

OFFICIAL OPINION NO. 04-02, Interpretation of Article XIII, §§ 20-21, Cement Plant Sale Trust Fund

June 22, 2004

Jason C. Dilges, Commissioner
Bureau of Finance and Management
500 East Capitol
Pierre, SD 57501-5070

OFFICIAL OPINION NO. 04-02

**Interpretation of Article XIII, §§ 20-21
Cement Plant Sale Trust Fund**

Dear Commissioner Dilges:

You have requested an official opinion of the Office of Attorney General regarding the following facts:

FACTS:

In 2001, the people amended the South Dakota Constitution by approving constitutional amendments providing for the establishment of a trust fund created from the proceeds of the sale of the State cement plant and authorized certain distributions from that fund. Article XIII of the South Dakota Constitution was amended, adding Sections 20 and 21. Section 20 provides:

The net proceeds derived from the sale of state cement enterprises shall be deposited by the South Dakota Cement Commission in a trust fund hereby created to benefit the citizens of South Dakota. The South Dakota Investment Council or its successor shall invest the trust fund in stocks, bonds, mutual funds, and other financial instruments as provided by law. Each fiscal year beginning in fiscal year 2001, a transfer of twelve million dollars shall be made from the trust fund to the state general fund as provided by law.

Section 21 provides:

Except as provided in Article XIII, section 20 of the Constitution of the State of South Dakota, the original principal of the trust fund shall forever remain inviolate. However, the Legislature shall, by appropriation, make distributions from the difference between the

twelve million dollar annual general fund transfer and five percent of the market value of the trust fund for the support of education, but not for the replacement of state aid to general education or special education, if the increase in the market value of the trust fund in that fiscal year was sufficient to maintain the original principal of the trust fund after such distributions. Beginning with fiscal year 2006, the market value of the trust fund shall be determined by adding the market value of the trust fund at the end of the sixteen most recent calendar quarters, and dividing that sum by sixteen.

The principal amount placed in the trust after its creation was \$238 million. Beginning June 30, 2001, consistent with Article XIII, § 20, \$12 million has been transferred each year from the trust to the State General Fund for appropriation by the State Legislature. Recently, the market value of the trust fund has grown so that further distributions under the provisions of Article XIII, § 21 may now be possible. The Legislature has not appropriated any money for school purposes to be distributed from the trust fund. Additionally, there is no legislation that further delineates the parameters of these constitutional provisions.

Absent further direction, you are proposing to determine the market value of the trust fund as of the close of all markets on June 30, 2004. An audit will be performed in August to verify the market value of the trust fund as of June 30, 2004. If the market value is such that a distribution under Section 21 may take place, you will notify the Governor and the Legislature, but will take no action to distribute funds until the Legislature convenes to distribute them by appropriation.

Based upon the above, you have asked the following questions:

QUESTIONS:

1. Are the proposed actions set forth in the statement of facts in accordance with Article XIII, §§ 20 and 21 of the South Dakota Constitution?
2. If, prior to legislative appropriation, the value of the trust fund is diminished to the point that any appropriation would invade the principal, may money still be distributed from the trust fund under Article XIII, § 21?

IN RE QUESTION NO 1:

The questions you have raised are ones of constitutional construction. In construing our state constitution, this Office is required to follow the same rules as the South Dakota Supreme Court. The object of constitutional construction is "to give effect to the intent of the framers of the organic law and of the people adopting it." Poppen v. Walker, 520 N.W.2d 238, 242 (S.D. 1994). In construing a constitutional provision, the court must give regard to the whole instrument, must seek to harmonize the various provisions, and must if possible, give effect to all provisions. S.D. Auto Club, Inc. v. Volk, 305 N.W.2d 693, 696-97 (S.D. 1981). "The words used in the Constitution are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary." In re Janklow, 1999 S.D. 27, ¶ 3, 589 N.W.2d 624, 626 (citation omitted). Finally, constitutional amendments are adopted for the express purpose of making a change in the system and as such, the court is "under the duty to consider the old law, the mischief, and the remedy, and to interpret the constitution broadly to accomplish the manifest purpose of the amendment." Volk, 305 N.W.2d at 697.

Reviewing Article XIII, §§ 20 and 21, it is clear that the people amended the constitution for the express intent of placing the proceeds of the South Dakota cement plant sale in a trust fund where the principal would remain intact and disbursements would be made only as provided by the amendments. The two disbursements specifically authorized are: (1) the \$12 million per year transfer to the state general fund for appropriation, and (2) additional distributions for the support of education if the market value of the trust fund sufficiently exceeds the original principal in a fiscal year.

The language in Sections 20 and 21 reflects, at least partially, an intent to make the distributions self-executing. Article XIII, § 20 requires an annual \$12 million transfer from the trust fund to the state general fund. Article XIII, § 21 mandates an appropriation of money for educational purposes (except for replacement of state aid to general education or special education) in the amount of five percent of the market value of the trust less the \$12 million annual general fund transfer where, after the distributions are made, the market value of the trust fund exceeds the original principal deposited in trust. Beginning with fiscal year 2006, the market value calculations are determined based upon a sixteen quarter moving average.

Article XIII, § 20 specifically authorizes the investment of the trust fund in stocks, bonds and mutual funds. Given the equity investment authorization, and normal market fluctuations, the value of the trust fund may vary substantially during a fiscal year. Section

21 does not establish the date for market valuation to take place. It does, however, contain the restriction that no distribution may take place unless the market value of the trust fund in that fiscal year is sufficient to maintain the value of the original principal after all distributions. Your proposal contemplates a June 30 date to determine the market value of the trust fund. The only valuation date that can ensure compliance with this language is a June 30 date, the last day of a fiscal year. As such, I agree with your proposal to determine the market value of the trust fund as of June 30.

Your proposal contemplates that even if the trust fund's market value is great enough, no distribution will take place until the Legislature convenes sometime after June 30 to appropriate the funds to be distributed. Article XIII, § 21 mandates a legislative appropriation when there are sufficient funds available to make a distribution for the support of education. There is no discretion. There is, however, no specific time frame for that appropriation to take place.

In rendering an opinion on this issue, I must look to other provisions of the state constitution, specifically those addressing the convening of the Legislature and the appropriation process. In my opinion, it must be assumed that the people, in approving the trust fund provisions in Article XIII, §§ 20 and 21, were aware that under Article III, §§ 6 and 7, the Legislature annually convenes for its regular session beginning the second Tuesday of January for alternatively 35 and 40 legislative days. Further, it must be assumed that the voters knew that the constitution in Article XII sets forth the legislative appropriations process which is subject to gubernatorial veto, consistent with Article IV, § 4. Finally, it must also be assumed that the voters were aware of the additional authority that the Governor and Legislature are given to convene special sessions. See Article III, § 31 and Article IV, § 3. I cannot conclude that it was the intent of the people in adopting Sections 20 and 21 to amend these provisions.

Given these assumptions, it is my opinion that it was the intent of the people to have the mandated appropriation take place after the market value determination is made when the Legislature next convenes. Unless a special session is called, the appropriation from the trust fund would take place during the regular legislative session that follows the market value determination.

Unlike the normal appropriation process, Article XIII, § 21 gives the Legislature no room to speculate as to the dollar amount to appropriate or the purpose of that appropriation. Thus,

it is my opinion that the appropriation required in Section 21 may be made in the same manner as other appropriations are made for the support of education, that being, only a majority of each house of the Legislature is needed for passage. Since the purpose of the appropriation and the amount are already constitutionally defined, there is no need for the constitutional safeguards that apply to special appropriations. Therefore, I would agree with your proposal that after market value determination is made, funds will not be distributed until the Legislature convenes to distribute them by appropriation.

Finally, your proposal contemplates an audit being conducted before monies are available for appropriation. Though I do not believe a full-blown formal audit of the trust fund is required prior to legislative appropriation, a market value determination must be made in such a manner that it may be relied upon by the Legislature in calculating the amount to be appropriated. When this activity is to be completed depends upon when the Legislature convenes for the purpose of appropriation. Clearly, if the Legislature does not convene until its regular session, the contemplated August audit would suffice.

IN RE QUESTION NO 2:

Your second question concerns what effect, if any, a decline in the market value of the trust fund after the June 30 market valuation date but prior to the date funds are appropriated would have on the legality of any distribution. In my opinion, that answer is none. I construe Article XIII, § 21 to place a restriction on distributions based upon a market valuation of June 30 each fiscal year. When the value of the trust fund on that date is sufficient for distribution to take place, money must be appropriated. The fact that the market value diminished prior to actual disbursement does not affect its legality. To reach any other conclusion would make it impossible for the Legislature to make any appropriation. The people safeguarded the trust fund from depletion by limiting the Section 21 distribution to five percent of the market value less the \$12 million transfer.

As a further aid, I am including an example applying the above opinion, as follows:

Assume that on June 30 the market value of the trust fund is \$260 million. Five percent of the trust fund is \$13 million which, less the \$12 million transfer, leaves \$1 million to be appropriated for the support of education. On the date of appropriation, however, the unaudited market value of the trust fund has decreased. Nonetheless, the distribution must take place in accordance with the appropriation even though the market value of the trust fund at the date monies are withdrawn is below the \$238 million threshold.

If, however, the market value on June 30 were \$250 million, no additional appropriation could take place even though there is an additional \$500,000 potentially available for the support of education, since, such a distribution after the \$12 million annual transfer would reduce the trust fund market value to \$237.5 million, below the \$238 million original principal level. This is true even though, at the time the Legislature convenes, the market value may have risen and would be sufficient to allow a distribution.

Respectfully submitted,

Lawrence E. Long
Attorney General

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