 2014 through the passage of the Water Resources Reform & Development Act and a Project Partnership Agreement was signed with the U.S. Army Corps of Engineers in 2016. Efforts are also underway with permitting agencies in North Dakota and Minnesota, including a new permit application submitted to Minnesota in March of 2018. A permit decision is expected in the winter of 2018.

In December 2018, the Diversion Authority released a new \$2.75 billion cost estimate. The proposed funding plan for the Project includes \$750 million from the deferral government (\$450 million committed to date), \$870 million for the State of North Dakota (\$570 committed to date), and over a billion dollars locally provided by approved sales taxes in Fargo and Cass County.

## Souris/Mouse River Flood Protection Project

The Mouse River Flood Protection plan consists of an overall project from the 49th Parallel (Sherwood) to 49th Parallel (Westhope). The preliminary alignment for protection measures is an area from the Mouse River State Park to Velva and consists of levees, floodwalls, river diversions and closure features, transportation closure structures, interior pump stations, ring dikes, and residential and commercial property acquisitions in the flood alignment boundary. Levees comprise nearly 90 percent of the alignment, totaling 21.6 miles. The remainder of the alignment consists of 2.8 miles of floodwalls and 30 transportation closure structures (19 roadway and 11 railroad). In addition, the project would require 33 stormwater pump stations.

The estimated project cost is \$820 million, based on the current level of design based on a 27,400 cfs flood event. Of this estimated cost, \$565 million is related to construction, \$154 million is related to property acquisition, and the remaining \$101 million covers planning, engineering, and program management costs. In addition to the urban portion from Mouse River Park

to Velva, there is also a rural reaches portion that is the STARR program, which is looking at structure acquisition, ring dike, and relocation options. There are also plans to look at enhanced conveyance from Velva to the Canadian border. The rural reaches portion is approximately \$180 million, bringing the entire project to over \$1 billion.

## Sheyenne River Flood Protection

In the fall of 2011, Valley City began developing investment strategies for permanent flood protection. Funds were originally approved for the Valley City Permanent Flood Protection during the 2013 ND Legislative Session. This flood protection consists of a combination of clay levees, floodwalls and select property acquisitions. Phase 1 of the project, protecting residential property and Valley City State University, was completed in the fall of 2016. The second phase will focus on Main Street and one of the city's Distribution Power Substations. Design for Phase 2 is getting started with work anticipated to begin in 2017. Overall completion is expected within eight years assuming an average of \$25 million in state funding each biennium over that time period.

Lisbon developed a permanent flood protection plan which includes home acquisitions and levee construction along the Sheyenne River. With the help of the State Water Commission, the city began construction on Levee A in 2014. Levee A tied into existing high ground on the northwest side of the city and extended east to ND State Hwy 32. The following year, the city constructed Levee C, which started just east of ND State Hwy 32 and extends south to a point that is just north of ND State Hwy 27. The city is currently constructing Levee E, which includes 1,100 feet of flood protection on the east side of the Sheyenne River between ND State Hwy 27 and 8th Ave. The city is currently in the design process for Levee D and Levee F and look to be under construction in 2017 and 2018, respectively. Once Levee D and Levee F are constructed, levee work will be completed in the northern portion of the city.

## Devils Lake Outlet Operations

The state completed construction of an outlet from the west end of Devils Lake to the Sheyenne River in 2005. The original west-end pumps were designed with a maximum capacity of 100 cubic feet per second (cfs). Modifications constructed in early 2010 increased that capacity to 250 cfs. During the summer of 2012, as the flood water continued to rise in the Devils Lake Basin, the state also completed an outlet from East Devils Lake with a maximum capacity of 350 cfs. The combined operating capacity of the West and East Devils Lake outlets is 600 cfs, and together, the outlets have discharged over 1.16 million acre-feet. At the current lake elevation, this



# Challenge XI

time corresponds to approximately 6.5 feet of flood water on top of the lake surface. The funding request for Devils Lake Outlet Operations go towards the costs associated with operating the Devils Lake Outlets, monitoring the outlet and downstream water quality, and providing mitigation for those who are adversely impacted by outlet operation.

## Rural Water Supply

Regional/rural water systems provide a safe, reliable, high-quality, and affordable water supply to North Dakota residents, farms, industries, subdivisions, and small communities. In order to meet the growing statewide water needs, Garrison Diversion Conservancy District, the State Water Commission, the four Tribal Nations, and the North Dakota Rural Water Systems Association are working cooperatively to solve water quality and quantity problems.

Projects for the 2019-2021 biennium include, but are not limited to, expansions of Agassiz WUD, All Seasons WUD, Dakota RWD, East Central RWD, Greater Ramsey WD, McLean- Sheridan RWD, Missouri West Water System, North Prairie RWD, North Central RWD, West Central RWD, South Central RWD, Southeast RWD, Western RWD, Tri-County WD, and Walsh RWD. Without assistance, many systems could not reasonably afford to bring water to people who desperately need it or comply with complex regulations and mandates.

## Municipal Water Supply

North Dakota's 357 incorporated cities generate over 90% of in-state sales tax annually. A critical component of their revenue generating ability is a sustainable municipal water infrastructure that supports water demand and water quality. The partnership of local and state funding for water infrastructure capital investments encourage and strengthen a growing state economy. These projects not only serve municipal and industrial customers, but also serve rural water customers through current and future water supply regionalization partnerships.

## Red River Valley Water Supply Project (RRVWSP)

The Red River Valley Water Supply Project (RRVWSP) is a plan to safeguard water for North Dakota communities and rural water systems in times of drought by delivering water from the Missouri River to central and northern North Dakota through a buried pipeline. Upon its completion, the RRVWSP will benefit about half of North Dakota's population by providing an emergency water supply during droughts.

The water will also provide opportunities for industrial

development, as a current lack of industrial water supply has driven industries to obtain water through less desirable means and/or relocation out of North Dakota.

Funding requested is to be allocated towards construction of a pipeline segment, as well as completing the final design of key components and the land acquisition process for the RRVWSP.

## Southwest Pipeline Project (SWPP)

The Southwest Pipeline Project (SWPP) continues its mission of quality water for southwest North Dakota. The North Dakota State Water Commission (SWC) has been constructing a complex network of pipelines, pump stations, reservoirs and treatment facilities since 1986. More than 56,000 North Dakota residents receive quality water from the SWPP with service provided to more than 7,150 rural locations through over 5,262 miles of pipeline. Service is also available to three crew camps, two raw water depots, Red Trail Energy Ethanol Plant, 21 raw water customers, Missouri West Water System and Perkins County Rural Water System.

The SWPP continues construction on the supplemental intake at Renner Bay on Lake Sakakawea. Progress is being made on the raw-water main transmission pipeline. Construction is also continuing on the Residuals Handling Facility in Dickinson. The third WTP recently came online. The Project is increasing its storage capacity with the additional Dickinson and Richardton raw water reservoirs.

Rural areas and communities currently served by the SWPP are basing their current and future growth on the availability of quality water. Addressing the waiting list, water treatment plant replacement and additional capacity for both raw and potable water are necessary. Growth in southwest North Dakota is able to be sustained with the continued growth and increased capacity of the Pipeline.

## The Western Area Water Supply Project (WAWSP)

The Western Area Water Supply Project (WAWSP) utilizes water from the Missouri River in Williston, treats it at the Williston Regional Water Treatment Plant, and then transports it to cities and rural areas in all or parts of Burke, Divide, McKenzie, Mountrail, and Williams Counties in northwestern North Dakota. The WAWSP's service area is forecast to reach 125,000 people by the year 2038, according to a 2014 study completed by the North Dakota State University Department of Agribusiness and Applied Economics. The Western Area Water Supply Authority (WAWSA) has constructed more than 1,042 miles of transmission lines and rural water distribution networks, as well as pump stations, reservoirs, and other critical infrastructure, in order to serve an estimated 65,000 people in the service area.

The WAWSP Business Plan is a first-of-its-kind public-private partnership in North Dakota. To date, the North Dakota Legislature has obligated \$309 million to

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complete the project. In order to repay its loans, WAWSA is selling the system's unused water capacity to the oil industry during the population growth period to pay for a significant portion of the project's \$469 million cost. Specific projects that could be advanced this biennium include part two of a McKenzie County system expansion, R&T system Stanley, White Earth and Powers Lake rural distributions, and Williams Rural north and 29-mile rural distribution efforts.

### **Northwest Area Water Supply (NAWS)**

The Northwest Area Water Supply (NAWS) is delivering drinking water to areas in north central North Dakota. NAWS currently has approximately 230 miles of pipe (185 miles of distribution pipeline and 45 miles of raw water transmission pipeline), one high service pump station, two ground storage reservoirs, one elevated storage reservoir, and four booster pump stations. The project currently serves Burlington, West River Water and Sewer, Berthold, Kenmare, Sherwood, Mohall, Upper Souris Water District, and All Seasons Water Users District with water purchased from Minot through an interim water supply agreement. The project also distributes water for the city through two connections to the Minot water distribution system, the Minot Air Force Base, and multiple connections to North Prairie Rural Water. The project had been in litigation since 2002 and under a federal injunction since 2005. In August 2017, the US District Court for the District of Columbia ruled in favor of the State and Bureau of Reclamation and vacated the injunction. Manitoba and Missouri appealed the district court decision, but Manitoba has since settled its case with Reclamation.

Work is currently underway to replace the softening basins and associated systems at the Minot Water Treatment Plant and design is underway for the Biota Water Treatment Plant at Max and for the intake modifications at Snake Creek Pumping Plant. Contracts will be bid over the winter of 2018-19 for the first two pipeline contracts to extend the distribution system towards Bottineau for construction in the 2019 construction season. Design is underway for the remaining pipeline to Bottineau for construction in the 2020 season along with other critical project components. The water needs in the Bottineau area are critical and the aquifers currently serving the project through contracts with the City of Minot are not a sustainable water source.

### **General Water Management**

In addition to the many large-scale water projects being developed across the state, there are dozens of smaller local water management projects that benefit individuals and local communities. The State Water Commission provides support for these water management projects by cost-sharing with local entities, primarily water resource districts. Joint water boards also play a key role in these local water management projects. Examples of general water management projects that typically receive cost-share assistance from the state include: rural flood control, snagging and clearing, channel improvements, recreation projects, dam certification and repairs, planning efforts, special studies, and other water management projects.

### **Irrigation**

Irrigation provides the opportunity for producers to grow high-value crops that meet high-quality market standards and to consistently raise high-yielding good quality traditional crops. According to a 2014 NDSU study, investment in irrigation provides positive returns over dryland crop rotations. North Dakota has about 290,000 acres of land under irrigation, but a 2012 study showed a potential for 550,000 additional irrigated acres in North Dakota. The SWC provides up to 50% cost-share for off-farm irrigation supply works, storage facilities, intake structures, pumps, and electrical power.

### **Project Funding**

The North Dakota Water Coalition has assembled a priority list of minimum state funding levels needed to assist projects and categories during the 2019-2021 biennium which total \$552.4 million. The projects sponsors have coordinated to prioritize the water funding needs to align with the anticipated \$403 million available for water projects. Because the minimum amounts of critical water project funding needs exceed the projected revenues the Water Coalition recommends the following to help meet the critical water needs of our state:

- Fund of State Water Commission administrative operations from the State General Fund
- Oppose any reduction or diversion of 20 percent of oil and gas extraction taxes from the Resources Trust Fund which supports water projects and infrastructure
- Support lending programs and credit options up to \$150 million, through the Bank of North Dakota and the Legacy Fund to finance the completion of state water infrastructure

## **2019 and Beyond**

**Water needs are clearly greater than our resources. We must work hard to "Meet the Challenge" and "complete North Dakota's water infrastructure for economic growth and quality of life."**



*Great Public Schools*

*Great Public Service*

**Testimony Before the Senate Finance and Taxation Committee  
SB 2362  
Wednesday, March 13, 2019**

Good morning Chairman Cook and members of the Committee. For the record, I am Nick Archuleta and I am the President of North Dakota United. On behalf of our 11,500 members, I rise today to urge a DO PASS recommendation for SB 2362.

Mr. Chairman, SB 2362 is a good piece of legislation in that it is a rapid response to correct an unintended error caused by ambiguous language in statute. This ambiguity caused monies intended to be placed in the Foundation Aid Stabilization Fund and the Common Schools Trust Fund to be misapplied to other funds, instead.

SB 2362 makes it very clear that monies intended to be placed in the Foundation Aid Stabilization Fund, and the Common Schools Trust Fund, will indeed go to these important funds to be used to educate not just this generation of North Dakota's students, but generations of North Dakotans in perpetuity. For this, our members are grateful.

Furthermore, Mr. Chairman and members of the Committee, North Dakota United will be fully supportive of any amendment to SB 2362 that seeks to restore the monies that should have gone to the Common Schools Trust Fund and the Foundation Aid Stabilization Fund to those funds.

Mr. Chairman, thank you for the opportunity to be here today. This concludes my testimony and I am happy to answer any questions you may have.



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#10 pg.1

**SB2362** – Testimony in support with request for consideration of amendment.

3/13/2019 – NDCEL

Dr. Aimee Copas – Executive Director

Chairman Cook and members of the Senate Finance and Taxation committee, thank you for taking the time to recognize our testimony regarding SB2362. NDCEL represents school leaders throughout North Dakota. We recognize that the issue that the legislature has been forced to grapple with is unfortunate, and, is in no way something that was done intentionally or with malice.

We fully support the language to correct the distribution of funds moving forward and we appreciate the legislature proposing such language. That being said - I'm sure that all parties involved want nothing more than for the ability to be honor K12 funding priorities along with replenishing the funds into the constitutional funds that support K12 education. We also realize and respect that all decisions made are dependent upon funds. In the opinion of our organization, the ability to fund K12 priorities for this session as outlined in the K12 funding bill and various budgets AND refill the funds in the Common Schools Trust Fund and the Foundation Aid Stabilization Fund is a best-case scenario. We hope that with the financial forecast that was presented this week might present that possibility.

We would ask that if the dollars are possible to maintain the policy and funding increases for K12 funding AND replenish the funds into the Common Schools Trust fund and the Foundation Aid Stabilization fund, that this body support an amendment to this bill that would allow for that ideal scenario to take place. We understand that the modality and timeframe by which such an act would happen would need to be determined by the legislature. We support the body doing the right thing regardless whether it is immediate or over time. Thank you for your time and support of K12 Education.

*NDCEL is the strongest unifying voice representing and supporting administrators and educational leaders in pursuit of quality education for all students in North Dakota.*

*Executive Director: Aimee Copas-----Assistant Director: Russ Ziegler*

Oehlke, Jeb D.

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**From:** McLeod, Carlee M.  
**Sent:** Thursday, September 02, 2010 8:28 AM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Awesome. Thank you.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 5:02 PM  
**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Continuing what you are already doing and introducing a bill draft might make the most sense. The fix does not need to disturb the existing agreement. Just replace inconsistent provisions with a statement that the state's share of revenues from oil and gas production taxes under the agreement shall be distributed as tax revenue under chapter 57-51 and the state's share of revenues from oil extraction taxes under the agreement shall be distributed as tax revenue under chapter 57-51.1.

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 4:57 PM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Yep. And we should be good on the production piece. It's just whether we have to do something difference with extraction than we've been doing.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 4:48 PM  
**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Oh, I see. The introduction to subsection 5 sates it's only discussing oil and gas production taxes, while subsection 1 states that the agreement is to cover both the oil and gas production tax and the oil extraction tax. This is even more messed up than I thought on my quick review.

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 4:45 PM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

I've got a copy and I'll find it and scan it to send to you. However, my confusion is that we're not talking about production taxes. We're talking about extraction. And extraction doesn't distribute to political subdivisions, so any reference to them is out of place there. My gut tells me that the people testifying didn't know the extraction system well enough to give reliable legislative history.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 4:38 PM



**To:** McLeod, Carlee M.

**Subject:** RE: Tribal oil and gas extraction state share split question

3/13 SB 2362 #11 pg. 2

Carlee—

I've just reviewed the legislative history. It's lengthy. <http://www.legis.nd.gov/assembly/60-2007/bill-status/senate/SB2419.pdf>

Some highlights:

Ryan Bernstein testified at p. 13: "my understanding from the Tax Department is that political subdivisions take that [State's share of revenues] first."

Ryan also said in response to a question about the effect of drilling on roads: "That goes to some of the discussions about taxes that are imposed to the counties as to what they will get and try to cover their costs much like it is now with oil producing counties off the reservations. They are able to get some of the tax monies to help build into the roads and infrastructures that will cover the activity that will go on there. As it is written right now that would be taken right off the top and then the money would be split after that." See pp. 13-14.

My interpretation of these statements is that Ryan hadn't had an opportunity to review the existing distributions for himself, and this was a shorthand description.

Rep. Drovdal said on p. 17: "this bill deals only with the tax charged on the oil exploration." This implies that there was no intent to impliedly repeal the existing distribution statutes.

My Stienner, Ass'n of Oil & Gas Producing Counties, said on p. 34: "... keeping in mind that 75% of the gross production goes to the state general fund ..." This implies that there was some awareness that the existing distributions were not only to political subdivisions.

Lengthy discussion at pp. 36-37. Also at the conference committee. In particular, p. 12 of the conf. comm. Includes a statement from Rep. Drovdal: "they had a presentation earlier this year because of the caps that were put in the percentage on that first 5% is 75% is going to the state and the cities; counties and schools are getting 25%. There is a bill that changes that formula ..." This also implies that there was some awareness that the existing distributions were not only to political subdivisions.

Further conference committees were held. In the last conf. comm. hearing on April 21, 2007, p. 1, Rep. Porter says of the last hoghouse amendment: "States share, runs through normal distribution, the political subdivisions and schools are held harmless, ..." This implies no intention to alter existing distribution statutes.

However, throughout the discussions, there were numerous comments about the local impacts of oil production on county roads, local schools, and other political subdivisions. Some amendments that were not incorporated directly into the final approved bill, but which may have had an impact on the final language, would have directly distributed funds to the local governments in addition to a state share and a tribal share.

Now, with the statutes and the legislative history before us, reasonable minds should be able to make sense of the situation. But we're stuck between two positions. Did the Legislature mean to apply the usual distributions for oil and gas production and oil extraction? If so, then the words "among political subdivisions" in NDCC 57-51.2-02(5)(c) is inconsistent with that intent because it implies a restriction of payments to political subdivisions only. But if the Legislature intended only to distribute these revenues to political subdivisions and to exclude entities other than political subdivisions, then the references to chapters 57-51 and 57-51.1 in the same section are inconsistent with that purpose because they distribute funds to other entities.



Before digging further, do you have a copy of the agreement between the Governor and the Tribal Government, or is it available on the web?

Edward

3/13 SB 2362 #11 pg. 3

Edward E. Erickson  
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State of North Dakota  
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Bismarck, ND 58505-0040  
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TTY (800) 366-6888  
eerickso@nd.gov

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 9:58 AM  
**To:** McLeod, Carlee M.; Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Edward,

I know things are always very busy down there. Have you had a chance to look at this? I was just talking with Becky from legislative council, and it seems we both have the same questions. As reports are being generated leading up to session, I think there may be more questions, so it would be great to have a definitive answer.

Thanks!

Carlee

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**From:** McLeod, Carlee M.  
**Sent:** Thursday, March 18, 2010 10:42 AM  
**To:** Erickson, Edward E.  
**Subject:** Tribal oil and gas extraction state share split question

Edward,

I have a question regarding the oil and gas extraction from tribal lands and whether or not it is subject to the split referenced in NDCC 57-51.1-07.

**Applicable law:**

57-51.1-06. Oil extraction tax development fund established. The tax imposed by section 57-51.1-02 must be paid to the state treasurer when collected by the state tax commissioner and must be credited to a special fund in the state treasury, to be known as the oil extraction tax development fund. The moneys accumulated in such fund must be allocated as provided in this chapter and the legislative assembly shall make any appropriation of money that may be necessary to accomplish the purposes of this chapter.

57-51.1-07. Allocation of moneys in oil extraction tax development fund. Moneys deposited in the oil extraction tax development fund must be transferred monthly by the state treasurer as follows:

1. Twenty percent must be allocated and credited to the sinking fund established for payment of the state of North Dakota water development bonds, southwest pipeline series, and any moneys in excess of the sum necessary to maintain the account within the sinking fund and for the payment of principal and interest on the bonds must be credited to a special trust fund, to be known as the resources trust fund. The resources trust fund must be established in the state treasury and the funds therein must be deposited and invested as are other state funds to earn the maximum amount permitted by law which income must be deposited in the resources trust fund. The principal and income of the resources trust fund may be expended only pursuant to legislative appropriation and are available to:

- a. The state water commission for planning for and construction of water-related projects, including rural water systems. These water-related projects must be those which the state water commission has the authority to undertake and construct pursuant to chapter 61-02; and
  - b. The industrial commission for the funding of programs for development of energy conservation and renewable energy sources; for studies for development of cogeneration systems that increase the capacity of a system to produce more than one kind of energy from the same fuel; for studies for development of waste products utilization; and for the making of grants and loans in connection therewith.
2. Twenty percent must be allocated as provided in section 24 of article X of the Constitution of North Dakota.
  3. Sixty percent must be allocated and credited to the state's general fund for general state purposes.

57-51.1-07.2. Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula. The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

57-51.1-07.4. Separate allocation of state share of collections from reservation development. Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009.

57-51.2-02. Agreement requirements. An agreement under this chapter is subject to the following:

1. The only taxes subject to agreement are the state's oil and gas gross production and oil extraction taxes attributable to production from wells located within the exterior boundaries of the Fort Berthold Reservation.
2. The state's oil and gas gross production tax under chapter 57-51 must apply to all wells located within the Fort Berthold Reservation.
3. The state's oil extraction tax under chapter 57-51.1 as applied to oil and gas production attributable to trust lands on the Fort Berthold Reservation may not exceed six and one-half percent but may be reduced through negotiation between the governor and the Three Affiliated Tribes.
4. Any exemptions for oil and gas production from trust lands under chapters 57-51 and 57-51.1 do not apply to production within the boundaries of the Fort Berthold Reservation except as otherwise provided in the agreement.
5. The allocation of revenue from oil and gas production taxes on the Fort Berthold Reservation must be as follows:
  - a. Production attributable to trust lands. All revenues and exemptions from all oil and gas gross production and oil extraction taxes attributable to production from trust lands on the Fort Berthold Reservation must be evenly divided between the tribe and the state.
  - b. All other production. The tribe must receive twenty percent of the total oil and gas gross production taxes collected from all production attributable to nontrust lands on the Fort Berthold Reservation in lieu of the application of the Three Affiliated Tribes' fees and taxes related to production on such lands. The state must receive the remainder.
  - c. The state's share of the revenue as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 and 57-51.1.
6. An oil or gas well that is drilled and completed during the time of an agreement under this chapter must be subject to the terms of the agreement for the life of the well.
7. The Three Affiliated Tribes must agree not to impose a tribal tax or any fee on future production of oil and gas on the Fort Berthold Reservation during the term of the agreement.
8. To address situations in which the tax commissioner refunds taxes to a taxpayer, the agreement must allow the tax commissioner to offset future distributions to the tribe.
9. The tax commissioner must retain authority to administer and enforce chapters 57-51 and 57-51.1 as applied to wells subject to any agreement authorized by this chapter.
10. An oil or gas well that is drilled and completed during the time an agreement under this chapter is in effect is subject to state regulatory provisions for the life of the well in addition to any other applicable regulatory provisions.
11. The federal district court for the western division of North Dakota is the venue for any dispute arising from a revenue-sharing agreement between the state and the Three Affiliated Tribes.

57-51.2-03. Statutory inconsistencies superseded. This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions.

3/13 SB 2362 #11 pg.5

END NDCC

My question is two fold: One, are tribal extraction dollars subject to the 60/20/20 split, and if so, does that split apply before the 700,000 cap is met, or does it kick in after?

Per NDCC 57-51.1-07.4, the first \$700,000 of the state share of tribal extraction is to be put in the permanent oil trust fund. We have interpreted state share in that context to mean the dollars not distributed to the tribes from the tribal extraction distribution. So, for instance, if in month 1, \$100 was the amount not distributed to the tribes, we would apply that entire \$100 to the permanent oil trust fund to be credited against the \$700,000 "cap". In our interpretation, we view the state share referenced in 57-51.1-07.4 as meaning the non-tribal portion, and have put all non-tribal monies of the tribal agreement toward the \$700,000. We don't believe that even if the 60/20/20 split is applicable to the tribal agreement, it is applicable to the first \$700,000.

We come to this understanding from reading NDCC 57-51.2-02(5)(c) regarding the "state share" meaning the non-tribal portion.

That section also goes onto state that the state share shall be distributed to political subdivisions as provided in 57-51 (gross production) and 57-51.1 (extraction). The portion of the state dollars distributed in 57-51.1 is found at 57-51.1-07, and the monies are separated into funds, not distributed to political subdivisions. Money is divided into funds. Are we to break down the tribal state share into the 60/20/20 in accordance with 57-51.1-07 and put only 60% of the tribal money in the permanent oil trust, or put the all money into the permanent oil trust fund as per 57-51.1-07.2?

Thanks,  
Carlee

**Carlee McLeod**  
**Deputy State Treasurer**

Deputy State Treasurer  
State of North Dakota  
600 East Boulevard Dept. 120  
Bismarck, ND 58505-0120  
Phone: 701.328.2643  
Email: [cmcleod@nd.gov](mailto:cmcleod@nd.gov)  
[www.nd.gov/ndtreas](http://www.nd.gov/ndtreas)

Introduced by

Senators Cook, Holmberg, Wardner

Representatives Delzer, Headland, Pollert

(Approved by the Delayed Bills Committee)

1 A BILL for an Act to amend and reenact ~~section~~sections 57-51.1-07 and 57-51.1-07.5 of the  
2 North Dakota Century Code, relating to the allocation of oil extraction tax; to provide an effective  
3 date; and to declare an emergency.

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

5 **SECTION 1. AMENDMENT.** Section 57-51.1-07 of the North Dakota Century Code is  
6 amended and reenacted as follows:

7 **57-51.1-07. Allocation of moneys in oil extraction tax development fund. (Effective**  
8 **through July 31, 2019)**

9 Moneys deposited in the oil extraction tax development fund must be transferred monthly by  
10 the state treasurer as follows:

11 1. Twenty percent must be allocated and credited to the sinking fund established for  
12 payment of the state of North Dakota water development bonds, southwest pipeline  
13 series, and any moneys in excess of the sum necessary to maintain the accounts  
14 within the sinking fund and for the payment of principal and interest on the bonds must  
15 be credited to a special trust fund, to be known as the resources trust fund. The  
16 resources trust fund must be established in the state treasury and the funds therein  
17 must be deposited and invested as are other state funds to earn the maximum amount  
18 permitted by law which income must be deposited in the resources trust fund. Three  
19 percent of the amount credited to the resources trust fund must be transferred no less  
20 than quarterly into the renewable energy development fund, not to exceed three  
21 million dollars per biennium. One half of one percent of the amount credited to the  
22 resources trust fund must be transferred no less than quarterly into the energy  
23 conservation grant fund not to exceed two hundred thousand dollars per biennium.



- 1 The principal and income of the resources trust fund may be expended only pursuant
- 2 to legislative appropriation and are available to:
- 3 a. The state water commission for planning for and construction of water-related
- 4 projects, including rural water systems. These water-related projects must be
- 5 those which the state water commission has the authority to undertake and
- 6 construct pursuant to chapter 61-02.
- 7 b. The industrial commission for the funding of programs for development of
- 8 renewable energy sources; for studies for development of cogeneration systems
- 9 that increase the capacity of a system to produce more than one kind of energy
- 10 from the same fuel; for studies for development of waste products utilization; and
- 11 for the making of grants and loans in connection therewith.
- 12 c. The department of commerce for the funding of programs for development of
- 13 energy conservation and for the making of grants and loans relating to energy
- 14 conservation.
- 15 2. Twenty percent must be allocated to the common schools trust fund and foundation
- 16 aid stabilization fund as provided in section 24 of article X of the Constitution of North
- 17 Dakota.
- 18 3. Thirty percent must be allocated to the legacy fund as provided in section 26 of
- 19 article X of the Constitution of North Dakota.
- 20 4. Thirty percent must be allocated and credited to the state's general fund.

21 **Allocation of moneys in oil extraction tax development fund. (Effective after July 31,**  
22 **2019)**

23 Moneys deposited in the oil extraction tax development fund from revenue collected under  
24 section 57-51.1-02 and, excluding oil extraction tax revenue allocated to the state collected under  
25 the terms of an agreement entered pursuant to chapter 57-51.2, must be transferred monthly by  
26 the state treasurer as follows:

- 27 1. Twenty percent must be allocated and credited to the sinking fund established for
- 28 payment of the state of North Dakota water development bonds, southwest pipeline
- 29 series, and any moneys in excess of the sum necessary to maintain the accounts
- 30 within the sinking fund and for the payment of principal and interest on the bonds must
- 31 be credited to a special trust fund, to be known as the resources trust fund. The

resources trust fund must be established in the state treasury and the funds therein must be deposited and invested as are other state funds to earn the maximum amount permitted by law which income must be deposited in the resources trust fund. Three percent of the amount credited to the resources trust fund must be transferred no less than quarterly into the renewable energy development fund, not to exceed three million dollars per biennium. One-half of one percent of the amount credited to the resources trust fund must be transferred no less than quarterly into the energy conservation grant fund not to exceed one million two hundred thousand dollars per biennium. The principal and income of the resources trust fund may be expended only pursuant to legislative appropriation and are available to:

- a. The state water commission for planning for and construction of water-related projects, including rural water systems. These water-related projects must be those which the state water commission has the authority to undertake and construct pursuant to chapter 61-02; and
  - b. The industrial commission for the funding of programs for development of renewable energy sources; for studies for development of cogeneration systems that increase the capacity of a system to produce more than one kind of energy from the same fuel; for studies for development of waste products utilization; and for the making of grants and loans in connection therewith.
  - c. The department of commerce for the funding of programs for development of energy conservation and for the making of grants and loans relating to energy conservation.
2. Twenty percent must be allocated to the common schools trust fund and foundation aid stabilization fund as provided in section 24 of article X of the Constitution of North Dakota.
  3. Thirty percent must be allocated to the legacy fund as provided in section 26 of article X of the Constitution of North Dakota. For purposes of the calculation under this subsection, oil extraction tax revenue includes revenue allocated to the state under the terms of an agreement entered pursuant to chapter 57-51.2.
  4. Thirty percent ~~All remaining funds~~ must be allocated and credited to the state's general fund.

**SECTION 2. AMENDMENT.** Section 57-51.1-07.5 of the North Dakota Century Code is amended and reenacted as follows:

**57-51.1-07.5. State share of oil and gas taxes - Deposits.**

From the revenues designated for deposit in the state general fund under chapters 57-51 and 57-51.1, and 57-51.2, the state treasurer shall deposit the revenues received each biennium in the following order:

1. The first two hundred million dollars into the state general fund;
2. The next two hundred million dollars into the tax relief fund;
3. The next seventy-five million dollars into the budget stabilization fund, but not in an amount that would bring the balance in the fund to more than the limit in section 54-27.2-01;
4. For the period beginning August 1, 2017, and ending July 31, 2019, the next two hundred million dollars into the state general fund and after July 31, 2019, the next one hundred million dollars into the state general fund;
5. The next one hundred million dollars:
  - a. Eighty percent into the strategic investment and improvements fund and twenty percent into the lignite research fund until three million dollars has been deposited into the lignite research fund to be used for advanced energy technology grants; and
  - b. One hundred percent into the strategic investment and improvements fund after three million dollars has been deposited into the lignite research fund;
6. The next twenty million dollars into the state disaster relief fund, but not in an amount that would bring the unobligated balance in the fund to more than twenty million dollars; and
7. Any additional revenues into the strategic investment and improvements fund.

**SECTION 3. EFFECTIVE DATE.** This Act is effective for allocations made by the state treasurer beginning on the first day of the month following the month in which this Act is filed with the secretary of state.

**SECTION 4. EMERGENCY.** This Act is declared to be an emergency measure.



March 25, 2019

PROPOSED AMENDMENTS TO SENATE BILL NO. 2362

Page 1, line 2, after the first semicolon insert "to provide a contingent appropriation and transfer;"

Page 1, line 2, after the second semicolon insert "to provide an expiration date;"

Page 2, line 27, overstrike "and credited"

Page 3, line 23, after the period insert: "One-half of one percent must be allocated to the resources trust fund beginning with allocations made by the state treasurer in August 2019 and continuing until the combined allocations under this subsection total one hundred twenty-eight million seven hundred forty thousand dollars, after which the allocations under this subsection become ineffective."

3."

Page 3, line 28, overstrike "Thirty percent" and insert immediately thereafter "The remainder"

Page 3, line 28, overstrike "and credited"

Page 3, after line 28, insert:

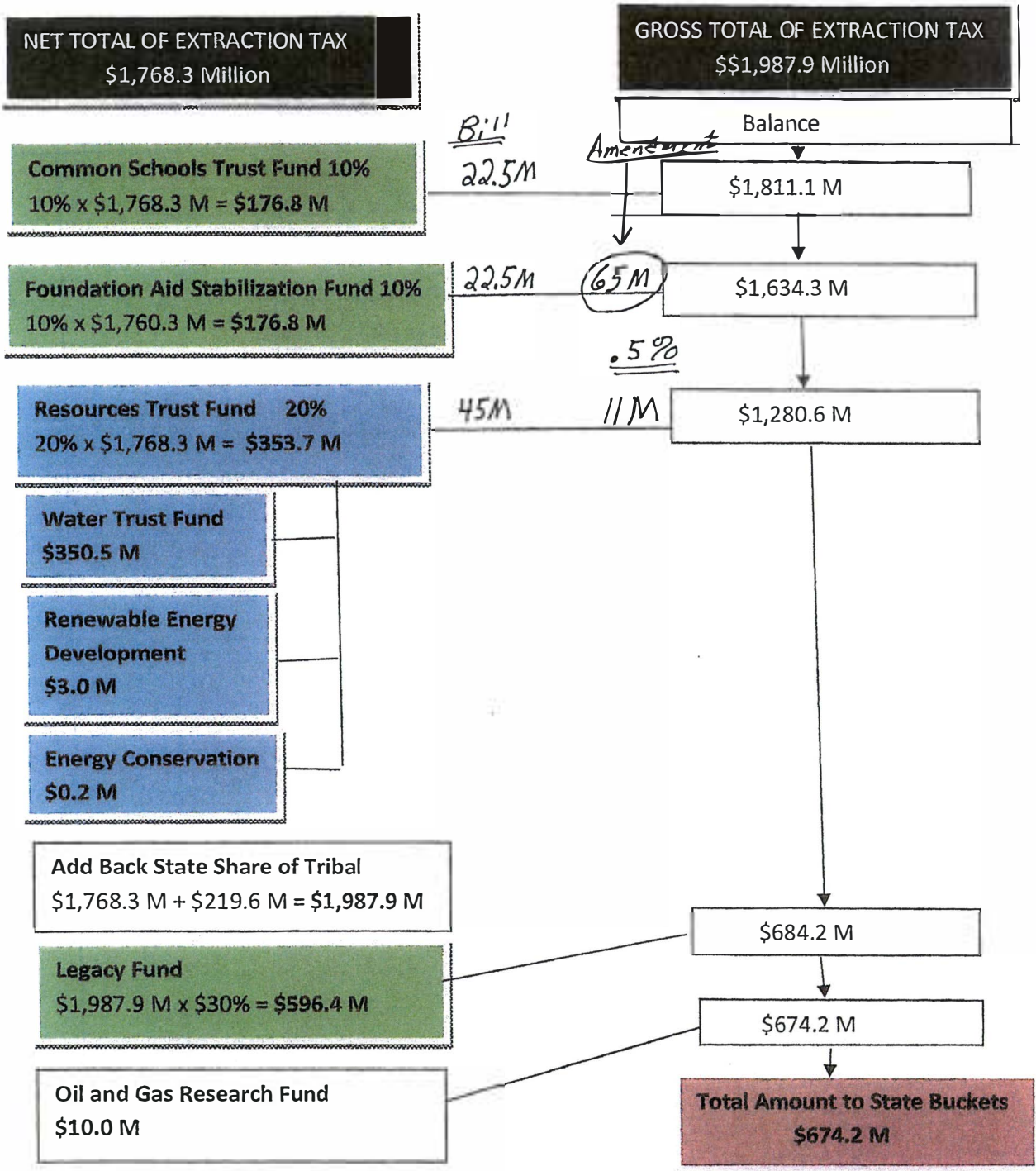
**"SECTION 2. CONTINGENT APPROPRIATION - TRANSFER - GENERAL FUND TO COMMON SCHOOLS TRUST FUND.** If the actual legacy fund earnings transferred to the general fund at the end of the 2019-21 biennium in accordance with section 26 of article X of the Constitution of North Dakota exceed the estimate made by the sixty-sixth legislative assembly by at least \$64,370,000, there is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of \$64,370,000, which the state treasurer shall immediately transfer to the common schools trust fund, for the biennium beginning July 1, 2019, and ending June 30, 2021."

Renumber accordingly

#1 SB 2362  
3-29-19

A1

## OIL AND GAS EXTRACTION TAX



#2

SB 2362  
3-29-19

# STATE BUCKETS AND LEGACY FUND

ASSUMPTIONS: \$52.50 A BARREL FOR OIL

1,200,000 BARRELS PER DAY

Proposal

## STATE BUCKET FUND

Gross Production Tax	\$752.0 M
Extraction Tax	\$674.2 M X
Total Bucket Fund	\$1,426,2 M

## STATE LEGACY FUND

Gross Production Tax	\$613,5 M
Extraction Tax	\$596.4 M
Total Placed In Legacy	\$1,209.9 M

State General Fund #1 \$200.0 M

County Social Services \$200.0 M

Budget Stabilization Fund \$75.0 M

State General Fund #2 \$200.0 M

Lignite Research Fund \$10.0 M

Disaster Relief Fund 0.0 M

Municipal Infrastructure Fund \$30.4 M

Strategic Investment and  
Improvement Fund \$400 M

County /Township Infrastructure Fund 30.4 M

Municipal Infrastructure Fund \$84.6.0 M

County/Township Infrastructure Fund \$84.6 M

Airport Infrastructure Fund \$20 M

Strategic Investment and Improvement Fund \$91.2 M X

#3

SB 2362  
3-29-19

pg 1

## LEGACY EARNINGS 2019 - 2021 BIENNIUM

### Assumptions

Rate of Earnings ----- 3.5%

Average Principle Balance ----- 6.7 Billion

$6.7 \text{ B} \times 3.5\% \times 2 \text{ years} = 470 \text{ Million}$

Starting Balance ----- 470.0 M

2019-21 Appropriation----- 100.0 M

Balance 370.0 M

**Common Schools Replacement 64.5 M**

Balance 305.5 M



Introduced by

Senators Cook, Holmberg, Wardner

Representatives Delzer, Headland, Pollert

(Approved by the Delayed Bills Committee)

- 1 A BILL for an Act to amend and reenact section 57-51.1-07 of the North Dakota Century Code,  
2 relating to the allocation of oil extraction tax; to provide a contingent appropriation; to provide for  
3 a transfer; to provide an effective date; and to declare an emergency.

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

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8 **~~through July 31, 2019)~~**

9 Moneys deposited in the oil extraction tax development fund must be transferred monthly by  
10 the state treasurer as follows:

- 11 4. ~~Twenty percent must be allocated and credited to the sinking fund established for~~  
12 ~~payment of the state of North Dakota water development bonds, southwest pipeline~~  
13 ~~series, and any moneys in excess of the sum necessary to maintain the accounts~~  
14 ~~within the sinking fund and for the payment of principal and interest on the bonds must~~  
15 ~~be credited to a special trust fund, to be known as the resources trust fund. The~~  
16 ~~resources trust fund must be established in the state treasury and the funds therein~~  
17 ~~must be deposited and invested as are other state funds to earn the maximum amount~~  
18 ~~permitted by law which income must be deposited in the resources trust fund. Three~~  
19 ~~percent of the amount credited to the resources trust fund must be transferred no less~~  
20 ~~than quarterly into the renewable energy development fund, not to exceed three~~  
21 ~~million dollars per biennium. One half of one percent of the amount credited to the~~  
22 ~~resources trust fund must be transferred no less than quarterly into the energy~~  
23 ~~conservation grant fund not to exceed two hundred thousand dollars per biennium.~~

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- 3 a. The state water commission for planning for and construction of water related  
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- 7 b. The industrial commission for the funding of programs for development of  
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9 that increase the capacity of a system to produce more than one kind of energy  
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- 18 3. Thirty percent must be allocated to the legacy fund as provided in section 26 of  
19 article X of the Constitution of North Dakota.
- 20 4. Thirty percent must be allocated and credited to the state's general fund.

21 **Allocation of moneys in oil extraction tax development fund. (Effective after July 31,**  
22 **2019)**

23 Moneys deposited in the oil extraction tax development fund from revenue collected under  
24 section 57-51.1-02 and oil extraction tax revenue allocated to the state under the terms of an  
25 agreement entered pursuant to chapter 57-51.2 must be transferred monthly by the state  
26 treasurer as follows:

- 27 1. Twenty percent must be allocated ~~and credited~~ to the sinking fund established for  
28 payment of the state of North Dakota water development bonds, southwest pipeline  
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30 within the sinking fund and for the payment of principal and interest on the bonds must  
31 be credited to a special trust fund, to be known as the resources trust fund. The

- 1 resources trust fund must be established in the state treasury and the funds therein  
2 must be deposited and invested as are other state funds to earn the maximum amount  
3 permitted by law which income must be deposited in the resources trust fund. Three  
4 percent of the amount credited to the resources trust fund must be transferred no less  
5 than quarterly into the renewable energy development fund, not to exceed three  
6 million dollars per biennium. One-half of one percent of the amount credited to the  
7 resources trust fund must be transferred no less than quarterly into the energy  
8 conservation grant fund not to exceed one million two hundred thousand dollars per  
9 biennium. The principal and income of the resources trust fund may be expended only  
10 pursuant to legislative appropriation and are available to:
- 11 a. The state water commission for planning for and construction of water-related  
12 projects, including rural water systems. These water-related projects must be  
13 those which the state water commission has the authority to undertake and  
14 construct pursuant to chapter 61-02; and
- 15 b. The industrial commission for the funding of programs for development of  
16 renewable energy sources; for studies for development of cogeneration systems  
17 that increase the capacity of a system to produce more than one kind of energy  
18 from the same fuel; for studies for development of waste products utilization; and  
19 for the making of grants and loans in connection therewith.
- 20 c. The department of commerce for the funding of programs for development of  
21 energy conservation and for the making of grants and loans relating to energy  
22 conservation.
- 23 2. One-half of one percent must be allocated to the resources trust fund beginning with  
24 allocations made by the state treasurer in August 2019 and continuing until the  
25 combined allocations under this subsection total one hundred twenty-eight million  
26 seven hundred forty thousand dollars, after which the state treasurer shall discontinue  
27 making allocations under this subsection.
- 28 3. Twenty percent must be allocated to the common schools trust fund and foundation  
29 aid stabilization fund as provided in section 24 of article X of the Constitution of North  
30 Dakota.



1 ~~3.4.~~ Thirty percent must be allocated to the legacy fund as provided in section 26 of  
2 article X of the Constitution of North Dakota.

3 ~~4. Thirty percent~~

4 5. The remainder must be allocated ~~and credited~~ to the state's general fund.

5 **SECTION 2. CONTINGENT APPROPRIATION - TRANSFER - GENERAL FUND TO**  
6 **COMMON SCHOOLS TRUST FUND.** If the actual legacy fund earnings transferred to the  
7 general fund at the end of the 2019-21 biennium in accordance with section 26 of article X of  
8 the Constitution of North Dakota exceed the estimate made by the sixty-sixth legislative  
9 assembly by at least \$64,370,000, there is appropriated out of any moneys in the general fund  
10 in the state treasury, not otherwise appropriated, the sum of \$64,370,000, which the state  
11 treasurer shall immediately transfer to the common schools trust fund, for the biennium  
12 beginning July 1, 2019, and ending June 30, 2021.

13 **SECTION 3. EFFECTIVE DATE.** This Act is effective for allocations made by the state  
14 treasurer beginning on the first day of the month following the month in which this Act is filed  
15 with the secretary of state.

16 **SECTION 4. EMERGENCY.** This Act is declared to be an emergency measure.



STATE OF NORTH DAKOTA  
**OFFICE OF STATE TREASURER**  
KELLY L. SCHMIDT, STATE TREASURER

Kelly Schmidt, State Treasurer  
In Support of SB 2362  
Senate Appropriations  
Sen. Holmberg, Chair  
Sen. Krebsbach, Vice-Chair  
Sen. Wanzek, Vice-Chair  
March 29, 2019

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pg 1

Mr. Chairman, members of the committee, I am Kelly Schmidt, State Treasurer. I stand in support of SB 2362 as it would clarify ambiguous statutes relating to the oil extraction tax allocations my office completes each month.

I would like to give you a brief history and the steps the Office of State Treasurer has taken to interpret the statutes and our attempts to clarify the ambiguity.

The oil extraction allocation has remained constant since Nov. 2007 with the first collection of tax on tribal land. During the 2009-2011 biennium, as oil activity began to increase on the Fort Berthold Reservation and the state was negotiating tribal agreements associated with this activity, our office thoroughly researched the related statutes within North Dakota Century Code. This was a concerted effort on our behalf to ensure we correctly and accurately allocated the state's share of oil and gas revenue from wells subject to the oil and gas agreement between the Three Affiliated Tribes and the State of North Dakota.

In researching the applicable statutes, the determination was made that the state's share of oil extraction revenue imposed on tribal lands was tribal revenue shared with the state and therefore separate and distinct from the oil extraction tax generated on land within the state. Based on statutory language referencing "state share", an interpretation was made to allocate the state's share of tribal revenue directly to the general fund bucket of the formula.

During our research, it became clear there were numerous conflicts among the related chapters which could lead to differing interpretations of the law. With these conflicts in mind, we sought guidance from the Attorney General's office. Upon reviewing the statutes in question and the pertinent legislative history, the Attorney General's office concluded the statute was indeed ambiguous and multiple conflicting interpretations could be reached. He also determined that we had reached a reasonable conclusion which did not contradict clear and unambiguous statutory language. The Attorney General's Office also advised we continue to make the allocations in this matter until clarification was received from the legislature. Attachment A is correspondence between the Deputy Treasurer and the Attorney General's office from March 2010 to September 2010 relating to this discussion.

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In the 2011 legislative session, we worked diligently with numerous individuals and agencies to obtain clarification. We worked directly with OMB and the Governor's Office. We worked with legislators to remedy the inconsistencies. Amendments were proposed and drafted during that session, none of which were included in the final passage of any bill. After 10 conference committee meetings, HB 1268 containing clarifying language was ultimately killed in conference committee. With no changes to the specific statutes relating to this issue, our office continued to allocate this revenue based on our initial interpretation as suggested by the Attorney General's Office.

As part of our fiscal audit for the 2009-2011 biennium, the State Auditor's Office audited the allocation of oil and gas tax revenues and, specifically, our interpretation of the statutes relating to the oil extraction tax from tribal lands. We explained to them our process in making the determination and how we sought guidance directly from the Attorney General's Office on the issue. They subsequently requested confirmation of this guidance from the Attorney General's Office. Included in your materials (attachment B) is an August 2012 email between the Attorney General's Office and the State Auditor's Office. This allocation has been reviewed and audited with no findings over the last 5 biennia by the State Auditor.

My office has worked diligently to ensure that all funds are being allocated and distributed correctly based on statute and as intended by the legislature. With the exponential growth of oil and gas revenue to the state and the changes made each biennium to the distributions formulas and allocations I believe this topic was muted due to the strength and urgency of those issues. My team and I work tirelessly before and during each legislative session to ensure bills containing changes to any oil and gas formulas are drafted in such a way that we are able to allocate and distribute the funds exactly as intended by the legislature and that no further conflicts are created. (This session was the Prairie Dog Bill) It is after the session we step up again to implement these biennial changes to ensure "the buckets" are filled and our counties, cities, schools, and townships receive their funds accurately.

We fully appreciate the opportunity to clarify this portion of the oil extraction tax allocations and would ask for your support of SB 2362 which provides the much-needed clarification of this very ambiguous subject.

Deputy Treasurer & AG  
Oil Extraction  
Mar. 2010 - Sept 2010

(A)

Oehlke, Jeb D.

**Sent:** [redacted]  
**To:** McLeod, Carlee M.  
**Subject:** Thursday, September 02, 2010 8:28 AM  
Erickson, Edward E.  
RE: Tribal oil and gas extraction state share split question

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pg 3

Awesome. Thank you.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 5:02 PM  
**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Continuing what you are already doing and introducing a bill draft might make the most sense. The fix does not need to disturb the existing agreement. Just replace inconsistent provisions with a statement that the state's share of revenues from oil and gas production taxes under the agreement shall be distributed as tax revenue under chapter 57-51 and the state's share of revenues from oil extraction taxes under the agreement shall be distributed as tax revenue under chapter 57-51.1.

---

**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 4:57 PM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Yep. And we should be good on the production piece. It's just whether we have to do something difference with extraction than we've been doing.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 4:48 PM  
**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Oh, I see. The introduction to subsection 5 sates it's only discussing oil and gas production taxes, while subsection 1 states that the agreement is to cover both the oil and gas production tax and the oil extraction tax. This is even more messed up than I thought on my quick review.

---

**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 4:45 PM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

I've got a copy and I'll find it and scan it to send to you. However, my confusion is that we're not talking about production taxes. We're talking about extraction. And extraction doesn't distribute to political subdivisions, so any reference to them is out of place there. My gut tells me that the people testifying didn't know the extraction system well enough to give reliable legislative history.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 4:38 PM

**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

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Carlee—

I've just reviewed the legislative history. It's lengthy. <http://www.legis.nd.gov/assembly/60-2007/bill-status/senate/SB2419.pdf>

Some highlights:

Ryan Bernstein testified at p. 13: "my understanding from the Tax Department is that political subdivisions take that [State's share of revenues] first."

Ryan also said in response to a question about the effect of drilling on roads: "That goes to some of the discussions about taxes that are imposed to the counties as to what they will get and try to cover their costs much like it is now with oil producing counties off the reservations. They are able to get some of the tax monies to help build into the roads and infrastructures that will cover the activity that will go on there. As it is written right now that would be taken right off the top and then the money would be split after that." See pp. 13-14.

My interpretation of these statements is that Ryan hadn't had an opportunity to review the existing distributions for himself, and this was a shorthand description.

Rep. Drovdal said on p. 17: "this bill deals only with the tax charged on the oil exploration." This implies that there was no intent to impliedly repeal the existing distribution statutes.

Vicky Stiener, Ass'n of Oil & Gas Producing Counties, said on p. 34: "... keeping in mind that 75% of the gross production tax goes to the state general fund ..." This implies that there was some awareness that the existing distributions were not only to political subdivisions.

Lengthy discussion at pp. 36-37. Also at the conference committee. In particular, p. 12 of the conf. comm. Includes a statement from Rep. Drovdal: "they had a presentation earlier this year because of the caps that were put in the percentage on that first 5% is 75% is going to the state and the cities; counties and schools are getting 25%. There is a bill that changes that formula ..." This also implies that there was some awareness that the existing distributions were not only to political subdivisions.

Further conference committees were held. In the last conf. comm. hearing on April 21, 2007, p. 1, Rep. Porter says of the last hoghouse amendment: "States share, runs through normal distribution, the political subdivisions and schools are held harmless, ..." This implies no intention to alter existing distribution statutes.

However, throughout the discussions, there were numerous comments about the local impacts of oil production on county roads, local schools, and other political subdivisions. Some amendments that were not incorporated directly into the final approved bill, but which may have had an impact on the final language, would have directly distributed funds to the local governments in addition to a state share and a tribal share.

Now, with the statutes and the legislative history before us, reasonable minds should be able to make sense of the situation. But we're stuck between two positions. Did the Legislature mean to apply the usual distributions for oil and gas production and oil extraction? If so, then the words "among political subdivisions" in NDCC 57-51.2-02(5)(c) is inconsistent with that intent because it implies a restriction of payments to political subdivisions only. But if the Legislature intended only to distribute these revenues to political subdivisions and to exclude entities other than political subdivisions, then the references to chapters 57-51 and 57-51.1 in the same section are inconsistent with that purpose because they distribute funds to other entities.



Before digging further, do you have a copy of the agreement between the Governor and the Tribal Government, or is it available on the web?

Edward

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eerickso@nd.gov

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pg 5

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 9:58 AM  
**To:** McLeod, Carlee M.; Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Edward,

I know things are always very busy down there. Have you had a chance to look at this? I was just talking with Becky from legislative council, and it seems we both have the same questions. As reports are being generated leading up to session, I think there may be more questions, so it would be great to have a definitive answer.

Thanks!  
Carlee

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**From:** McLeod, Carlee M.  
**Sent:** Thursday, March 18, 2010 10:42 AM  
**To:** Erickson, Edward E.  
**Subject:** Tribal oil and gas extraction state share split question

Edward,

I have a question regarding the oil and gas extraction from tribal lands and whether or not it is subject to the split referenced in NDCC 57-51.1-07.

**Applicable law:**

57-51.1-06. Oil extraction tax development fund established. The tax imposed by section 57-51.1-02 must be paid to the state treasurer when collected by the state tax commissioner and must be credited to a special fund in the state treasury, to be known as the oil extraction tax development fund. The moneys accumulated in such fund must be allocated as provided in this chapter and the legislative assembly shall make any appropriation of money that may be necessary to accomplish the purposes of this chapter.

57-51.1-07. Allocation of moneys in oil extraction tax development fund. Moneys deposited in the oil extraction tax development fund must be transferred monthly by the state treasurer as follows:

1. Twenty percent must be allocated and credited to the sinking fund established for payment of the state of North Dakota water development bonds, southwest pipeline series, and any moneys in excess of the sum necessary to maintain the account within the sinking fund and for the payment of principal and interest on the bonds must be credited to a special trust fund, to be known as the resources trust fund. The resources trust fund must be established in the state treasury and the funds therein must be deposited and invested as are other state funds to earn the maximum amount permitted by law which income must be deposited in the resources trust fund. The principal and income of the resources trust fund may be expended only pursuant to legislative appropriation and are available to:

- a. The state water commission for planning for and construction of water-related projects, including rural water systems. These water-related projects must be those which the state water commission has the authority to undertake and construct pursuant to chapter 61-02; and
  - b. The industrial commission for the funding of programs for development of energy conservation and renewable energy sources; for studies for development of cogeneration systems that increase the capacity of a system to produce more than one kind of energy from the same fuel; for studies for development of waste products utilization; and for the making of grants and loans in connection therewith.
2. Twenty percent must be allocated as provided in section 24 of article X of the Constitution of North Dakota.
  3. Sixty percent must be allocated and credited to the state's general fund for general state purposes.

57-51.1-07.2. Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula. The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

57-51.1-07.4. Separate allocation of state share of collections from reservation development. Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009.

57-51.2-02. Agreement requirements. An agreement under this chapter is subject to the following:

1. The only taxes subject to agreement are the state's oil and gas gross production and oil extraction taxes attributable to production from wells located within the exterior boundaries of the Fort Berthold Reservation.
2. The state's oil and gas gross production tax under chapter 57-51 must apply to all wells located within the Fort Berthold Reservation.
3. The state's oil extraction tax under chapter 57-51.1 as applied to oil and gas production attributable to trust lands on the Fort Berthold Reservation may not exceed six and one-half percent but may be reduced through negotiation between the governor and the Three Affiliated Tribes.
4. Any exemptions for oil and gas production from trust lands under chapters 57-51 and 57-51.1 do not apply to production within the boundaries of the Fort Berthold Reservation except as otherwise provided in the agreement.
5. The allocation of revenue from oil and gas production taxes on the Fort Berthold Reservation must be as follows:

- a. Production attributable to trust lands. All revenues and exemptions from all oil and gas gross production and oil extraction taxes attributable to production from trust lands on the Fort Berthold Reservation must be evenly divided between the tribe and the state.
- b. All other production. The tribe must receive twenty percent of the total oil and gas gross production taxes collected from all production attributable to nontrust lands on the Fort Berthold Reservation in lieu of the application of the Three Affiliated Tribes' fees and taxes related to production on such lands. The state must receive the remainder.
- c. The state's share of the revenue as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 and 57-51.1.

6. An oil or gas well that is drilled and completed during the time of an agreement under this chapter must be subject to the terms of the agreement for the life of the well.
7. The Three Affiliated Tribes must agree not to impose a tribal tax or any fee on future production of oil and gas on the Fort Berthold Reservation during the term of the agreement.
8. To address situations in which the tax commissioner refunds taxes to a taxpayer, the agreement must allow the tax commissioner to offset future distributions to the tribe.
9. The tax commissioner must retain authority to administer and enforce chapters 57-51 and 57-51.1 as applied to wells subject to any agreement authorized by this chapter.
10. An oil or gas well that is drilled and completed during the time an agreement under this chapter is in effect is subject to state regulatory provisions for the life of the well in addition to any other applicable regulatory provisions.
11. The federal district court for the western division of North Dakota is the venue for any dispute arising from a revenue-sharing agreement between the state and the Three Affiliated Tribes.

57-51.2-03. Statutory inconsistencies superseded. This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions.



# 5

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pg 7

**END NDCC**

question is two fold: One, are tribal extraction dollars subject to the 60/20/20 split, and if so, does that split apply before the 700,000 cap is met, or does it kick in after?

Per NDCC 57-51.1-07.4, the first \$700,000 of the state share of tribal extraction is to be put in the permanent oil trust fund. We have interpreted state share in that context to mean the dollars not distributed to the tribes from the tribal extraction distribution. So, for instance, if in month 1, \$100 was the amount not distributed to the tribes, we would apply that entire \$100 to the permanent oil trust fund to be credited against the \$700,000 "cap". In our interpretation, we view the state share referenced in 57-51.1-07.4 as meaning the non-tribal portion, and have put all non-tribal monies of the tribal agreement toward the \$700,000. We don't believe that even if the 60/20/20 split is applicable to the tribal agreement, it is applicable to the first \$700,000.

### Question Asked

We come to this understanding from reading NDCC 57-51.2-02(5)(c) regarding the "state share" meaning the non-tribal portion.

That section also goes onto state that the state share shall be distributed to political subdivisions as provided in 57-51 (gross production) and 57-51.1 (extraction). The portion of the state dollars distributed in 57-51.1 is found at 57-51.1-07, and the monies are separated into funds, not distributed to political subdivisions. Money is divided into funds. Are we to break down the tribal state share into the 60/20/20 in accordance with 57-51.1-07 and put only 60% of the tribal money in the permanent oil trust, or put the all money into the permanent oil trust fund as per 57-51.1-07.2?

Thanks,  
Carlee

**Carlee McLeod**  
**Deputy State Treasurer**

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AG to Auditor  
Oil Extraction 2009-11 Audit  
Aug. 2012

(B)

Oehlke, Jeb D.

#5 582362

3-29-19

pg 8

From: Erickson, Edward E.  
Sent: Tuesday, August 07, 2012 4:52 PM  
To: Scherbenske, Kevin J.  
Cc: Oehlke, Jeb D.; Mickelson, Lori S.  
Subject: Tribal Oil Extraction Tax Allocation

Kevin—

It is my understanding that you have asked what advice I gave the State Treasurer's Office on handling the Tribal Oil Extraction Tax distribution in NDCC 57-51.2-02(5)(c) during the 2009-2011 biennium. This was a significantly long time ago, and my final advice was given in a conversation. To the best of my present recollection, my analysis was that the statutes involved were ambiguous as a matter of law and that these issues were not clarified by the legislative history nor by the agreement between the Governor and tribal government. Therefore, the STO should continue making distributions as they had and seek a legislative correction to remove the ambiguity.

There is a conflict in the relevant statutes which creates a legal ambiguity. Chapter 57-51.2 allows for the Governor and the Three Affiliated Tribes to agree to apply the State's Oil & Gas Production Tax and the Oil Extraction Tax within the Reservation, with revenues being split between the Tribe and the State. This legislation, and the agreement it permits, resolved a question whether the State could impose taxes on oil & gas production or oil extraction within the boundaries of the Reservation by both parties agreeing to apply the State's taxes and split the revenue between the Tribe and the State. NDCC 57-51.2-02(5)(c) provides, in part: "The state's share of revenue [from application of the oil & gas production tax and from application of the oil extraction tax within the reservation] as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 [oil & gas gross production tax] and 57-51.1 [oil extraction tax]." Under chapter 57-51.1, NDCC 57-51.1-06 requires the "tax imposed by section 57-51.1-02 must be ... credited to ... the oil extraction tax development fund." That fund is distributed according to a formula which, at that time, provided 20% for water development bonds (Resources Trust Fund), 20% under Art. X, sec. 24, NDConst. (Common Schools Trust Fund and Foundation Aid Stabilization Fund), and 60% to the state General Fund. Of these three items, arguably only the amount allocated to the General Fund appears to be described by the term "state's share" as used in NDCC 57-52.2-02(5)(c).

However, the Tribal Oil Extraction tax is not taxed under section 57-51.1-02 as required by section 57-51.1-06, instead it is taxed under section 57-51.2-02. The STO was authorized to resolve any conflict between chapter 57-51.2 and chapters 57-51 and 57-51.1 in favor of the provision in chapter 57-51.2 by section 57-51.2-03, which provides "This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions." Therefore, it is my recollection of a conversation with the then-Deputy State Treasurer that the STO resolved this conflict by deeming the "state's share" of the Tribal Oil Extraction Tax as entirely intended to go to the state General Fund because the other funds receiving distributions in chapter 57-51.1 did not direct money toward the State and thus those provisions did not address the "state's share."

Further, during the 2009-2011 biennium, the following statute directed the distribution of the state's share under chapter 57-51.1:

**57-51.1-07.2. (Contingent repeal - See note) Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula.**

The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent

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oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

Please note that NDCC 57-51.1-07.2 also included a provision for the Director of the Budget to adjust the \$71 million figure, meaning that the actual cap may have been different.

It is my understanding from the STO that for the first three months in which the STO made distributions of the Tribal Oil Extraction Tax (September, October, and November of 2009), the STO followed the direction in 57-51.1-07.4 (since repealed), which stated "Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009." During the month of December 2009 (distribution of Extraction taxes collected in November on oil produced in October) the \$700,000 cap in 57-51.1-07.4 was met. During this month the total amount retained by the State (after the split with the tribal government) of the Tribal Oil Extraction tax was \$317,421.79. The STO deposited \$235,529.65 directly into the Permanent Oil Tax Fund which met the cap requirement in 57-51.1-07.4. With the remaining \$81,892.14, the STO followed the requirements of 57-51.1-07 and performed the split which allocated 20% to the Resources Trust Fund, 20% evenly divided between the Common Schools Trust Fund and the Foundation Aid Stabilization Fund, and the 60% state share went into the Permanent Oil Tax Fund since the general fund cap had already been met. In each month following this, for the remainder of the biennium, the STO performed the distribution of these funds in the manner in which it interpreted NDCC 57-51.2-02(5)(c) by depositing the entire amount of the Tribal Oil Extraction Tax retained by the state into the Permanent Oil Tax Fund.

The legal standard applicable to this issue is that "[T]he construction of a statute by an administrative agency charged with [its] execution is entitled to weight and [the court] will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language." Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999). The State Treasurer's Office is charged with administering the revenue distributions under these chapters. Under this standard, when faced with an ambiguous statute, the STO's determination of the best method to resolve the conflict will be recognized by the courts. Further, as noted above, section 57-51.2-03 directs that any conflict between chapter 57-51.2 and chapters 57-51 or 57-51.1 must be resolved by favoring the provision in chapter 57-51.2. In my opinion, the STO's resolution of this conflict does not contradict clear and unambiguous statutory language, and is consistent with the intent shown by the legislative history and section 57-51.2-03.

Therefore, my advice was for the STO to continue making distributions of the state's share of tribal oil extraction tax revenue pursuant to their reasonable interpretation of these ambiguous statutes, and to seek a corrective amendment in the next legislative session. It is my understanding that the STO sought and received an amendment in 2011 HB 1268 in an attempt to address some of the ambiguities in these chapters, but the bill ultimately failed in favor of similar legislation which did not contain the corrective amendment. Also, the STO worked with the Legislature on other bills affecting these chapters, including 2011 HB 1451 which eliminated the Permanent Oil Tax Trust Fund and directed where state revenues were to be deposited.

-Edward-

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# North Dakota WATER COALITION

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Barnes Rural Water District  
Cass County Government  
Cass County Joint Board  
Devils Lake  
Devils Lake Basin Joint Board  
Dickinson  
Fargo  
Garrison Diversion  
Conservancy District  
Grafton  
Grand Forks  
Grand Forks – Traill Water  
District  
Lake Agassiz Water Authority  
Lisbon  
Mandan  
McLean-Sheridan Rural Water  
Mercer County Water Resource  
District  
Minot  
Missouri River Joint Board  
North Central Regional Water  
District  
North Dakota Association of  
Counties  
North Dakota Farmers Union  
North Dakota Irrigation  
Association  
North Dakota League of Cities  
North Dakota Public Finance  
Authority  
North Dakota Rural Water  
Systems Association  
North Dakota Soybean  
Growers Association  
North Dakota State Water  
Commission  
North Dakota Water Resource  
Districts Association  
North Dakota Water Users  
Association  
North Dakota Weather  
Modification Association  
Northeast Regional Water  
District  
Northwest Area Water Supply  
Red River Joint Water Board  
Souris River Joint Board  
South Central Regional Water  
District  
Southwest Water Authority  
Souris River Rural Water District  
City  
West Fargo  
Western Area Water Supply  
Williston

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3-29-19  
pg 1

Testimony of Lance Gaebe, Executive Director  
North Dakota Water Coalition  
In Support of SB 2362  
March 29, 2019

Mr. Chairman and members of the Senate Appropriations Committee, my name is Lance Gaebe and I serve as the Executive Director of the North Dakota Water Coalition.

The North Dakota Water Coalition formed in 1994 to advocated for the completion of North Dakota's water infrastructure for economic growth and quality of life. The Water Coalition brings together more than 40 water project sponsors and groups to work toward unity for support of water projects across North Dakota. Collaboration within the water community and building consensus regarding funding needs and priorities are essential in meeting the water resource management needs of North Dakota.

The state funds the State Water Commission's operations, capital projects and grants for water supply, flood control, irrigation and general water management projects from the Resources Trust Fund and the Water Development Trust Fund. Article X of the North Dakota Constitution created the Resources Trust Fund and in Section 22 it stipulates that revenue from taxes imposed on the extraction of oil be allocated to the Resources Trust Fund.

The North Dakota Water Coalition supports Senate Bill 2362 as amended to implement a clarification so the full amount of the oil and gas extraction tax allocated to the Resources Trust Fund is deposited in that fund. Thus, we support a change of how the monies are deposited going forward and for the temporary adjustment of the allocation of an additional half percent of extraction taxes to restore of the \$128 million to the Resources Trust Fund for critically important water projects.

The Water Coalition members appreciate the state's commitment to fund water projects. However, it is difficult to accomplish the large-scale water infrastructure projects with the \$412 million currently projected in the Resources Trust Fund in 2019-21. As you have learned, for the upcoming biennium alone there are over \$700 million in "shovel ready" -necessary water projects, thus the Water Coalition supports the efforts conceived in amended SB 2362 to address the interpretation issues of how oil and gas extraction tax revenues generated on the Fort Berthold Indian Reservation are deposited into the Resources Trust Fund. Restoring the monies back into the Resources Trust Fund would help to fund more vital water infrastructure projects, protecting the state and its resources.

In order to protect our growing cities and resources, state funding is needed. That is why we support SB 2362 and the full restoration of monies back into the Resources Trust Fund.

We appreciate your past support of water infrastructure and urge your continued support of North Dakota's water infrastructure with the adoption of SB 2362.

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1707 North 9th Street  
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Phone: (701) 328 – 2800  
Fax: (701) 328 – 3650

[www.land.nd.gov](http://www.land.nd.gov)



Jodi A. Smith, Commissioner

**TESTIMONY OF JODI SMITH  
Commissioner of University and School Lands  
North Dakota Department of Trust Lands**

**Senate Bill 2362**

House Finance and Taxation Committee  
April 2, 2019

Chairman Headland and members of the House Finance and Taxation Committee, I am Jodi Smith, the Commissioner and Secretary for the Board of University and School Lands (Board). I am here to testify in on Senate Bill 2362.

The Department of Trust Lands (Department) is the administrative arm of the Board, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund (CSTF) and 12 additional permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages four additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, and the Indian Cultural Education Trust.

The Department also administers the responsibilities outlined in the Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.1. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the CSTF.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

**HISTORY**

In 1889, Congress passed the Enabling Act "to provide for the division of Dakota [Territory] into two states, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments, and to be admitted into the union on an equal footing with the original states, and to make donations of public lands to such states." Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.



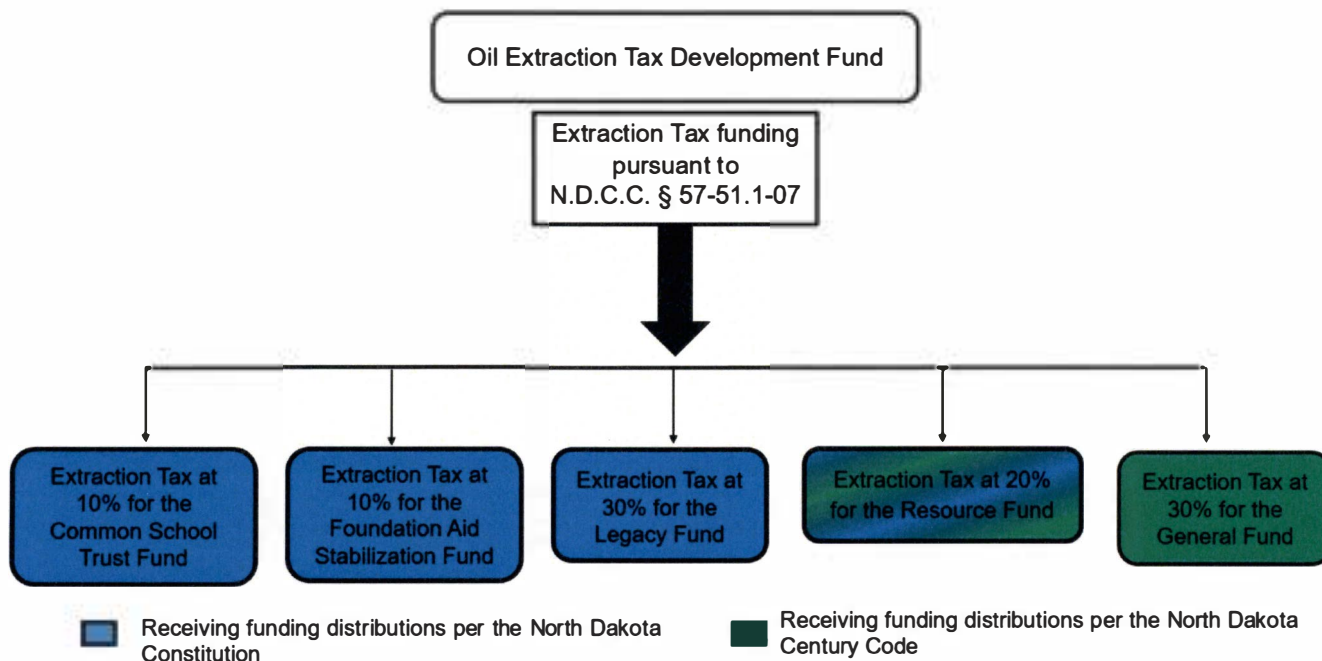
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Section 10 of this Act granted sections 16 and 36 in every township to the new states "for the support of common schools." In cases where portions of sections 16 and 36 had been sold prior to statehood, indemnity or "in lieu" selections were allowed. In North Dakota, this grant of land totaled more than 2.5 million acres.

Sections 12, 14, 16, and 17 of the Enabling Act, and other acts referred to therein, provided further land grants to the State of North Dakota for the support of colleges, universities, the state capitol, and other public institutions. Revenues are generated through the prudent management of trust assets, which assets include approximately 706,600 surface acres and 2.6 million mineral acres.

### ALLOCATION AND HISTORY OF OIL EXTRACTION TAXES

The State of North Dakota imposes production and extraction taxes on all oil produced in the state. The oil extraction tax is imposed on all oil produced in the state pursuant to N.D.C.C. § 57-51.1-02. Oil production subject to this tax includes production attributable to tribal trust lands on the reservation and on tribal trust properties outside reservation boundaries pursuant to N.D.C.C. § 57-51.2-02(3). All taxes imposed under N.D.C.C. § 57-51.1-02 are deposited into the oil extraction tax development fund, pursuant to N.D.C.C. § 57-51.1-06. N.D.C.C. § 57-51.1-07 allocates these oil extraction taxes to several funds, one of which is the CSTF. Consistent with statute, Article X, § 24 of the North Dakota Constitution (Article X, § 24) provides that "[t]en percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited into the common schools trust fund." Below is a chart showing the allocation of moneys in the oil extraction tax development fund (Extraction Tax Allocation).



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In 1993, the 53<sup>rd</sup> Legislative Assembly approved Senate Concurrent Resolution (SCR) 4011, entitled "Oil Extraction Tax Revenues – Proposed Constitutional Amendment". The resolution proposed a new section to Article X of the North Dakota Constitution that if passed by the electors, would direct the allocation of oil extraction tax revenue as follows:

- a. 20% of the revenue from oil extraction taxes from taxable oil produced in the state must be allocated to:
  - i. 50% to the CSTF and
  - ii. 50% to the foundation aid stabilization fund; the interest income must be transferred to the general fund on July 1 of each year.

SCR 4011 was approved by the voters in the 1994 general election. Article X, § 24 was effective for oil produced after June 30, 1995.

In 1995, the 54<sup>th</sup> Legislative Assembly amended N.D.C.C. § 57-51.1-07 by allocating 20% of the oil extraction tax revenues in the oil extraction tax development fund, as provided in Article X, § 24. Under Article X, § 24, this allocation was distributed equally to the CSTF and to the Foundation Aid Stabilization Fund (FASF).

In 2011, the 62<sup>nd</sup> Legislative Assembly passed SB 2129, amending N.D.C.C. § 57-51.1-07 to identify by name "the common schools trust fund" and "the foundation aid stabilization fund" as the recipients; however, no change to the allocation was made.

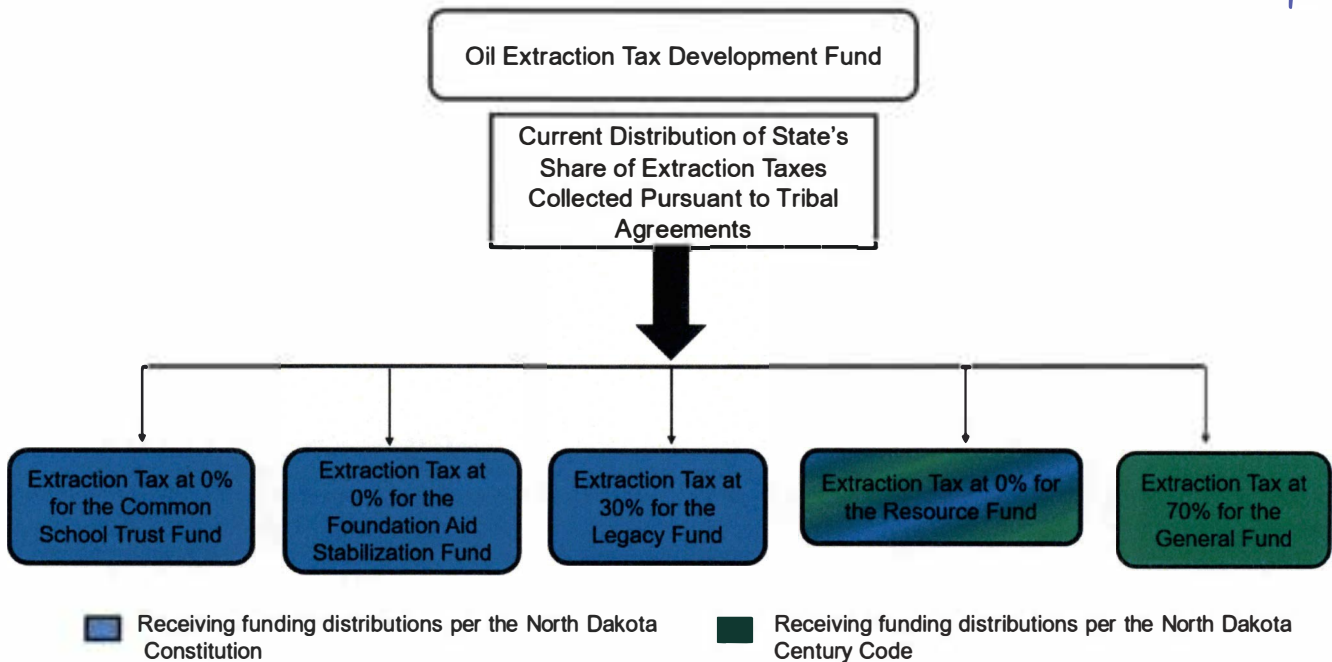
The Legacy Fund was approved by the voters in the 2010 general election. Article X, Section 26 of the Constitution requires: "Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund." (Emphasis added). In SB 2129, the 62<sup>nd</sup> Legislative Assembly added the Legacy Fund as a recipient of 30% of oil extraction tax revenue.

Amendments to N.D.C.C. § 57-51.1-07 by the 63<sup>rd</sup> and 65<sup>th</sup> Legislative Assemblies resulted in no changes to allocations to the constitutional funds, namely: the CSTF, FASF, and the Legacy Fund.

Despite the amendments to N.D.C.C. § 57-51.1-07 since 1995, the allocations to both the CSTF and the FASF have each remained constant at "[t]en percent of the revenue from oil extraction taxes from taxable oil produced in this state," per Article X, § 24. Similarly, no changes have been made to the 30% allocation to the Legacy Fund since 2011.

Based upon the distributions to these three constitutional funds, it is evident the Legacy Fund has received its 30% share of oil extraction tax revenue as required by the Constitution and N.D.C.C. § 57-51.1-07. It is equally evident that the CSTF and the FASF have not received the combined 20% allocation (10% to each fund) as required by the Constitution and N.D.C.C. § 57-51.1-07.

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### COMMON SCHOOLS TRUST FUND

Per Article IX, Section 2 of the North Dakota Constitution:

Distributions from the [CSTF], together with the net proceeds of all fines for violation of state laws and all other sums which may be added by law, must be faithfully used and applied each year for the benefit of the common schools of the state and no part of the fund must ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of common schools as provided by law. Distributions from an educational or charitable institution's trust fund must be faithfully used and applied each year for the benefit of the institution and no part of the fund may ever be diverted, even temporarily, from this purpose or used for any purpose other than the maintenance of the institution, as provided by law.

For the biennium during which this amendment takes effect, distributions from the perpetual trust funds must be the greater of the amount distributed in the preceding biennium or ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. Thereafter, biennial distributions from the perpetual trust funds must be ten percent of the five-year average value of trust assets, excluding the value of lands and minerals. The average value of trust assets is determined by using the assets' ending value for the fiscal year that ends one year before the beginning of the biennium and the assets' ending value for the four preceding fiscal years. Equal amounts must be distributed during each year of the biennium.

Since changes to the Constitution became effective in 2009, trust growth, and trust distributions to beneficiaries, have increased at historic rates. As the following table shows, per pupil distributions to K-12 education have increased from approximately \$400 per pupil per year during the 2009-11 biennium to a projected \$1,592 per student during the 2019-21 biennium. During that same period of time,

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distributions from the CSTF grew from approximately 4.0% of the cost of education to a projected 13.9% of the cost of education.

Biennium	Amount Distributed	Common Schools % of Cost Education	Common Schools \$ / Pupil Distribution
2009-11	\$ 77,178,000	4.0%	\$ 400.96
2011-13	\$ 92,514,000	4.5%	\$ 461.33
2013-15	\$ 130,326,000	6.0%	\$ 643.27
2015-17	\$ 206,134,000	8.6%	\$ 971.69
2017-19	\$ 288,264,000	11.5%	\$ 1,318.88
2019-21	\$ 366,756,000	13.9%	\$ 1,592.35

The table below is another look at the CSTF's impact on education. With the inclusion of the 2019-21 contribution, the CSTF will have supplied nearly \$1 billion (\$991,480,000) to the schools in the last eight years.

Biennium	Formula Payment	Common Schools	Percentage of Formula	Common Schools Increase
2013-15	\$ 1,752,100,000	\$ 130,326,000	7.4%	\$ 37,812,000
2015-17	\$ 1,916,640,000	\$ 206,134,000	10.8%	\$ 75,808,000
2017-19	\$ 1,935,204,163	\$ 288,264,000	14.9%	\$ 82,130,000
2019-21	\$ 2,050,702,333	\$ 366,756,000	17.9%	\$ 78,492,000

#### SENATE BILL 2362

The Board supports the bill insofar as it attempts to bring clarity to the requirement that the CSTF must receive "[t]en percent of the revenue from oil extraction taxes from taxable oil produced in this state," as required under Article X, § 24 of the North Dakota Constitution and North Dakota law. Specifically, the bill clarifies how the extraction tax allocated to the State under any agreement pursuant to N.D.C.C. ch. 57-51.2 is to be distributed.

To date, the CSTF has not received its percentage of the extraction tax allocated to the State under any agreement pursuant to N.D.C.C. ch. 57-51.2. As such, the Board also supports amendments to the bill that would require the CSTF to receive any and all moneys it should have been receiving under the Extraction Tax Allocation. In other words, it is the Board's position that based on Constitutional and statutory requirements regarding tax allocation to the CSTF that have been in place for several years, it is essential to look retroactively to fill the constitutional funds. Article IX, § 2 of the North Dakota Constitution requires that "no part of the fund must ever be diverted, even temporarily."

All revenues received by the CSTF are invested upon receipt. If any amounts underpaid had been invested with the other CSTF assets, additional investment earnings would have been generated throughout the years, resulting in increased funds being available for distribution to fund K-12 education. The underpayment to the CSTF is currently estimated \$62,794,306 in principal and \$11,986,696 in interest earnings for a total of \$74,781,002. The following chart depicts the impact the underpayment has had on past biennial distributions, inclusive of investment earnings.



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Biennium	Impact on Beginning Assets	Impact on Biennial Distributions
2011-13	\$ 1,544,182	\$ 6,000
2013-15	\$ 11,475,547	\$ 136,000
2015-17	\$ 35,781,439	\$ 852,000
2017-19	\$ 51,417,254	\$ 2,364,000
2019-21	\$ 74,781,003	\$ 4,342,000
2021-23	\$ 74,781,003	\$ 6,130,000
2023-25	\$ 74,781,003	\$ 7,260,000
2025-27	\$ 74,781,003	\$ 7,478,000

\*Impacts for biennia including 2011-13, 2013-15, and 2015-17 include investment earnings

Compounded investment earnings over the course of the next three biennia will add to the impact on biennial distributions. The effect of not retroactively filling the CSTF will have a permanent impact on the State's contribution to the per pupil cost of education in perpetuity.

Simply stated, the Board supports Senate Bill 2362 to create clarity in the statute to ensure that moving forward, it is exceptionally clear how extraction taxes collected within the State are distributed to the CSTF. It is the position of the Board that the CSTF must be made whole with the effects of not repaying the CSTF having an impact on education in the State of North Dakota for generations to come.

I look forward to working with the committee on these issues and will answer any questions.





STATE OF NORTH DAKOTA  
**OFFICE OF STATE TREASURER**  
KELLY L. SCHMIDT, STATE TREASURER

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Kelly Schmidt, State Treasurer  
In Support of SB 2362  
House Finance & Tax  
Rep. Craig Headland, Chair  
Rep. Jim Grueneich, Vice-Chair  
April 2, 2019

Mr. Chairman, members of the committee, I am Kelly Schmidt, State Treasurer. I stand in support of SB 2362 as it would clarify ambiguous statutes relating to the oil extraction tax allocations my office completes each month.

I would like to give you a brief history and the steps the Office of State Treasurer has taken to interpret the statutes and our attempts to clarify the ambiguity.

The oil extraction allocation has remained constant since Nov. 2007 with the first collection of tax on tribal land. During the 2009-2011 biennium, as oil activity began to increase on the Fort Berthold Reservation and the state was negotiating tribal agreements associated with this activity, our office thoroughly researched the related statutes within North Dakota Century Code. This was a concerted effort on our behalf to ensure we correctly and accurately allocated the state's share of oil and gas revenue from wells subject to the oil and gas agreement between the Three Affiliated Tribes and the State of North Dakota.

In researching the applicable statutes, the determination was made that the state's share of oil extraction revenue imposed on tribal lands was tribal revenue shared with the state and therefore separate and distinct from the oil extraction tax generated on land within the state. Based on statutory language referencing "state share", an interpretation was made to allocate the state's share of tribal revenue directly to the general fund bucket of the formula.

During our research, it became clear there were numerous conflicts among the related chapters which could lead to differing interpretations of the law. With these conflicts in mind, we sought guidance from the Attorney General's office. Upon reviewing the statutes in question and the pertinent legislative history, the Attorney General's office concluded the statute was indeed ambiguous and multiple conflicting interpretations could be reached. He also determined that we had reached a reasonable conclusion which did not contradict clear and unambiguous statutory language. The Attorney General's Office also advised we continue to make the allocations in this matter until clarification was received from the legislature. Attachment A is correspondence between the Deputy Treasurer and the Attorney General's office from March 2010 to September 2010 relating to this discussion.

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In the 2011 legislative session, we worked diligently with numerous individuals and agencies to obtain clarification. We worked directly with OMB and the Governor's Office. We worked with legislators to remedy the inconsistencies. Amendments were proposed and drafted during that session, none of which were included in the final passage of any bill. After 10 conference committee meetings, HB 1268 containing clarifying language was ultimately killed in conference committee. With no changes to the specific statutes relating to this issue, our office continued to allocate this revenue based on our initial interpretation as suggested by the Attorney General's Office.

As part of our fiscal audit for the 2009-2011 biennium, the State Auditor's Office audited the allocation of oil and gas tax revenues and, specifically, our interpretation of the statutes relating to the oil extraction tax from tribal lands. We explained to them our process in making the determination and how we sought guidance directly from the Attorney General's Office on the issue. They subsequently requested confirmation of this guidance from the Attorney General's Office. Included in your materials (attachment B) is an August 2012 email between the Attorney General's Office and the State Auditor's Office. This allocation has been reviewed and audited with no findings over the last 5 biennia by the State Auditor.

My office has worked diligently to ensure that all funds are being allocated and distributed correctly based on statute and as intended by the legislature. With the exponential growth of oil and gas revenue to the state and the changes made each biennium to the distributions formulas and allocations I believe this topic was muted due to the strength and urgency of those issues. My team and I work tirelessly before and during each legislative session to ensure bills containing changes to any oil and gas formulas are drafted in such a way that we are able to allocate and distribute the funds exactly as intended by the legislature and that no further conflicts are created. (This session was the Prairie Dog Bill) It is after the session we step up again to implement these biennial changes to ensure "the buckets" are filled and our counties, cities, schools, and townships receive their funds accurately.

We fully appreciate the opportunity to clarify this portion of the oil extraction tax allocations and would ask for your support of SB 2362 which provides the much-needed clarification of this very ambiguous subject.

Deputy Treasurer & AG  
Oil Extraction

Mar. 2010 - Sept 2010

(A)

Oehlke, Jeb D.

**Sent:** McLeod, Carlee M.  
**To:** Thursday, September 02, 2010 8:28 AM  
**Subject:** Erickson, Edward E.  
RE: Tribal oil and gas extraction state share split question

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Awesome. Thank you.

---

**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 5:02 PM  
**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Continuing what you are already doing and introducing a bill draft might make the most sense. The fix does not need to disturb the existing agreement. Just replace inconsistent provisions with a statement that the state's share of revenues from oil and gas production taxes under the agreement shall be distributed as tax revenue under chapter 57-51 and the state's share of revenues from oil extraction taxes under the agreement shall be distributed as tax revenue under chapter 57-51.1.

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 4:57 PM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Yep. And we should be good on the production piece. It's just whether we have to do something difference with extraction than we've been doing.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 4:48 PM  
**To:** McLeod, Carlee M.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Oh, I see. The introduction to subsection 5 sates it's only discussing oil and gas production taxes, while subsection 1 states that the agreement is to cover both the oil and gas production tax and the oil extraction tax. This is even more messed up than I thought on my quick review.

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 4:45 PM  
**To:** Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

I've got a copy and I'll find it and scan it to send to you. However, my confusion is that we're not talking about production taxes. We're talking about extraction. And extraction doesn't distribute to political subdivisions, so any reference to them is out of place there. My gut tells me that the people testifying didn't know the extraction system well enough to give reliable legislative history.

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**From:** Erickson, Edward E.  
**Sent:** Wednesday, September 01, 2010 4:38 PM

**To:** McLeod, Carlee M.

**Subject:** RE: Tribal oil and gas extraction state share split question

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Carlee—

I've just reviewed the legislative history. It's lengthy. <http://www.legis.nd.gov/assembly/60-2007/bill-status/senate/SB2419.pdf>

Some highlights:

Ryan Bernstein testified at p. 13: "my understanding from the Tax Department is that political subdivisions take that [State's share of revenues] first."

Ryan also said in response to a question about the effect of drilling on roads: "That goes to some of the discussions about taxes that are imposed to the counties as to what they will get and try to cover their costs much like it is now with oil producing counties off the reservations. They are able to get some of the tax monies to help build into the roads and infrastructures that will cover the activity that will go on there. As it is written right now that would be taken right off the top and then the money would be split after that." See pp. 13-14.

My interpretation of these statements is that Ryan hadn't had an opportunity to review the existing distributions for himself, and this was a shorthand description.

Rep. Drovdal said on p. 17: "this bill deals only with the tax charged on the oil exploration." This implies that there was no intent to impliedly repeal the existing distribution statutes.

Vicky Stiener, Ass'n of Oil & Gas Producing Counties, said on p. 34: "... keeping in mind that 75% of the gross production tax goes to the state general fund ..." This implies that there was some awareness that the existing distributions were not only to political subdivisions.

Lengthy discussion at pp. 36-37. Also at the conference committee. In particular, p. 12 of the conf. comm. Includes a statement from Rep. Drovdal: "they had a presentation earlier this year because of the caps that were put in the percentage on that first 5% is 75% is going to the state and the cities; counties and schools are getting 25%. There is a bill that changes that formula ..." This also implies that there was some awareness that the existing distributions were not only to political subdivisions.

Further conference committees were held. In the last conf. comm. hearing on April 21, 2007, p. 1, Rep. Porter says of the last hoghouse amendment: "States share, runs through normal distribution, the political subdivisions and schools are held harmless, ..." This implies no intention to alter existing distribution statutes.

However, throughout the discussions, there were numerous comments about the local impacts of oil production on county roads, local schools, and other political subdivisions. Some amendments that were not incorporated directly into the final approved bill, but which may have had an impact on the final language, would have directly distributed funds to the local governments in addition to a state share and a tribal share.

Now, with the statutes and the legislative history before us, reasonable minds should be able to make sense of the situation. But we're stuck between two positions. Did the Legislature mean to apply the usual distributions for oil and gas production and oil extraction? If so, then the words "among political subdivisions" in NDCC 57-51.2-02(5)(c) is inconsistent with that intent because it implies a restriction of payments to political subdivisions only. But if the Legislature intended only to distribute these revenues to political subdivisions and to exclude entities other than political subdivisions, then the references to chapters 57-51 and 57-51.1 in the same section are inconsistent with that purpose because they distribute funds to other entities.

Before digging further, do you have a copy of the agreement between the Governor and the Tribal Government, or is it available on the web?

ward

Edward E. Erickson  
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eerickso@nd.gov

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**From:** McLeod, Carlee M.  
**Sent:** Wednesday, September 01, 2010 9:58 AM  
**To:** McLeod, Carlee M.; Erickson, Edward E.  
**Subject:** RE: Tribal oil and gas extraction state share split question

Edward,

I know things are always very busy down there. Have you had a chance to look at this? I was just talking with Becky from legislative council, and it seems we both have the same questions. As reports are being generated leading up to session, I think there may be more questions, so it would be great to have a definitive answer.

Thanks!  
Carlee

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**From:** McLeod, Carlee M.  
**Sent:** Thursday, March 18, 2010 10:42 AM  
**To:** Erickson, Edward E.  
**Subject:** Tribal oil and gas extraction state share split question

Edward,

I have a question regarding the oil and gas extraction from tribal lands and whether or not it is subject to the split referenced in NDCC 57-51.1-07.

### Applicable law:

57-51.1-06. Oil extraction tax development fund established. The tax imposed by section 57-51.1-02 must be paid to the state treasurer when collected by the state tax commissioner and must be credited to a special fund in the state treasury, to be known as the oil extraction tax development fund. The moneys accumulated in such fund must be allocated as provided in this chapter and the legislative assembly shall make any appropriation of money that may be necessary to accomplish the purposes of this chapter.

57-51.1-07. Allocation of moneys in oil extraction tax development fund. Moneys deposited in the oil extraction tax development fund must be transferred monthly by the state treasurer as follows:

1. Twenty percent must be allocated and credited to the sinking fund established for payment of the state of North Dakota water development bonds, southwest pipeline series, and any moneys in excess of the sum necessary to maintain the account within the sinking fund and for the payment of principal and interest on the bonds must be credited to a special trust fund, to be known as the resources trust fund. The resources trust fund must be established in the state treasury and the funds therein must be deposited and invested as are other state funds to earn the maximum amount permitted by law which income must be deposited in the resources trust fund. The principal and income of the resources trust fund may be expended only pursuant to legislative appropriation and are available to:



- a. The state water commission for planning for and construction of water-related projects, including rural water systems. These water-related projects must be those which the state water commission has the authority to undertake and construct pursuant to chapter 61-02; and
  - b. The industrial commission for the funding of programs for development of energy conservation and renewable energy sources; for studies for development of cogeneration systems that increase the capacity of a system to produce more than one kind of energy from the same fuel; for studies for development of waste products utilization; and for the making of grants and loans in connection therewith.
2. Twenty percent must be allocated as provided in section 24 of article X of the Constitution of North Dakota.
  3. Sixty percent must be allocated and credited to the state's general fund for general state purposes.

57-51.1-07.2. Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula. The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

57-51.1-07.4. Separate allocation of state share of collections from reservation development. Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009.

57-51.2-02. Agreement requirements. An agreement under this chapter is subject to the following:

1. The only taxes subject to agreement are the state's oil and gas gross production and oil extraction taxes attributable to production from wells located within the exterior boundaries of the Fort Berthold Reservation.
2. The state's oil and gas gross production tax under chapter 57-51 must apply to all wells located within the Fort Berthold Reservation.
3. The state's oil extraction tax under chapter 57-51.1 as applied to oil and gas production attributable to trust lands on the Fort Berthold Reservation may not exceed six and one-half percent but may be reduced through negotiation between the governor and the Three Affiliated Tribes.
4. Any exemptions for oil and gas production from trust lands under chapters 57-51 and 57-51.1 do not apply to production within the boundaries of the Fort Berthold Reservation except as otherwise provided in the agreement.
5. The allocation of revenue from oil and gas production taxes on the Fort Berthold Reservation must be as follows:

- a. Production attributable to trust lands. All revenues and exemptions from all oil and gas gross production and oil extraction taxes attributable to production from trust lands on the Fort Berthold Reservation must be evenly divided between the tribe and the state.
  - b. All other production. The tribe must receive twenty percent of the total oil and gas gross production taxes collected from all production attributable to nontrust lands on the Fort Berthold Reservation in lieu of the application of the Three Affiliated Tribes' fees and taxes related to production on such lands. The state must receive the remainder.
  - c. The state's share of the revenue as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 and 57-51.1.
6. An oil or gas well that is drilled and completed during the time of an agreement under this chapter must be subject to the terms of the agreement for the life of the well.
  7. The Three Affiliated Tribes must agree not to impose a tribal tax or any fee on future production of oil and gas on the Fort Berthold Reservation during the term of the agreement.
  8. To address situations in which the tax commissioner refunds taxes to a taxpayer, the agreement must allow the tax commissioner to offset future distributions to the tribe.
  9. The tax commissioner must retain authority to administer and enforce chapters 57-51 and 57-51.1 as applied to wells subject to any agreement authorized by this chapter.
  10. An oil or gas well that is drilled and completed during the time an agreement under this chapter is in effect is subject to state regulatory provisions for the life of the well in addition to any other applicable regulatory provisions.
  11. The federal district court for the western division of North Dakota is the venue for any dispute arising from a revenue-sharing agreement between the state and the Three Affiliated Tribes.

57-51.2-03. Statutory inconsistencies superseded. This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions.

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END NDCC

question is two fold: One, are tribal extraction dollars subject to the 60/20/20 split, and if so, does that split apply before the 700,000 cap is met, or does it kick in after?

Per NDCC 57-51.1-07.4, the first \$700,000 of the state share of tribal extraction is to be put in the permanent oil trust fund. We have interpreted state share in that context to mean the dollars not distributed to the tribes from the tribal extraction distribution. So, for instance, if in month 1, \$100 was the amount not distributed to the tribes, we would apply that entire \$100 to the permanent oil trust fund to be credited against the \$700,000 "cap". In our interpretation, we view the state share referenced in 57-51.1-07.4 as meaning the no-tribal portion, and have put all non-tribal monies of the tribal agreement toward the \$700,000. We don't believe that even if the 60/20/20 split is applicable to the tribal agreement, it is applicable to the first \$700,000.

*Question Asked*

We come to this understanding from reading NDCC 57-51.2-02(5)(c) regarding the "state share" meaning the non-tribal portion.

That section also goes onto state that the state share shall be distributed to political subdivisions as provided in 57-51 (gross production) and 57-51.1 (extraction). The portion of the state dollars distributed in 57-51.1 is found at 57-51.1-07, and the monies are separated into funds, not distributed to political subdivisions. Money is divided into funds. Are we to break down the tribal state share into the 60/20/20 in accordance with 57-51.1-07 and put only 60% of the tribal money in the permanent oil trust, or put the all money into the permanent oil trust fund as per 57-51.1-07.2?

Thanks,  
Carlee

**Carlee McLeod**  
**Deputy State Treasurer**

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AG to Auditor  
Oil Extraction 2009-11 Audit  
Aug. 2012

(B)

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O. [redacted] e, Jeb D.

From: Erickson, Edward E.  
Sent: Tuesday, August 07, 2012 4:52 PM  
To: Scherbenske, Kevin J.  
Cc: Oehlke, Jeb D.; Mickelson, Lori S.  
Subject: Tribal Oil Extraction Tax Allocation

Kevin—

It is my understanding that you have asked what advice I gave the State Treasurer's Office on handling the Tribal Oil Extraction Tax distribution in NDCC 57-51.2-02(5)(c) during the 2009-2011 biennium. This was a significantly long time ago, and my final advice was given in a conversation. To the best of my present recollection, my analysis was that the statutes involved were ambiguous as a matter of law and that these issues were not clarified by the legislative history nor by the agreement between the Governor and tribal government. Therefore, the STO should continue making distributions as they had and seek a legislative correction to remove the ambiguity.

There is a conflict in the relevant statutes which creates a legal ambiguity. Chapter 57-51.2 allows for the Governor and the Three Affiliated Tribes to agree to apply the State's Oil & Gas Production Tax and the Oil Extraction Tax within the Reservation, with revenues being split between the Tribe and the State. This legislation, and the agreement it permits, resolved a question whether the State could impose taxes on oil & gas production or oil extraction within the boundaries of the Reservation by both parties agreeing to apply the State's taxes and split the revenue between the Tribe and the State. NDCC 57-51.2-02(5)(c) provides, in part: "The state's share of revenue [from application of the oil & gas production tax and from application of the oil extraction tax within the reservation] as divided in subdivisions a and b is subject to distribution among political subdivisions as provided in chapters 57-51 [oil & gas gross production tax] and 57-51.1 [oil extraction tax]." Under chapter 57-51.1, NDCC 57-51.1-06 requires the "tax imposed by section 57-51.1-02 must be ... credited to ... the oil extraction tax development fund." That fund is distributed according to a formula which, at that time, provided 20% for water development bonds (Resources Trust Fund), 20% under Art. X, sec. 24, ND Const. (Common Schools Trust Fund and Foundation Aid Stabilization Fund), and 60% to the state General Fund. Of these three items, arguably only the amount allocated to the General Fund appears to be described by the term "state's share" as used in NDCC 57-52.2-02(5)(c).

However, the Tribal Oil Extraction tax is not taxed under section 57-51.1-02 as required by section 57-51.1-06, instead it is taxed under section 57-51.2-02. The STO was authorized to resolve any conflict between chapter 57-51.2 and chapters 57-51 and 57-51.1 in favor of the provision in chapter 57-51.2 by section 57-51.2-03, which provides "This chapter supersedes any inconsistent provisions of chapters 57-51 and 57-51.1 and any inconsistent provisions of state law relating to regulatory provisions and state law relating to oil and gas exploration and production and administration of those provisions." Therefore, it is my recollection of a conversation with the then-Deputy State Treasurer that the STO resolved this conflict by deeming the "state's share" of the Tribal Oil Extraction Tax as entirely intended to go to the state General Fund because the other funds receiving distributions in chapter 57-51.1 did not direct money toward the State and thus those provisions did not address the "state's share."

Further, during the 2009-2011 biennium, the following statute directed the distribution of the state's share under chapter 57-51.1:

57-51.1-07.2. (Contingent repeal - See note) Permanent oil tax trust fund - Deposits - Interest - Adjustment of distribution formula.

The state treasurer shall deposit seventy-one million dollars of revenue derived from taxes imposed on oil and gas under chapters 57-51 and 57-51.1 into the general fund. Revenue exceeding seventy-one million dollars must be deposited by the state treasurer in the permanent oil tax trust fund. Interest earnings of the permanent



oil tax trust fund must be credited to the general fund. The principal of the permanent oil tax trust fund may not be expended except upon a two-thirds vote of the members elected to each house of the legislative assembly.

Please note that NDCC 57-51.1-07.2 also included a provision for the Director of the Budget to adjust the \$71 million figure, meaning that the actual cap may have been different.

It is my understanding from the STO that for the first three months in which the STO made distributions of the Tribal Oil Extraction Tax (September, October, and November of 2009), the STO followed the direction in 57-51.1-07.4 (since repealed), which stated "Notwithstanding any other provision of law, the state treasurer shall transfer to the permanent oil tax trust fund the first seven hundred thousand dollars of the state's share of tax revenues under this chapter from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation after June 30, 2009." During the month of December 2009 (distribution of Extraction taxes collected in November on oil produced in October) the \$700,000 cap in 57-51.1-07.4 was met. During this month the total amount retained by the State (after the split with the tribal government) of the Tribal Oil Extraction tax was \$317,421.79. The STO deposited \$235,529.65 directly into the Permanent Oil Tax Fund which met the cap requirement in 57-51.1-07.4. With the remaining \$81,892.14, the STO followed the requirements of 57-51.1-07 and performed the split which allocated 20% to the Resources Trust Fund, 20% evenly divided between the Common Schools Trust Fund and the Foundation Aid Stabilization Fund, and the 60% state share went into the Permanent Oil Tax Fund since the general fund cap had already been met. In each month following this, for the remainder of the biennium, the STO performed the distribution of these funds in the manner in which it interpreted NDCC 57-51.2-02(5)(c) by depositing the entire amount of the Tribal Oil Extraction Tax retained by the state into the Permanent Oil Tax Fund.

The legal standard applicable to this issue is that "[T]he construction of a statute by an administrative agency charged with [its] execution is entitled to weight and [the court] will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language." Frank v. Traynor, 600 N.W.2d 516, 520 (N.D. 1999). The State Treasurer's Office is charged with administering the revenue distributions under these chapters. Under this standard, when faced with an ambiguous statute, the STO's determination of the best method to resolve the conflict will be recognized by the courts. Further, as noted above, section 57-51.2-03 directs that any conflict between chapter 57-51.2 and chapters 57-51 or 57-51.1 must be resolved by favoring the provision in chapter 57-51.2. In my opinion, the STO's resolution of this conflict does not contradict clear and unambiguous statutory language, and is consistent with the intent shown by the legislative history and section 57-51.2-03.

Therefore, my advice was for the STO to continue making distributions of the state's share of tribal oil extraction tax revenue pursuant to their reasonable interpretation of these ambiguous statutes, and to seek a corrective amendment in the next legislative session. It is my understanding that the STO sought and received an amendment in 2011 HB 1268 in an attempt to address some of the ambiguities in these chapters, but the bill ultimately failed in favor of similar legislation which did not contain the corrective amendment. Also, the STO worked with the Legislature on other bills affecting these chapters, including 2011 HB 1451 which eliminated the Permanent Oil Tax Trust Fund and directed where state revenues were to be deposited.

—Edward—

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OIL EXTRACTION TAX REVENUE ALLOCATION HISTORY - 2005-17

This memorandum provides historical information on the statutory and constitutional provisions in place regarding oil extraction tax allocations from 2005 through 2017.

2005	2007	2009	2011	2013	2015	2017														
<p><b>57-51.1-06. Oil extraction tax development fund.</b> Tax imposed by the oil extraction tax chapter must be credited to this fund and allocated as provided in the oil extraction tax chapter.</p>	<p><b>Chapter 57-51.2. Tribal oil and gas agreements.</b> Legislation created Chapter 57-51.2, which provides the Governor authority to enter agreements with the Three Affiliated Tribes relating to taxation and regulation of oil and gas exploration and production within the boundaries of the Fort Berthold Reservation. An agreement entered pursuant to Chapter 57-51.2 must provide a 50/50 revenue split for oil and gas gross production tax and oil extraction tax revenue derived from trust lands. An agreement must provide an 80/20 revenue split, in favor of the state, on oil and gas gross production tax revenue derived from nontrust lands. The chapter provided the state's share of revenue under an agreement is subject to distribution among political subdivisions as provided in Chapters 57-51 and 57-51.1. (2007 Senate Bill No. 2419)</p> <p>An agreement was entered between the state and the Three Affiliated Tribes on June 10, 2008.</p>	<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> The lead-in language requiring quarterly apportionment of the money in the fund was changed to require monthly transfers of the money in the fund. (2009 House Bill No. 1164)</p>	<p><b>Tribal oil and gas agreement.</b> Though no statutory changes were made to Chapter 57-51.2, the state and the Three Affiliated Tribes entered a new agreement on January 13, 2010, as the first agreement was effective only for the first 24 months after it was signed.</p>	<p><b>Chapter 57-51.2. Tribal oil and gas agreements.</b> Chapter 57-51.2 was amended to increase the tribal share of revenue allowable under an agreement for production on nontrust lands from 20 percent of oil and gas gross production taxes to 50 percent of total oil and gas gross production and oil extraction taxes. The chapter also was amended to require the Three Affiliated Tribes report annually to the Budget Section regarding investment of revenues. (2013 House Bill No. 1198) Legislation also clarified the state's share of oil and gas gross production tax revenue is subject to distribution among political subdivisions as provided in the gross production tax law. (2013 House Bill No. 1005)</p> <p>A new agreement was entered between the state and the Three Affiliated Tribes on June 21, 2013.</p>	<p><b>57-51.1-06. Oil extraction tax development fund.</b> Legislation added language that revenue collected from prior periods must be considered revenue collections from the period in which the revenue was received for purposes of distributions and allocations made by the State Treasurer. (2015 Senate Bill No. 2172)</p>															
<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> Moneys deposited in the fund must be apportioned quarterly by the State Treasurer as follows:</p> <table><tr><td>20%</td><td>Resources trust fund</td></tr><tr><td>20%</td><td>Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution</td></tr><tr><td>60%</td><td>General fund</td></tr></table>	20%	Resources trust fund	20%	Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution	60%	General fund			<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> This section was amended to add a 30 percent distribution to the legacy fund. (2011 Senate Bill No. 2129)</p> <table><tr><td>20%</td><td>Resources trust fund</td></tr><tr><td>20%</td><td>Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution</td></tr><tr><td>30%</td><td>Legacy fund</td></tr><tr><td>30%</td><td>General fund</td></tr></table>	20%	Resources trust fund	20%	Divided evenly between the common schools trust fund and the foundation aid stabilization fund pursuant to the constitution	30%	Legacy fund	30%	General fund	<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> Legislation provided for the transfer of a portion of the revenue allocated to the resources trust fund to the renewable energy development fund and the energy conservation grant fund. (2013 Senate Bill No. 2014)</p>		<p><b>57-51.1-07. Allocation of moneys in the oil extraction tax development fund.</b> Legislation adjusted the amount of revenue transferred to the resources trust fund and energy conservation grant fund from the revenue allocated to the resources trust fund. (2017 House Bill No. 1020)</p>
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<p><b>57-51.1-07.2. Permanent oil tax trust fund.</b> Oil and gas gross production tax and oil extraction tax revenue deposited in the general fund which exceeds \$71 million per biennium must be transferred to the permanent oil tax trust fund. Earnings are returned to the general fund. The principal may be expended only upon a 2/3 vote of each house.</p>		<p><b>57-51.1-07.2. Permanent oil tax trust fund.</b> The State Treasurer introduced legislation to remove the administrative step of placing revenue exceeding \$71 million into the general fund and then transfer it to the permanent oil tax trust fund. The amendment allowed revenue over \$71 million to be deposited directly in the permanent oil tax trust fund. (2009 House Bill No. 1140)</p>	<p><b>57-51.1-07.2. Permanent oil tax trust fund.</b> This section was repealed. (2011 House Bill No. 1451)</p>																	
<p><b>57-51.1-07.3. Oil and gas research fund.</b> For the 2005-07 biennium and forward, 2 percent of the state's share of oil and gas gross production tax and oil extraction tax revenue deposited into the general fund, up to a cap of \$1.3 million, must be deposited into the oil and gas research fund. The percentage is calculated on the prior 3 months of general fund deposits and is transferred into the oil and gas research fund quarterly.</p>	<p><b>57-51.1-07.3. Oil and gas research fund.</b> Legislation increased the maximum that could be deposited in this fund from \$1.3 million to \$3 million per biennium. (2007 House Bill No. 1128)</p>	<p><b>57-51.1-07.3. Oil and gas research fund.</b> The State Treasurer introduced legislation to clarify the 2 percent calculation under this section was to be calculated independently of the \$71 million calculation under Section 57-51.1-07.2 rather than drawn from the first \$71 million deposited in the general fund under Section 57-51.1-07. (2009 House Bill No. 1126) Legislation also increased the maximum amount that could be deposited in this fund from \$3 million to \$4 million per biennium. (2009 Senate Bill No. 2051)</p>	<p><b>57-51.1-07.5. State share of oil and gas taxes - Deposits.</b> This section was created by 2011 House Bill No. 1451 and directed the State Treasurer to deposit revenues designated for deposit in the state general fund under Chapters 57-51 and 57-51.1 as follows:</p> <table><tr><td>First \$200 million - General fund</td></tr><tr><td>Next \$341,790,000 - Property tax relief sustainability fund</td></tr><tr><td>Next \$100 million - General fund</td></tr><tr><td>Next \$100 million - Strategic investment and improvements fund</td></tr><tr><td>Next \$22 million - State disaster relief fund</td></tr><tr><td>Remainder - Strategic investment and improvements fund</td></tr></table>	First \$200 million - General fund	Next \$341,790,000 - Property tax relief sustainability fund	Next \$100 million - General fund	Next \$100 million - Strategic investment and improvements fund	Next \$22 million - State disaster relief fund	Remainder - Strategic investment and improvements fund	<p><b>57-51.1-07.3. Oil and gas research fund.</b> Legislation increased the maximum that could be deposited in this fund from \$4 million to \$10 million per biennium. (2013 Senate Bill No. 2014)</p>										
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	<p><b>57-51.1-07.4. Allocation of state share of collections from reservation development.</b> Legislation provided, notwithstanding any other provision of law, the State Treasurer shall transfer to the permanent oil tax trust fund the first \$700,000 of the state's share of oil extraction tax revenue from oil produced from wells within the exterior boundaries of the Fort Berthold Reservation drilled and completed after June 31, 2007. (2007 House Bill No. 1395)</p>	<p><b>57-51.1-07.4. Allocation of state share of collections from reservation development.</b> The State Treasurer introduced legislation to repeal this section. (2009 Senate Bill No. 2088) The repeal did not go into effect due to language that passed in a separate bill which amended the statute to again transfer the first \$700,000 of revenue during the biennium to the permanent oil tax trust fund. (2009 House Bill No. 1394)</p>	<p><b>57-51.1-07.4. Allocation of state share of collections from reservation development.</b> This section was repealed. (2011 House Bill No. 1451)</p>		<p><b>57-51.1-07.5. State share of oil and gas taxes - Deposits.</b> House Bill No. 1377 (2015) amended the distributions through June 30, 2017, as follows:</p> <table><tr><td>First \$200 million - General fund</td></tr><tr><td>Next \$300 million - Tax relief fund</td></tr><tr><td>Next \$100 million - General fund</td></tr><tr><td>Next \$100 million - Strategic investment and improvements fund</td></tr><tr><td>Next \$22 million - State disaster relief fund</td></tr><tr><td>Remainder - Allocated 70 percent to the strategic investment and improvements fund and 30 percent to the political subdivision allocation fund</td></tr></table>	First \$200 million - General fund	Next \$300 million - Tax relief fund	Next \$100 million - General fund	Next \$100 million - Strategic investment and improvements fund	Next \$22 million - State disaster relief fund	Remainder - Allocated 70 percent to the strategic investment and improvements fund and 30 percent to the political subdivision allocation fund	<p><b>57-51.1-07.5. State share of oil and gas taxes - Deposits.</b> House Bill No. 1152 (2017) amended the distributions after June 30, 2017, as follows:</p> <table><tr><td>First \$200 million - General fund</td></tr><tr><td>Next \$200 million - Tax relief fund</td></tr><tr><td>Next \$75 million - Budget stabilization fund</td></tr><tr><td>Next \$200 million - General fund</td></tr><tr><td>Next \$100 million - Allocated 80 percent to the strategic investment and improvements fund and 20 percent to the lignite research fund until \$3 million is deposited in the lignite research fund, and 100 percent into the strategic investment and improvements fund after \$3 million has been deposited into the lignite research fund.</td></tr><tr><td>Next \$20 million - State disaster relief fund</td></tr><tr><td>Remainder - Strategic investment and improvements fund</td></tr></table>	First \$200 million - General fund	Next \$200 million - Tax relief fund	Next \$75 million - Budget stabilization fund	Next \$200 million - General fund	Next \$100 million - Allocated 80 percent to the strategic investment and improvements fund and 20 percent to the lignite research fund until \$3 million is deposited in the lignite research fund, and 100 percent into the strategic investment and improvements fund after \$3 million has been deposited into the lignite research fund.	Next \$20 million - State disaster relief fund	Remainder - Strategic investment and improvements fund	
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Remainder - Strategic investment and improvements fund																				

Article X, Section 24, Constitution of North Dakota provides "Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the common schools trust fund," and "Ten percent of the revenue from oil extraction taxes from taxable oil produced in this state must be deposited in the foundation aid stabilization fund in the state treasury, the interest of which must be transferred to the state general fund on July first of each year."

Article X, Section 26, Constitution of North Dakota provides "Thirty percent of total revenue derived from taxes on oil and gas production or extraction must be transferred by the state treasurer to a special fund in the state treasury known as the legacy fund."