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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

North Dakota Legislative Assembly, Senator Ray Holmberg, Representative Al Carlson, Senator Rich Wardner, Senator Joan Heckaman, and Representative Corey Mock,	)	Supreme Court Case No: 20170436
Petitioners,	)	
v.	)	
State of North Dakota ex rel. Wayne K. Stenehjem, in his capacity as Attorney General of the State of North Dakota; North Dakota Governor Doug Burgum,	)	
Respondent and Cross-Petitioners.	)	

*** *** ***

PETITIONERS' BRIEF IN REPLY TO RESPONDENT GOVERNOR BURGUM'S BRIEF IN OPPOSITION TO PETITION FOR DECLARATORY JUDGMENT, OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS, AND BRIEF IN OPPOSITION TO CROSS-PETITION FOR DECLARATORY JUDGMENT

and Addendum

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LAW AND ARGUMENT (PETITION)

I. An Actual And Justiciable Controversy Exists As To Vetoes The Governor Concedes Are Unconstitutional.

[¶1] The Attorney General has opined, and the Governor agrees, the Governor's challenged vetoes in relation to subsection 3 of Section 18 of Senate Bill No. 2003, 2017 N.D. Leg., (the Dickinson State veto), subsection 2 of Section 5 of House Bill No. 1020, 2017 N.D. Leg. (the Water Commission veto), and Section 12 of Senate Bill No. 2013, 2017 N.D. Leg. (the University/School Lands veto), were ineffective as exceeding the scope of his authority under Article V, Section 9 of the Constitution of North Dakota. (Add. 103-105; Governor's Brief at ¶¶ 4-5.) The Governor asserts that as a result, there is no actual and justiciable controversy for this Court to resolve. (Governor's Brief at ¶¶ 5, 18-58.) The Governor's position is in error. For the reasons discussed below, only a determination by this Court as to the effectiveness of the challenged vetoes at issue can negate the effect of the Governor's challenged vetoes.

[¶2] Article V, Section 9 of the Constitution of North Dakota provides, in relevant part:

> Every bill passed by the legislative assembly must be presented to the governor for the governor's signature. **If the governor signs the bill, it becomes law**.
>
> The governor may veto a bill passed by the legislative assembly. The governor may veto items in an appropriation bill. **Portions of the bill not vetoed become law**.
>
> ***

N.D. Const. art. V, § 9 (emphasis added). The unambiguous language of Article V, Section 9 establishes portions of a bill not vetoed become law upon the bill's signature by the Governor. In this case, the challenged vetoes at issue were signed into law by the Governor on May 1, 2017 (S.B. 2018 [Add.51]) and May 2, 2017 (S.B. 2003 [Add.69], H.B. 1020 [Add.82], S.B. 2013 [Add.96]).

[¶3] It appears to be the position of the Governor that either the Attorney General's opinion as to the ineffectiveness of the challenged vetoes, or the Governor's subsequent agreement with the Attorney General in relation thereto, or both, resolves this dispute. Those positions are in error.

[¶4] First, an opinion of the Attorney General does not constitute law and does not supplant this Court in ruling upon the constitutional questions presented. The ramifications of an attorney general's opinion were addressed by this Court in *State ex rel. Johnson v. Baker*, wherein this Court explained as follows:

> It is argued that to hold the attorney general's advice should control in the above respects, is to empower the attorney general to supplant the court in determining whether a statute conflicts with the constitution. We can see no merit in this contention. The attorney general, an officer required to be learned in the law, no more supplants the court in passing upon the validity of a legislative enactment than the auditor or treasurer or any other officer not required to be a lawyer would in doing so. On the contrary, if such officers may disregard the provision made by the legislature for obtaining advice from the attorney general on constitutional questions and presume to pass upon such questions themselves, they will supplant that officer. But the attorney general does not, and is not intended to, supplant the courts in such cases. He gives his opinions for the guidance of the state officers until such questions as concern them are passed upon by the courts. His opinions, if followed in good faith, relieve them from responsibility and protect them. If they fail or refuse to follow his opinions they do so at their peril.

74 N.D. 244, 21 N.W.2d 355, 277 (N.D. 1945) (citation omitted). In other words, the opinion of the Attorney General guides state officers on legal and constitutional questions, and a state officer will be protected from personal liability if the officer follows the Attorney General's opinion. However, the Attorney General's opinion does not constitute law, and while the Court will consider the opinion of the Attorney General, the Court is not bound by the Attorney General's opinion. *See Sorum v. Dalrymple*, 2014 ND 233, ¶ 10, 857 N.W.2d 96, 100 ("... Attorney General opinions are not binding upon this court and we will not follow them if they are inconsistent with the statutory interpretation that the court deems reasonable." (citations omitted)).

[¶5] In the present case, the Attorney General's opinion as to the constitutionality of the Governor's challenged vetoes at issue was sought and obtained by members of the Legislative Assembly.[1] The Legislative Assembly and individual petitioning members thereof are in agreement with some aspects of the Attorney General's opinion, and disagree with other aspects.

[¶6] Second, an opinion of the Attorney General does not have the effect of changing the language of a statutory or constitutional provision, and cannot negate the official action of the Governor in relation to the challenged vetoes. The Attorney General's opinion that certain challenged gubernatorial vetoes were ineffective only constitutes an opinion and does not render the challenged vetoes ineffective, or otherwise change the language of the legislation at issue.

[¶7] Third, the Governor's subsequent acquiescence that his challenged vetoes were ineffective does not make them ineffective. The Constitution of North Dakota does not expressly empower the Governor to withdraw a veto, and the Governor made no attempt to do so. Only a declaration from this Court as to the constitutionality of the challenged vetoes at issue can resolve this matter and establish what is the current status of the law.

[¶8] This Court in *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979) ("*Olson*") determined an unauthorized gubernatorial veto is of no effect, and the bill, including the language the Governor attempted to veto in *Olson*, automatically became law without further action being required. *Olson*, at 272-73. Current Section 9 provides "Portions of the bill not vetoed become

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[1] It should be noted members of the Legislative Assembly did not request an opinion from the Attorney General concerning the constitutionality of the Budget Section provisions challenged by the Governor and Attorney General in their Cross-Petition herein. (Supp. Add. 1) The Attorney General's opinions in relation to the constitutionality of the Budget Section provisions were gratuitous and exceeded the scope of the Attorney General's statutory authority. *See* N.D.C.C. § 54-12-01(8) ("The attorney general shall: . . . [g]ive written opinions, when requested by either branch of the legislative assembly, upon legal questions." (emphasis added)). Note the Attorney General is not authorized to give opinions on constitutional questions to either house of the Legislative Assembly.

law." N.D. Const. art. V, § 9. As a result, if the Court determines the Governor's partial vetoes at issue are void, the subject bills, including the language attempted to be vetoed, would automatically become law without any further action being required by the Legislative Assembly or Governor. However, only this Court can make the determination whether the challenged vetoes were in fact ineffective (i.e. unconstitutional) for the purpose of negating the effects of the challenged vetoes.

[¶9] The Legislative Assembly and petitioning members thereof request the Court determine the Governor's attempted partial vetoes of subsection 3 of Section 18 of Senate Bill No. 2003, 2017 N.D. Leg., (the Dickinson State veto), subsection 2 of Section 5 of House Bill No. 1020, 2017 N.D. Leg. (the Water Commission veto), and Section 12 of Senate Bill No. 2013, 2017 N.D. Leg. (the University/School Lands veto), were ineffective (i.e. unconstitutional), as conceded by the Governor. Petitioners also request the Court declare said bills, without the attempted partial vetoes at issue, automatically become the law pursuant to Article V, Section 9 of the Constitution of North Dakota as of the dates each was signed by the Governor (i.e. May 1-2, 2017).

II. The Governor's Veto Of A Clause In Section 12 Of Senate Bill No. 2018 Is Unconstitutional.

[¶10] Section 12 of S.B. 2018, 2017 N.D. Leg., with the language stricken (vetoed) by the Governor underlined, provides:

> **SECTION 12. ENTREPRENEURSHIP GRANTS AND VOUCHER PROGRAM – EXEMPTION.** Section 1 of this Act includes the sum of $2,250,000, of which $600,000 is from the general fund and $1,650,000 is from special funds, for an entrepreneurship grants and voucher program to be developed and administered by the department of commerce, for the biennium beginning July 1, 2017, and ending June 30, 2019. Of the amount appropriated, $900,000 is to be distributed equally to entrepreneurial centers located in Bismarck, Fargo, and Grand Forks, $300,000 to an organization that provides workplace safety, and $300,000 for biotechnology grants. The department shall establish guidelines to provide grants to entrepreneurial centers certified by the department. The department also shall establish guidelines to award vouchers to entrepreneurs to procure business development assistance from certified entrepreneurial centers or to provide grants

> to entrepreneurs working with an entrepreneurial center. The amount appropriated for entrepreneurship grants in section 1 of this Act is not subject to section 54-44.1-11 and any unexpended funds from this line item are available during the biennium beginning July 1, 2019, and ending June 30, 2019.

(Add.50.)

[¶11] Contrary to the Governor's assertion, the vetoed phrase "$300,000 to an organization that provides workplace safety," in Section 12 of S.B. 2018 is a condition on an appropriation, not an appropriation. The language in Section 1 of S.B. 2018 constitutes appropriations language. The vetoed phrase in section 12 does not. The Governor cannot parse out $300,000 from the $2.25 million appropriation. This is a substantive disagreement between the legislative and executive branches.

[¶12] First, Section 1 essentially mirrors the sample appropriation language contained in the North Dakota Legislative Drafting Manual 2017 located at page 18. (Supp. Add. 10.) This Court has frequently cited the North Dakota Legislative Drafting Manual when interpreting legislative enactments. *See Industrial Contractors, Inc. v.* Taylor, 2017 ND 183, ¶ 17, 899 N.W.2d 680, 685 (citing N.D. Legislative Drafting Manual in interpreting legislation); *Midthun v. North Dakota Workforce Safety Ins.*, 2009 ND 22, ¶ 14, 761 N.W.2d 572, 577 (same); *In re Estate of Elken,* 2007 ND 107, ¶ 8, 735 N.W.2d 842, 846 (same); *Genter v. Workforce Safety & Ins. Fund*, 2006 ND 237, ¶ 29, 724 N.W.2d 132, 141 (same); *Amerada Hess Corp. v. State ex rel. Tax Com'r,* 2005 ND 155, ¶ 13, 704 N.W.2d 8, 14 (same); *State v. Sorensen*, 482 N.W.2d 596, 598 (N.D. 1992) (same).

[¶13] Second, Section 1 is titled "Appropriation" and incorporates appropriation language, in relevant part, as follows:

> The funds provided in this section, or so much of the funds as may be necessary, are appropriated out of the moneys in the general fund in the state treasury, not otherwise appropriated, and from special funds derived from federal funds and other income, to the department of commerce for the purpose of defraying the expenses of the department of commerce, for the biennium beginning July 1, 2017, and ending June 30, 2019, as follows:

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(Add.1.) By comparison, Section 12 and Section 14 simply refer to the appropriation of funds in Section 1, and place conditions upon the use of portions of the appropriations made in Section 1. Section 12 provides, in relevant part:

> Section 1 of this Act includes the sum of $2,250,000, of which $600,000 is from the general fund and $1,650,000 is from special funds, for an entrepreneurship grants and voucher program to be developed and administered by the department of commerce, for the biennium beginning July 1, 2017, and ending June 30, 2019. Of the amount appropriated, . . . $300,00 to an organization that provides workplace safety, ...

(Add.3.) Section 14 provides, in relevant part:

> Nothwithstanding section 54-65-08, the estimated income line item in section 1 of this Act includes $3,500,000 from the research North Dakota fund to the department of commerce for department programs. Of this amount, . . . $1,500,000 is for entrepreneurship grants and vouchers, ...

(Add.3.) Neither Section 12 nor Section 14 contains appropriation language. The Legislative Council staff have years of experience drafting appropriations, including the appropriation in S.B. 2018. *See* North Dakota Legislative Drafting Manual 2017 (Supp. Add. 2-13); N.D. Senate Rule 405 and N.D. House Rule 405 (Supp. Add. 14) (requiring all bills to be submitted to Legislative Council for approval as to form and style). The vetoed phrase is not an appropriation in the view of Legislative Council. Section 12 clearly sets forth conditions on the use of the appropriation in Section 1. The Governor's veto of the phrase "$300,000 to an organization that provides workforce safety" in Section 12 constituted an inappropriate veto of a condition on an appropriation without a corresponding veto of the appropriation to which it pertains. This Court in *Olson* held:

> We hold that the governor, in exercising his partial veto power, may only veto items or parts in appropriation bills that are related to the vetoed appropriation and are so separate and distinct that, after removing them, the bill can stand as workable legislation which comports with the fundamental purpose the legislature intended to effect when the whole

was enacted. **He may not veto conditions or restrictions on appropriations without vetoing the appropriation itself.**

State ex rel. Link v. Olson, 286 N.W.2d at 270-71 (bold added).

[¶14] Third, the issue in this case is whether the veto itself, not the executive branch's post hoc actions concerning the $300,000, was unconstitutional. Looking at the actual language the Governor left in S.B. 2018 after his attempted veto, you are left with a bill which either (1) leaves the full $2.25 million appropriation in Section 1 and referenced in section 12, but lacks a legislatively-imposed condition on $300,000 of that appropriation, or (2) leaves an internally inconsistent and unworkable bill because the appropriated amounts discussed in sections 1, 12 and 14 are not reduced by the $300,000 taken out by the veto. The Governor's argument leaves only option (2), but neither outcome is permissible under our Constitution and under the standards articulated in *Olson*.

[¶15] Fourth, the veto illustrated the Governor's intent to retain the full $2.25 million appropriation. The $2.25 million appropriated amount in Section 1 was not vetoed. The Governor's veto message says the non-vetoed portion of section 12 provides sufficient guidance for awarding grants but says nothing about reducing the total grant dollars appropriated.

[¶16] Fifth, the analysis of the Director of the North Dakota Office of Management and Budget ("Director") (Resp. Add.1-13) wherein the Director opines the Research North Dakota Fund was the source of the $300,000 at issue, is fundamentally flawed. The $1.5 million for entrepreneurship grants and vouchers, referenced in Section 14 as coming from the Research North Dakota Fund, does not account for the fact $600,000 from the general fund and $1.65 million in special funds were appropriated for entrepreneurship grants and vouchers in Section 1, as referenced in Section 12. The Director's conclusion does not explain the source of the remaining

$150,000 in special funds appropriated for entrepreneurship grants and vouchers, or explain how the veto of $300,000 in Section 12 was to be allocated back among the general fund, the Research North Dakota Fund, and the other special funds from which the original $2.25 million appropriation was made. Section 14 does not even reference Section 12 – it only identifies the special funding source of $3.5 million of the overall appropriation made in Section 1. The fact the amount allocated in Section 14 from the Research North Dakota Fund for entrepreneurship grants and vouchers happened to match the amounts discussed in Section 12 does not necessarily mean the two sums are directly linked. Instead, Section 14 merely identifies the source of $1.5 million of the $1.65 million in special funds appropriated for entrepreneurship grants and vouchers.

[¶17] The Director's logic also fails to account for the fact that if the Governor intended to veto $300,000 of appropriation, as opposed to a condition on an appropriation, the reference to $1.5 million to be utilized for entrepreneurship grants and vouchers in Section 14 also should have been modified to account for a reduction in funds stemming from the Research North Dakota Fund for that purpose. Section 12 expressly states $1.65 million in special funds were appropriated in Section 1 for entrepreneurship grants and vouchers. Considering there was only $150,000 of other special fund monies allocated for the entrepreneurship grants and vouchers, the $1.5 million referenced in Section 14 derived from the Research North Dakota Fund necessarily had to have been reduced. The Governor did not veto any portion of Section 14.

[¶18] The argument about the "bookkeeping error" is a red herring. The inconsistences in S.B. 2018 resulting from the challenged veto could not be cured through a simple bookkeeping entry by the Office of Management and Budget (OMB). The inconsistencies in the law remain following the OMB's adjusting entries. Also, if the availability of the $300,000 for the Governor depended on a bookkeeping error, then the executive branch simply could undo its actions if the Governor

changes his mind again. Under the Governor's analysis, the legislation that was left after the veto does not prevent this. The Governor's bookkeeping error argument also does not address the constitutionality of the veto itself.

[¶19] Furthermore, contrary to the Director's assertion and the Governor's argument, the Legislative Council did not confirm the funding source for the $300,000 at issue. The email relied upon for this assertion (Respondent's Add. 10) was from an executive branch employee about what the executive branch employee claimed two legislators said on the subject, which was simply forwarded to an OMB employee by a Legislative Council employee, without comment. This Court has never before relied on third-hand, nonpublic statements as alleged evidence of legislative intent, as offered by the Governor. In addition, alleged statements by two legislators do not constitute legislative intent. *See Little v. Tracy*, 497 N.W.2d 700, 704 (N.D. 1993) ("Random statements by legislative committee members, while possibly useful if they are consistent with the statutory language and other legislative history, are of little value in fixing legislative intent." (citations omitted)). Similarly, the Director and Governor's reliance upon a statement made by Representative Martinson on the subject, as contained in meeting minutes of a Conference Committee hearing for the Department of Commerce (Resp. Add. 9) also is misplaced as the statement of one legislator as to his desires does not constitute the intent of the Legislative Assembly. *See Metric Construction, Inc. v. Great Plains Properties*, 344 N.W.2d 679, 683 (N.D. 1984) (stating sponsor testimony or citizen testimony preserved in the form of sparse committee notes provides little insight as to legislative intent); *Snyder's Drug Stores, Inc. v. North Dakota State Board of Pharmacy*, 219 N.W.2d 140, 147 (N.D. 1974) ("It is our view that we cannot accept Senator Sinner's statement of the objective of the amendment . . ., as encompassing all of the objectives of the amendment, or any of the objectives of the amendment, for that matter.");

Albright v. North Dakota Workforce Safety & Ins., 2013 N.D. 97, ¶¶ 20-27, 833 N.W.2d 1, 7-9 (in determining legislative intent in ambiguous statute, considering the testimony of the representative who introduced the legislation at issue, testimony in opposition to the legislation by an executive branch attorney, text of an amendment to the legislation, statements by the committee chairman made during hearings, and testimony by counsel for the agency impacted by the legislation – extensive statements made in public hearings, and supported by text). The Governor's argument is misleading.

[¶20] The Legislative Assembly and petitioning members thereof request the Court determine the Governor's attempted partial veto of the phrase "$300,000 to an organization that provides workplace safety" is void, resulting in section 12 of S.B. 2018, without the attempted partial veto, automatically becoming the law effective May 1, 2017, pursuant to Article V, Section 9 of the Constitution of North Dakota.

III. The Governor's Veto Of The Phrase "And For Credit Hours Completed At The School" In Section 39 Of Senate Bill No. 2003 Is Unconstitutional.

[¶21] Section 39 of S.B. 2003, 2017 N.D. Leg., with the language stricken (vetoed) by the Governor underlined, provides:

> **SECTION 39. LEGISLATIVE INTENT – NORTH DAKOTA STATE UNIVERSITY – LEASE ARRANGEMENT AND OTHER SAVINGS.** It is the intent of the sixty-fifth legislative assembly that future general fund appropriations in support of the North Dakota state university department of nursing program in Bismarck be adjusted for savings resulting from facility lease negotiations and for credit hours completed at the school.

(Add.68 [underlining added].) The Governor provided the following explanation for this partial veto:

> The portion of paragraph 39 that reads "and for credit hours completed at the school" is hereby vetoed. Reducing general fund appropriations based upon credit hours is contrary to the legislatively approved higher education funding formula.

(Add.52.)

[¶22] There is a substantive disagreement over the attempted veto in Section 39 of S.B. 2003. The Governor's argument the statement of legislative intent in Section 39 cannot bind a future Legislative Assembly is completely irrelevant and a red herring. The relevant question is whether the Governor can strike words or phrases in a bill to alter an expression of legislative intent. The Governor cannot. To allow otherwise is a violation of the separation of powers and exceeds gubernatorial veto authority. Only the Legislative Assembly may express its legislative intent. The Governor has no authority to supplant an explicit expression of legislative intent with his own or an expression of intent he wishes the Legislative Assembly would have made, particularly when he does so through selectively deleting a handful of words. *See Olson*, 286 N.W.2d at 269-70 ("Thus, a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort the legislative intent, and in effect create legislation inconsistent with that enacted by the Legislature, by the careful striking of words, phrases, clauses or sentences." (quoting *State ex rel. Sego v. Kirkpatrick*, 524 P.2d 975, 981-82 (N.M. 1974)); *Cenarrusa v. Andrus*, 582 P.2d 1082, 1092 (Idaho 1978) (determining it was a usurpation of legislative function for the governor to exercise a partial veto to remove a statement of legislative intent as to permit such a veto would allow the governor to create a new law the legislature did not intend to pass); *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392-93 (Mo. 1973) (noting a gubernatorial power to veto an "item" in an appropriations bill refers to a separable sum of money appropriated, and not to separate words, phrases or sentences which express purposes with reference to the appropriation made.)

[¶23] Expressions of legislative intent serve many functions, and a governor may not manipulate

them. The vetoed language expressed the intention of the Legislative Assembly for appropriations from the general fund for the NDSU nursing program in Bismarck be adjusted, in part, for credit-hours completed at the school. The Governor's attempted veto of eight words completely changes the intended meaning of the legislation. Query, if the vetoed expression of legislative intent really was so unimportant, why did the Governor bother to veto it?

[¶24] The vetoed phrase is not an "item" that can be vetoed by the Governor. As discussed in the Legislative Assembly's principal brief, although this Court in *Olson* considered how other courts have interpreted the term "items" in construing their state constitutions, this Court has not expressly adopted a specific definition of the term "item" or "items" in this context. The term "item" has been defined by other courts in this context as a separable sum of money appropriated, not "words, phrases or sentences which express purposes or conditions with reference to the appropriation made." State ex rel. *Cason v. Bond*, 495 S.W.2d at 392. *See also Colorado General Assembly v. Owens*, 136 P.3d 262, 267 (Colo. 2006) ("item of an appropriation bill is an indivisible sum of money dedicated to a stated purpose; the term refers to something which may be eliminated from the bill without affecting the enactment's other purposes or provisions." (internal citations omitted)); *Jubelirer v. Rendell*, 953 A.2d 514, 534-35 (Pa. 2008) (compiling cases from numerous states which have a gubernatorial partial veto constitutional provision including phrase "item of any appropriation bill" or similar language, and restricting term "item" to items of appropriation).

[¶25] The Legislative Assembly and petitioning members thereof request the Court determine the Governor's attempted partial veto of the phrase "and for credit hours completed at the school" is void, resulting in section 39 of S.B. 2003, without the attempted partial veto, automatically becoming the law effective May 2, 2017, pursuant to Article V, Section 9 of the Constitution of North Dakota.

LAW AND ARGUMENT (CROSS-PETITION)

[¶26] As discussed above, the Governor concedes his vetoes of the Budget Section provisions in Senate Bill No. 2013 and House Bill No. 1020 were unconstitutional, as opined by the Attorney General. As a result, this Court should hold the attempted vetoes of the Budget Section provisions at issue were unconstitutional and of no effect.

[¶27] In their cross-petition for declaratory judgment, the Governor and Attorney General argue those Budget Section provisions nonetheless violate the non-delegation and separation of powers doctrines, and are therefore unconstitutional. As discussed below, the Governor's and Attorney General's arguments are without merit. However, two preliminary matters which should first be addressed by the Court are whether the Attorney General has standing to challenge the constitutionality of the Budget Section provisions at issue, and whether the Attorney General may advocate on behalf of the Governor against the constitutionality of those provisions.

I. The Attorney General Lacks Standing to Challenge the Constitutionality of The Budget Section Provisions And May Not Advocate Against Their Constitutionality.

[¶28] The Attorney General has joined the Governor in bringing the cross-petition on behalf of the State of North Dakota. The Attorney General's rationale for doing so appears to be two-fold. First, the Legislative Assembly and individual petitioning members thereof have challenged the Attorney General's opinion pertaining to the issues before this Court. Second, the Attorney General asserts that in his judgment, the cross-petition is brought in the best interests of the state under N.D.C.C. 54-12-02. Neither rationale authorizes the Attorney General to bring the cross-petition on behalf of the State, or to otherwise intervene as a party in this matter.

[¶29] The fact the Legislative Assembly and individual petitioning members thereof are requesting this Court to rule on the issues presented in a manner which, in part, differs from an opinion of the Attorney General addressing those issues does not authorize the Attorney General to intervene as a party to this action, either in his official capacity as Attorney General, or on behalf of the State. While the Attorney General generally has a right to appear and be heard before a court under North Dakota's Declaratory Judgment's Act when the constitutionality of a statute is being challenged under N.D.C.C. § 32-23-11, this Court has held such right to be heard does not equate to a right to intervene in the action as a party by the Attorney General. *See State ex rel. Olson v. Graff*, 287 N.W.2d 87, 89 (N.D. 1979) (N.D.C.C. § 32-23-11 only authorizes the Attorney General to be heard when the constitutionality of statute is being challenged - it does not authorize the Attorney General to intervene as a party to the proceedings, nor does it give the Attorney General special authority to initiate litigation under it). This Court has rejected the contention the State is a necessary party to an action that calls into question the constitutionality of a statute. *Id.* (while N.D.C.C. § 32-23-11 requires a municipality to be made a party to any action challenging the constitutionality of a municipal ordinance or franchise, the statute does not require the State be made a party if a State law is challenged (citing *Ralston Purina Company v. Hagemeister*, 188 N.W.2d 405 (N.D. 1971)).

[¶30] It is not disputed the Governor has standing to defend the constitutionality of his official actions at issue in the Petition, and to assert the claims contained in his Cross-Petition herein. However, the Attorney General does not have standing to intervene on behalf of the State in support of the Cross-Petition challenging the constitutionality of the budget section provisions of S.B. 2018 and H.B. 1020.

[¶31] "[T]he question of the constitutionality of a statute cannot be raised by one whose rights it does not affect and who has no legal interest in defeating it." *State ex rel. Johnson v. Baker*, 21 N.W.2d at 359. A state officer may not challenge the validity of a statute unless the public officer "show[s] it is [the public officer's] official duty to question the validity of the enactment or that [the public officer] will be otherwise personally affected if [the public officer] does not do so and it is in fact invalid." *Id.* It is not the Attorney General's official duty to question the validity of the Budget Section provisions, and the Attorney General will not be personally affected if the Attorney General does not do so in the event this Court ultimately determines the challenged Budget Section provisions are invalid.

[¶32] The Attorney General is a constitutional officer whose powers and duties are not prescribed by the constitution but by legislative enactment. *State ex rel. Johnson v. Baker*, 21 N.W.2d at 363; N.D. Const. art. V, § 2. Chapter 54-12 of the North Dakota Century Code prescribes the Attorney General's powers and duties. Although the Attorney General is generally authorized under N.D.C.C. § 54-12-01(3) to appear and defend the Governor in relation to the Petition, the Attorney General is not authorized to join in the cross-petition on behalf of the State or otherwise, and the Attorney General is conflicted out of representing the Governor in relation to the cross-petition challenge to the constitutionality of the Budget Section provisions.

[¶33] The Attorney General's reliance upon N.D.C.C. § 54-12-02 as alleged support for his intervention in this matter is misplaced. Section 54-12-02 provides "[t]he attorney general and the attorney general's assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state so to do." (emphasis added). The State is not a party to this matter, and as discussed below,

the Attorney General cannot be a party to this action or otherwise challenge the constitutionality of the Budget Section provisions at issue.

[¶34] The issues presented involve a dispute between the Legislative Assembly and the Governor, parties whose interests are directly impacted by the issues presented, and who are fully capable of asserting and defending their respective interests in this matter, albeit, via appropriate counsel. The Attorney General is not a real party in interest to this dispute. *See* N.D. R. Civ. P. 17(a) ("An action must be prosecuted in the name of the real party in interest."). *See also Baxley v. Rutland*, 409 F.Supp. 1249, 1256 (M.D. Ala. 1976) (determining Attorney General of Alabama lacked standing to prosecute action challenging constitutionality of state statute, in part, as attorney general had no personal stake in the outcome and was not the real party in interest under Fed. R. Civ. P. 17(a)). For this same reason, there exists no actual justiciable case or controversy as between the Attorney General and the Legislative Assembly relative to the issues before this Court. *See State v. Rosenquist*, 78 N.D. 671, 705, 51 N.W.2d 767, 787 (1952) ("The existence of a justiciable controversy between parties having adverse interests is essential to present a question for judicial determination[.]"); *Baxley v. Rutland*, 409 F.Supp. at 1257 (holding subjective opinion of attorney general of Alabama as to unconstitutionality of statute without any other personal stake in the outcome was insufficient to establish standing and the jurisdictional requirement of a case or controversy between parties with adversarial interests).

[¶35] Furthermore, although not cited as support by the Attorney General in this case, it should be noted this Court also has rejected a prior argument by the Attorney General in *State ex rel. Olson v. Graff* that the Attorney General was authorized to initiate suit in defense of the constitutionality of a statute under N.D.C.C. § 54-12-01(1). Section 54-12-01(1) states

the Attorney General shall "[a]ppear for and represent the state before the supreme court in all cases in which the state is interested as a party." In *Graff*, this Court noted "interested" is not synonymous with "concerned", and distinguished the prior case of *Farmers Insurance Exchange v. Nagle*, 190 N.W.2d 758 (N.D. 1971), in which the Attorney General was permitted to appeal a case even though not named as a party in the lower court, on the basis that in *Nagle*, the State would have become exposed to liability if the challenged statute therein were found invalid. *State ex rel. Olson v. Graff*, 287 N.W.2d at 89. "Consequently, this possible liability made the State an interested party and gave the attorney general the authority to prosecute the appeal under Section 54-12-01(1)." *Id.* The Court in *Graff* determined the Attorney General's concern a statute was not being complied with did not make him an interested party to the proceeding. *Id.* The Court in *Graff* also noted case law from other states shows a similar questioning of the attorney general's authority to become involved in private suits (citing *In Re Estate of Sharp*, 217 N.W.2d 258 (Wis. 1974)), and noted the Illinois Supreme Court held the attorney general is not empowered to represent the state when it did not have a direct and substantial interest in the litigation, quoting from *People v. Marquette Nat. Fire Ins. Co.*, 184 N.E. 800, 803 (Ill. 1933) as follows:

> The state is not directly interested in a lawsuit where its only concern is to see that its citizens are protected in their rights, though such rights may have been provided by laws enacted under the police power, . . ."

[¶36] In *State v. City of Oak Creek*, 605 N.W.2d 526 (Wis. 2000) ("Oak Creek"), the Wisconsin Supreme Court also concluded its attorney general may not challenge the constitutionality of a statute[2]. In *Oak Creek*, the Wisconsin attorney general, claiming to act on behalf of the State of

[2] The Wisconsin Supreme Court noted an exception to the general rule an attorney general may not challenge the constitutionality of a statute where the court has granted an attorney general's

Wisconsin, commenced an action against the City of Oak Creek requesting an injunction to require the city to remove a concrete channel from a quarter mile length of a creek, which flowed through the city. *Id.* at 528. The attorney general alleged a state statute that exempted the city from certain permitting requirements relating to the concrete channel was unconstitutional. *Id.*

[¶37] The Wisconsin Supreme Court in *Oak Creek* determined the attorney general lacked standing to challenge the constitutionality of the state statute at issue. *State v. City of Oak Creek*, 605 N.W.2d at 541. To have standing under Wisconsin law, a plaintiff must have suffered an actual or threatened injury, and the plaintiff's interest asserted must be recognized by law. *Id.* at 532. The court only addressed the second step by analyzing whether the attorney general's asserted interest in challenging the constitutionality of the statute was recognized by state law, as that issue was dispositive. *Id.*

[¶38] In Wisconsin, as in North Dakota, the state constitution says the powers and duties of the attorney general are prescribed by law. *Oak Creek* at 532; Wis. Const. art. VI, § 3. The Wisconsin court determined that as the legislature fixes the attorney general's powers and duties by statute, the attorney general does not have any common law powers or duties. *Oak Creek* at 533-34. "Therefore, unless the power to bring a specific action is granted by law, the office of the attorney

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petition for original jurisdiction where the subject matter was of public right-*publici-juris*, and discussed as examples cases where the attorney general was challenging state legislative reapportionment plans on the basis they directly violated the equal protection rights of the citizens of the state. *Oak Creek* at 539 (citing *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551 (Wis. 1964) and *State ex rel Attorney General v. Cunningham*, 51 N.W. 725 (Wis. 1892)). In other words, in *Oak Creek*, the Wisconsin Supreme Court expressly granted the attorney general permission to bring the petition before it to address a threatened direct injury to the constitutional rights of the citizens – rights that were not otherwise represented. The cross-petition herein alleges violation of the delegation of powers doctrine and separation of powers doctrine in relation to the Budget Section. The cross-petition does not allege direct injury to the constitutional rights of the citizens of North Dakota. Instead, the powers of the legislative and executive branches of government are at issue, which are being adequately represented directly by the Governor and the Legislative Assembly, the real parties in interest.

general is powerless to act." *Id.* at 533 (citation omitted). The court addressed some of the attorney general's statutory duties and concluded they did not support the attorney general's position. Those duties are similar to the duties laid out in N.D.C.C. § 54-12-01. The court concluded the attorney general lacked statutory authority to bring the suit. *Id.* at 541. The court determined a statute that granted the attorney general authority to represent the state as a party in civil cases in circuit court was not the equivalent to authority to challenge the constitutionality of state statutes. *Id.* at 536.

[¶39] In *Oak Creek*, the Wisconsin Supreme Court also noted the attorney general had previously recognized his statutory duty to defend the state statutes' constitutionality in a written attorney general's opinion. *Oak Creek* at 536. "[B]ecause the attorney general must defend the constitutionality of the statutes, any challenge to the statutes on his part would conflict with his duty to defend, unless specifically authorized by statute." *Id.* Similarly, the court rejected the attorney general's standing arguments under other constitutional and common law principles, including the great public concern doctrine, the state as polity doctrine, and the core function doctrine. *Id.* at 636-38.

[¶40] As discussed above, there is no statutory authority for the Attorney General to challenge the constitutionality of the Budget Section provisions at issue. The Attorney General's office has recognized the office's duty to defend legislative enactments. Former Attorney General Nicholas Spaeth refused to provide an opinion as to the constitutionality of an age requirement for instructors in the motorcycle safety program under N.D.C.C. § 39-28-02, stating as follows:

> Please understand that as Attorney General, I cannot give my opinion as to the constitutionality of this requirement. Only a court of law could make that determination. Secondly, as part of my statutory duty, I am required to defend and uphold the constitutionality of all statutes and rules of the state of North Dakota

N.D.A.G. Letter to Hoffner (Aug. 30, 1985). The Attorney General's website expresses the Attorney General's opinion that questions pertaining to the constitutionality of a statute are

unsuited for an opinion from the Attorney General. *See* Supp.Add. 15 (Attorney General's webpage discussing who may request a legal opinion and listing topics which are not appropriate for a legal opinion, including questions involving the constitutionality of a statute).

[¶41] Although this Court has previously held that under certain circumstances, public officers may challenge the constitutionality of a statute, this Court has not previously addressed whether the Attorney General may do so, or whether the Attorney General may advocate on behalf of a public officer against the constitutionality of a statute. Counsel for the Legislative Assembly has only located one case in North Dakota in which the Attorney General argued against the constitutionality of a statute on behalf of another – *Solberg v. State Treasurer*, 78 N.D. 806, 53 N.W.2d 49 (1952). In *Solberg*, the Attorney General was defending the Bank of North Dakota, the Industrial Commission of the State of North Dakota, and the North Dakota State Treasurer against a declaratory judgment claim seeking to compel the defendants to release to the plaintiffs the reservation of 50 percent of the oil, natural gas, and minerals on or underlying certain land. *Id.* at 49-50. In defense, the State Treasurer argued a statute relied upon by the plaintiffs requiring the release of the funds was unconstitutional. *Id.* at 51. The State Treasurer had previously obtained the Attorney General's opinion expressing doubt as to the constitutionality of the statute. *Id.* at 52. This Court concluded, in relevant part, that as the State Treasurer had obtained the Attorney General's opinion on the matter expressing doubt as to the constitutionality of the statute, and as granting the relief requested by the plaintiffs could result in substantial financial liability to the State as the reserved mineral interests at issue were pledged by the State as security for bonds issued and outstanding by the State, the State Treasurer could challenge the

constitutionality of the statute as a defense to the plaintiffs' claims. *Id.* Although the Court in *Solberg* held the State Treasurer could challenge the constitutionality of the statute under the circumstances, the Court did not directly address the issue of whether it was appropriate for the Attorney General to advocate against the constitutionality of the statute on behalf of the State Treasurer.

[¶42] There is a distinction between the Attorney General's statutory obligation to render opinions to either house of the Legislative Assembly on legal questions (note there is no authorization for opinions to the Legislative Assembly on constitutional questions) when requested under N.D.C.C. § 54-12-01(8), and actually challenging the constitutionality of a legislative enactment before a court. Numerous courts have held an attorney general may not challenge the constitutionality of a legislative enactment. *See Oak Creek*, 605 N.W.2d at 541 (holding attorney general of Wisconsin lacked standing to challenge constitutionality of state statute – discussed above); *State v. Burning Tree Club, Inc.*, 481 A.2d 785, 798-99 (Ct. App. Md. 1984) (holding Maryland attorney general lacked standing to bring declaratory judgment action challenging constitutionality of an enactment of the general assembly; statutory duty to appear in court to defend enactments of the general assembly did not equate to authority to initiate a legal challenge to constitutionality of state statute; statute has a presumption of constitutionality and has a right to advocate of its validity); *NAACP v. California*, 511 F.Supp. 1244, 1262 (E.D. Cal. 1981) (rejecting plaintiffs' argument a case or controversy existed as between them and the attorney general of California on the alleged basis the attorney general refused to initiate an action challenging the constitutionality of a state statute challenged by the plaintiffs, noting the attorney general of California has no standing to challenge the constitutionality of a state statute merely because he believes it to be unconstitutional); *Baxley v. Rutland*, 409 F.Supp. at 1257 (determining attorney

general of Alabama, as relator for and in the name of the state, lacked standing to challenge state statute in federal court on basis it allegedly violated Constitution of the United States, noting the incongruity of the State attacking the validity of an enactment of its own legislature; holding subjective opinion of attorney general as to unconstitutionality of statute without any other personal stake in the outcome was insufficient to establish standing and the jurisdictional requirement of a case or controversy between parties with adversary interests). As stated by the Court of Special Appeals of Maryland, "[e]ven if the Attorney General believes that a statute may ultimately be held unconstitutional, that belief 'does not make it such. A statute, with its presumption of constitutionality, has just as much right to an advocate of its validity' as a criminal defendant has to an advocate of his or her defense." *State v. Braverman*, 137 A.3d 377, 391 (Md. Ct. Spec. App. 2016) (quoting *State ex rel. Atty' Gen. v. Burning Tree Club, Inc.*, 481 A.2d at 799).

[¶43] The Legislative Assembly and individual petitioning members thereof request the Court determine the Attorney General lacks standing to challenge the constitutionality of the Budget Section provisions at issue on behalf of the State, and cannot argue against the constitutionality of those provisions on behalf of the Governor. To grant the Attorney General unfettered standing to challenge a legislative enactment when his office has no direct stake in the outcome would seriously disturb the balance of powers between the three branches of government. *See Baxley v. Rutland*, 409 F.Supp. at 1255 ("If his [attorney general of Alabama] powers and responsibilities are so extensive as to permit him in his own name and in the name of the State to seek declaratory and injunctive relief from the federal district court as to any statute of the State of Alabama, the balance of powers between the three departments of state government may be seriously disturbed.").

II. Applicable Standard for Challenge to Constitutionality of Statute.

[¶44] The Governor and Attorney General bear a heavy burden in challenging the constitutionality of a legislative enactment. As summarized by this Court:

> Whether a statute is unconstitutional presents a question of law. The party challenging the constitutionality of a statute has a burden of proving its constitutional infirmity. A party must do more than submit bare assertions to adequately raise constitutional issues.
>
> ***
>
> > "An Act of the legislature is presumed to be correct and valid, and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. A statute enjoys a conclusive presumption of constitutionality unless it is clearly shown that it contravenes the state or federal constitution. The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial determination."
>
> *Haney v. North Dakota Workers Comp. Bur.*, 518 N.W.2d 195, 197 (N.D. 1994). The power to hold an Act of the Legislature invalid is one of the highest functions of the courts, and such power should be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its validity is, in the judgment of the court, beyond a reasonable doubt. Further demonstrating the strength of this requirement, N.D. Const. art. VI, § 4 states that this Court "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide." . . . .

Weeks v. North Dakota Workforce Safety & Ins. Fund, 2011 ND 188, ¶ 9, 803 N.W.2d 601, 605 (multiple citations and quotations omitted). The Governor and Attorney General have not met their heavy burden in challenging the constitutionality of the Budget Section provisions at issue.

III. Budget Section Provisions of Section 5 of House Bill No. 1020 Are Constitutional.

[¶45] Section 5 of HB 1020 provides:

> **SECTION 5. STATE WATER COMMISSION PROJECT FUNDING DESIGNATIONS – TRANSFERS – BUDGET SECTION APPROVAL.**
>
> 1. Of the funds appropriated in the water and atmospheric resources line item in section 1 of this Act from funds available in the resources trust fund and water development trust fund, $298,875.000 is designated as follows:

a. $120,125,000 for water supply;
b. $27,000,000 for rural water supply;
c. $136,000,000 for flood control; and
d. $15,750,000 for general water.

2. The funding designated in this section is for the specific purposes identified; however, the state water commission may transfer funding among these items, *subject to budget section approval* and upon notification to the legislative management's water topics overview committee.

(Add.71-72 (italics added for emphasis).)

[¶46] The Budget Section provision in Section 5 of H.B. 1020 is constitutional. Under H.B. 1020, the Budget Section is not given discretion to modify the total appropriation made by the Legislative Assembly, or to prevent the expenditure of the total appropriation by the State Water Commission ("SWC") for the stated purposes in the amounts identified in the legislation. Instead, the Budget Section may only approve or disapprove any request by the SWC to transfer already appropriated funds between the purposes already approved by the Legislative Assembly. The Budget Section is therefore not enacting law or changing the law, and the Legislative Assembly has not delegated its full legislative power to the Budget Section. *See Ralston Purina Co. v. Hagemeister*, 188 N.W.2d at 411 ("The true distinction between powers which the Legislature may delegate and those which it may not is to be determined by ascertaining whether the power granted gives authority to make a law or whether the power pertains only to the execution of the law which was enacted."). Instead, the Budget Section simply provides the executive branch flexibility on the use of appropriated funds for the purposes established by the Legislative Assembly. Such flexibility is consistent with the modern delegation doctrine.

[¶47] The Legislative Assembly meets a maximum of 80 days every two years to fulfill its constitutional responsibility to appropriate state funds pursuant to Section 12 of Article X of the Constitution of North Dakota. Budgets for the next biennium are developed up to twenty-seven

months before the end of the next biennium. The Legislative Assembly provided biennial appropriations to state agencies that total more than $13.5 billion for the 2017-19 biennium.

[¶48] State spending needs are based on factors that are unpredictable including caseloads, number of students, oil activity, crime, business activity, infrastructure, and natural disasters, among other factors. The state's economy is agriculture and energy commodities based, and is subject to significant fluctuations. Federal funds are also unpredictable and the federal government has a fiscal year that begins on October 1 of each year. To address these various uncertainties in relation to the appropriations at issue under S.B. 2013 and H.B. 1020, the Legislative Assembly provided authority to the Budget Section to address specific conditions requiring more current information and complete information than is available during the session, and to provide limited flexibility to the executive branch to react to changing and unforeseen conditions between sessions.

[¶49] As explained in the Petition, the Budget Section is a legislative body that has allowed the executive branch to enjoy the flexibility required by modern demands, fluctuating revenues, and exigencies otherwise unavailable due to biennial legislative sessions. The Budget Section has not been delegated the power to make law or to modify law. Instead, the Budget Section only has been delegated the power to ascertain facts which will bring the provisions of the law into operation by their own terms. *See Stutsman County v. Historical Society of North Dakota*, 371 N.W.2d 321, 327 (N.D. 1985) ("The power to ascertain facts which will bring the provisions of a law into operation by its own terms is not an unconstitutional delegation of legislative powers." (citation omitted)). Under the modern view of the delegation doctrine, such broad delegation is appropriate and necessary. *See North Dakota Council of School Administrators v. Sinner*, 458 N.W.2d 280, 286 (N.D. 1990) (determining statute authorizing director of budget to make an allotment reducing an appropriation is not an unconstitutional delegation of legislative authority as Legislative

Assembly did not delegate power to make law); *Trinity Medical Center v. North Dakota Bd. Of Nursing*, 399 N.W.2d 845, 847 (N.D. 1985) (determining statutory grant of broad authority to Board of Nursing was not unconstitutional delegation of legislative powers).

[¶50] The Budget Section provision also does not violate the separation of powers doctrine. The act of executing the law in this context is the actual expenditure of funds, which the State Water Commission still would do in this case. The Budget Section only performs a limited legislative function of gathering facts to ascertain whether certain funds may be transferred between the specified purposes established by the Legislative Assembly.

[¶51] The Legislative Assembly and individual petitioning members thereof request the Court deny the Cross-Petition and uphold the constitutionality of the Budget Section provision in Section 5 of H.B. 1020.

IV. Budget Section Provisions of Section 12 of Senate Bill No. 2013 Are Constitutional.

[¶52] The Budget Section provision in Section 12 of S.B. 2013 is also constitutional. Section 12 of S.B. 2013 provides:

> **SECTION 12. INFORMATION TECHNOLOGY PROJECT – BUDGET SECTION APROVAL – LEGISLATIVE INTENT – AGENCY EFFICIENCIES.** The capital assets line item and the total special funds line item in section 1 of this Act include $3,600,000 from the state lands maintenance funds for an information technology project. *Of the $3,600,000, $1,800,000 may be spent only upon approval of the budget section.* It is the intent of the sixty-fifth legislative assembly that during the 2017-18 interim, the governor and the commissioner of university and school lands achieve efficiencies and budgetary savings within the department of trust lands through the use of innovative ideas and through alternative solutions relating to information technology.

(Add.86 (italics added).)

[¶53] As discussed above in relation to H.B. 1020, due to the two-year interim between meetings of the Legislative Assembly, some flexibility in appropriations is necessary to address ever changing economic conditions and other unforeseen events. In Section 12, the Legislative

Assembly provided the Budget Section with the criteria to be taken into consideration in determining whether to approve the expenditure of $1.8 million of the $3.6 million appropriated, specifically whether "efficiencies and budgetary savings within the department of trust lands through the use of innovative ideas and through alternative solutions relating to information technology" has been achieved. The Budget Section therefore serves as a fact-finding body for the legislative branch. The language of Section 12 expresses the Legislative Assembly's intention not to give the executive branch authority to expend $1.8 million of the full $3.6 million appropriation unless the stated objectives are met.

[¶54] In addition, the Budget Section provision does not violate the separation of powers doctrine. The act of executing the law in this context is the actual expenditure of funds, which the Commissioner of University and School Lands still would do in this case. The Budget Section only performs a limited legislative function of gathering facts to ascertain whether certain funds will be made available for expenditure.

[¶55] The Legislative Assembly and individual petitioning members thereof request the Court deny the Cross-Petition and uphold the constitutionality of the Budget Section provision in Section 12 of S.B. 2013.

V. In The Alternative, In The Event The Court Concludes any Budget Section Provision At Issue Is Unconstitutional, The Court Should Void The Offending Portions Of The Bills At Issue, Consistent With The Overall Legislative Intent And Resulting In Workable Legislation.

[¶56] In the alternative, in the event this Court concludes the Budget Section provisions in HB 1020 and/or SB 2013 are unconstitutional, this Court still would need to determine what is the law in relation to HB 1020 and SB 2013 as a result of any such determination of unconstitutionality.

[¶57] If this Court determines the Budget Section involvement in approving State Water Commission transfers of appropriated funds between designated purposes in Section 5 of H.B. 1020 constitutes an unconstitutional delegation of a legislative function, any such delegation to the State Water Commission, or any other person, entity, or other branch of government also would be unconstitutional. As a result, language granting the State Water Commission authority to transfer funding among the identified purposes also would be unconstitutional and need to be removed.

[¶58] An additional reason for removing the language authorizing the State Water Commission to transfer funds between the designated purposes is the bill's language requiring Budget Section approval unambiguously evidences the Legislative Assembly did not intend to delegate to the State Water Commission unfettered authority to transfer money from one purpose to another. A court will not look to extrinsic aids to help decipher legislation unless the legislation is ambiguous. N.D.C.C. § 1-02-05; *e.g., Northern X-Ray Co., Inc. v. State*, 542 N.W.2d 733, 735-36 (N.D. 1996); *Little v. Tracy*, 497 N.W.2d at 705. The Court will "presume[e] that the Legislature intended all that it said, and that it said all that it intended to say." *Mosser v. Denbury Resources, Inc.*, 112 F.Supp.3d 906, 924 (D.N.D. 2015) (internal citations omitted); *Little v. Tracy*, 497 N.W.2d at 705.

[¶59] Therefore, with respect to Section 18 of H.B. 1020, the Legislative Assembly and petitioning members thereof submit the result should be the elimination of the language underlined below:

> **SECTION 5. STATE WATER COMMISSION PROJECT FUNDING DESIGNATIONS – TRANSFERS – BUDGET SECTION APPROVAL.**
>
> 1. Of the funds appropriated in the water and atmospheric resources line item in section 1 of this Act from funds available in the resources trust fund and water development trust fund, $298,875.000 is designated as follows:
>
> a. $120,125,000 for water supply;

b. $27,000,000 for rural water supply;
c. $136,000,000 for flood control; and
d. $15,750,000 for general water.

2. The funding designated in this section is for the specific purposes identified[.]; however, the state water commission may transfer funding among these items, subject to budget section approval and upon notification to the legislative management's water topics overview committee.

The removal of the language underlined above still would result in workable legislation.

[¶60] With respect to Section 12 of S.B. 2013, if the delegation is deemed improper, the result should be that the $1.8 million that was contingent on Budget Section approval is withheld from the Commissioner of University and School Lands. Legislative intent should control this issue. The wording of the legislation shows the Legislative Assembly did not intend for the Commissioner to have the full $3.6 million unless certain conditions (i.e., efficiencies and budgetary savings within the Department of Trust Lands through the use of innovative ideas and through alternative solutions relation to IT), as determined by the Budget Section, were met. Therefore, modifications to S.B. 2013 would be required to remove the $1.8 million that was contingent on Budget Section approval and still result in consistent workable legislation. Specifically, the phrase "Budget Section Approval" should be removed from the title to Section 12. The reference in the first sentence of Section 12 to the $3,600,000 appropriation should be reduced to $1,800,000. The second sentence in Section 12 which provides "Of the $3,600,000, $1,800,000 may be spent upon the approval of the budget section" should be removed. In addition, Section 1, providing the appropriation at issue, will require modification. The $3.6 million appropriation in Section 1 for "capital assets" to which this condition pertains would also need to be reduced by $1.8 million. This would require a reduction of both the "Adjustments or Enhancements" column and "Appropriation" column of the "Capital assets" line item from $3.6 million to $1.8 million, with a corresponding math adjustment to the "Total special funds" line

items relative to both columns. Finally, Section 3 would require modification by reducing the "information technology project" line for the 2017-19 biennium from $3,600,000 to $1,800,000. Requested revisions to Section 1, Section 3 and Section 12 of S.B. 2013 incorporating these modifications are provided in the Supplemental Addendum hereto at pages 16 and 17.

CONCLUSION

[¶61] The Legislative Assembly and petitioning members thereof request this Court:

1. determine the legal effect of the Governor's partial vetoes at issue, including whether each veto is void;
2. determine the Attorney General lacks standing to join in the Governor's Cross-Petition and may not advocate against the constitutionality of the Budget Section provisions at issue;
3. determine what is the current status of each affected bill; and
4. in the event this Court concludes any Budget Section provision is unconstitutional, to remove the offending language and modify the legislative enactments to result in workable legislation consistent with the overall intent of the Legislative Assembly.

[¶62] Dated this 12th day of February, 2018.

BAKKE GRINOLDS WIEDERHOLT

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CERTIFICATE OF COMPLIANCE

[¶63] The undersigned, as attorneys for the Petitioners in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face and that the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and certificate of compliance totals 9,877 words.

[¶64] Dated this 12th day of February, 2018.

BAKKE GRINOLDS WIEDERHOLT

By: */s/ Randall J. Bakke*

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CERTIFICATE OF SERVICE

[¶65] I hereby certify that a true and correct copy of the foregoing **PETITIONERS' BRIEF IN REPLY TO RESPONDENT GOVERNOR BURGUM'S BRIEF IN OPPOSITION TO PETITION FOR DECLARATORY JUDGMENT, OR IN THE ALTERNATIVE, FOR WRIT OF MANDAMUS, AND BRIEF IN OPPOSITION TO CROSS-PETITION FOR DECLARATORY JUDGMENT** was on the 12th day of February, 2018, emailed to the following:

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By *s/Randall J. Bakke*
RANDALL J. BAKKE

PETITIONERS' SUPPLEMENTAL ADDENDUM

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May 17, 2017

Honorable Wayne Stenehjem
Attorney General
State Capitol
Bismarck, ND 58505

Dear Mr. Stenehjem:

We request your opinion on the following questions regarding vetoed legislation:

1. Under Section 9 of Article V of the Constitution of North Dakota, may the Governor veto a portion of a sentence within a bill providing an appropriation, when doing so changes the intent of the legislation? Specifically, do the vetoes of a portion of a sentence in Sections 18 and 39 of 2017 Senate Bill No. 2003, a portion of a sentence in Section 12 of 2017 Senate Bill No. 2018, and a portion of a sentence in 2017 House Bill No. 1020 exceed the constitutional authority of the Governor, as interpreted by the North Dakota Supreme Court, to veto an item in an appropriation bill?
2. Under Section 9 of Article V of the Constitution of North Dakota, may the Governor veto a condition or restriction on an appropriation without vetoing the appropriation to which the condition or restriction is tied? Specifically, do the vetoes of condition or restrictions on the use of appropriations in Section 6 of 2017 Senate Bill No. 2003, Section 12 of 2017 Senate Bill No. 2013, Section 12 of 2017 Senate Bill No. 2018, and Section 5 of 2017 House Bill No. 1020 exceed the constitutional authority of the Governor, as interpreted by the North Dakota Supreme Court, to veto an item in an appropriation bill?
3. Is it a violation of Section 26 of Article XI of the Constitution of North Dakota for the Legislative Assembly to create statutory interim committees to study issues related to state employee health insurance and to monitor state revenues and state economic activity?

Because of the time-sensitive nature of the questions presented, we would appreciate your expedited review of our request.

Sincerely,

Al Carlson
House Majority Leader

Rich Wardner
Senate Majority Leader

AC/RW/JJB

701.328.2916 Fax 701.328.3615 www.legis.nd.gov lcouncil@nd.gov

NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL

2017

Legislative Council
State Capitol
600 East Boulevard
Bismarck, ND 58505
(701) 328-2916

PART 2 - BILLS

The drafter should pay careful attention to the general principles of legislative drafting. While there are many considerations that enter into the drafting process, a bill that is defective in structure or technical compliance will not accomplish its desired objective.

A preliminary consideration in drafting should be whether a similar bill has been previously drafted. If a previously drafted bill can be used as an example, it will greatly assist the drafter. Do not assume that a previously drafted bill is correct, or even appropriate, in present circumstances but do attempt to find an example to consider. At the end of this part there are several examples intended to illustrate the principles discussed in this part.

PARTS OF A BILL

There are five main parts to a bill: session identification, sponsor identification, title, enacting clause, and body. Each part is essential and must be complete.

Session Identification

The session identification pertains to the legislative session into which the bill is introduced. The words **Sixty-fifth Legislative Assembly of North Dakota** must appear on the first page of all bills introduced in the 2017 legislative session. The words **Sixty-fifth Legislative Assembly** must appear on each subsequent page. Review the examples in this manual for illustrations of the proper alignment of the appropriate phrase.

Sponsor Identification

The sponsor identification pertains to the legislators or legislative entities sponsoring the bill. It consists of the phrase **Introduced by** and the name (or names) of the sponsor (or sponsors). If the sponsor is a legislator, the sponsor's name should be preceded by either the word **Representative** or **Senator** or the plurals of these words when there is more than one sponsor.

Under Senate Rule 401 in effect during the 2015 legislative session, the number of sponsors of a Senate bill was limited to no more than six members of the Legislative Assembly. House Rule 401 in effect during the 2015 legislative session limited the number of sponsors of a House bill to no more than twelve members of the Legislative Assembly. Joint Rule 208 limits the number of agency sponsors of a bill to not more than five.

Title

The title of a bill describes the content of unnumbered, unlocated created sections of law and lists the numbered or unnumbered but located sections of the Century Code or Session Laws treated by the bill and the nature of the treatment, i.e., whether the sections are created, amended, or repealed. At the end of this part, Example 6 illustrates creation of unnumbered, unlocated sections and Example 9 illustrates creation of an unnumbered but located section. The title of a bill must also briefly express the subject of the created, amended, or repealed sections. Except for bills creating unnumbered, unlocated sections of law, the subject of a bill is expressed in the "relating to" clauses. One relating to clause should describe the subject of all created sections, one relating to clause should describe the subject of all amended sections, and one relating to clause should describe the subject of all repealed sections. Statements of legislative intent, testimony, and the use of adjectives that imply value judgments should be avoided in drafting clauses describing the contents of a bill.

When drafting a title, consideration must be given to Article IV, Section 13, of the Constitution of North Dakota. That section provides that no bill may be amended on its passage through either house so as to change its general subject matter. In addition, no bill may embrace more than one subject, which must be expressed in its title, and a bill in violation of this provision is invalid to the extent of the violation.

The title of a bill begins with the words **A BILL for an Act**. Items, if contained in the bill, should be listed in the following manner:

1. Description of the subject matter of unnumbered, unlocated provisions.
2. All new numbered or located sections, subsections, subdivisions, paragraphs, and subparagraphs being created in numerical order.
3. The sections, subsections, subdivisions, paragraphs, and subparagraphs being amended in numerical order.
4. The sections, subsections, subdivisions, paragraphs, and subparagraphs being repealed in numerical order.
5. A legislative intent statement (intent statements are discouraged - see page 89).
6. A Legislative Management or agency study suggestion or directive.
7. A penalty.
8. An appropriation.
9. A transfer.
10. A provision for application.
11. A provision for retroactive application.
12. An effective date.
13. An expiration date.
14. A declaration of emergency.

If a bill creates, amends, or repeals provisions of the Century Code and provisions of the Session Laws, the listing of Session Laws provisions should follow the listing of Century Code provisions. The following example of a bill title contains all of these items in the proper order:

> A BILL for an Act to provide for the creation of certain banking corporations; to create and enact section 6-03-67.1 and a new section to chapter 6-04 of the North Dakota Century Code, relating to bank deposit insurance; to amend and reenact sections 6-02-03, 6-02-07, and, if House Bill No. 1044 of the sixty-fifth legislative assembly does not become effective, 6-03-01 of the North Dakota Century Code, relating to insurance requirements and organization certificates and certificates of authority of state banking associations; to repeal section 6-01-18 of the North Dakota Century Code and section 4 of chapter 350 of the 2013 Session Laws, relating to reports of insured institutions; to provide a statement of legislative intent; to provide for a legislative management study; to provide a penalty; to provide an appropriation; to provide a continuing appropriation; to provide for a transfer; to provide for application; to provide for retroactive application; to provide an effective date; to provide an expiration date; and to declare an emergency.

One exception to the general rule governing the proper order of items in a bill title is that if a bill primarily intended to provide an appropriation includes new law or an amendment to the Century Code or Session Laws, the appropriation should be the first reference in the title.

Enacting Clause

A bill must contain an enacting clause after the title. The required enacting clause is:

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

A bill without this enacting clause violates Senate and House Rules 404(3). Century Code Section 16.1-01-09 sets out the enacting clause required for an initiated measure.

Body

Format

The body of a bill is divided into numbered sections. Normally, a separate section of the bill is used for each section of the Century Code or Session Laws to be affected.

In the body of the bill, the listing sequence differs from that in the title. The created and amended sections must be arranged in numerical order by Century Code section number, without regard to whether the sections are created or amended; amended sections of the Session Laws are then listed in chronological order and within chronological order in numerical order by chapter number; and the repealed sections and chapters must be listed in numerical order at the end of the bill in one repeal section (more than one repeal section may be used if repeals will have differing effective dates). If an unnumbered section is created in a bill that also amends numbered sections, the unnumbered section should be placed among the numbered sections in the approximate logical placement of the new section in the Century Code. For example, if a bill creates an unnumbered section to Chapter 6-08 relating to the sale of banking institutions and also amends Sections 6-08-01 and 6-08-28 and the new section logically belongs between these two sections, it should be placed as the second section of the bill.

The special clauses--penalty clause, appropriation clause, transfer clause, application clause, retroactive application clause, effective date clause, expiration date clause, and emergency clause--should be placed in the same order as in the title, and following the substantive provisions of the bill. An exception to this rule for placement of special clauses exists. When a bill, the primary purpose of which is to provide an appropriation, has substantive provisions added, the appropriation section remains the first section of the bill.

Use of Overstrike and Underscore

In amending the Century Code or Session Laws, extreme care should be taken that each amended section conforms **exactly** to the existing law, including punctuation. Any material contained in a section of the Century Code or Session Laws which is to be deleted by an amendment to that section must be shown in the bill, and must be indicated by being overstruck by dashes. All new material inserted in an existing section must be underscored. **New material (indicated by underscores) replacing old material (indicated by overstrikes) should follow the old material being replaced.** Whenever possible, existing language should be retained. Punctuation within a Century Code or Session Laws section may not be changed unless handled as an amendment. **If a word is to be changed from singular to plural or vice versa, all of the old word must be overstruck and all of the new word must be underscored.**

All new law must be underscored whether amendments are included or a bill contains only new law. However, certain special clauses are not underscored, including effective date and expiration date clauses, emergency clauses, repealer clauses, Legislative Management study directives, and sections in appropriation bills which relate only to the appropriation provided.

Section Identification Number

Each section of a bill is given a section identification number, starting with **SECTION 1** and numbering consecutively thereafter.

Amending Clause

The purpose of the amending clause is to point out where the current and official version of the law to be amended is located. The amending clause must refer to the section of law being amended. If the law to be amended is not codified, the amending clause should refer to the proper section, chapter, and year of the Session Laws. In rare cases it is necessary to amend a bill already passed during the same Legislative Assembly. In such cases the amending clause must refer to the bill as approved. It may be necessary to amend an initiated measure that has been passed but not codified. In such cases the amending clause must refer to the initiated measure as adopted.

The amending clause follows the section identification number. Variations in an amending clause depend upon the type of amendment.

The amending clause (with a section identification number) to amend a section of law found in the Century Code should refer to the Century Code as follows:

> **SECTION 1. AMENDMENT.** Section 6-09-01 of the North Dakota Century Code is amended and reenacted as follows:

Legislation not of a general and permanent nature is normally not codified in the Century Code. Examples of typical nonpermanent sections are appropriations, bonding authorizations, building authorizations, and land sale authorizations.

The amending clause (with a section identification number) to amend a section of law not codified in the Century Code but compiled in the Session Laws should refer to the appropriate Session Laws as follows:

> **SECTION 3. AMENDMENT.** Section 22 of chapter 95 of the 2015 Session Laws is amended and reenacted as follows:

The amending clause (with a section identification number) to amend a section of law amended by the Session Laws should refer to the appropriate section of the Century Code and Session Laws as follows:

> **SECTION 4. AMENDMENT.** Section 40-18-15.1 of the North Dakota Century Code, as amended by section 159 of chapter 326 of the 2015 Session Laws, is amended and reenacted as follows:

The amending clause (with a section identification number) to amend a bill passed during the same Legislative Assembly should refer to the appropriate bill as follows:

> **SECTION 5. AMENDMENT.** Section 6 of House Bill No. 1046, as approved by the sixty-fifth legislative assembly, is amended and reenacted as follows:

When amending a bill recently passed or to be passed, the only overstrike or underscore that should appear is that which makes the changes to provisions in the bill being amended.

The amending clause (with a section identification number) to amend a section of an initiated measure adopted but not codified is:

> **SECTION 6. AMENDMENT.** Section 1 of initiated measure No. 1 as adopted at the (primary/general) election in 2016 is amended and reenacted as follows:

In some instances, the better practice may be to amend only a subsection of a section, especially if the entire section is quite long. This reduces the cost of printing bills. A good rule to use when deciding whether to repeat the whole section or to amend only a subsection is that if the whole section takes up more than one-half page in the Century Code, then amend only the relevant subsection. Never sacrifice clarity for brevity. If the subsection standing alone can be understood in the proper context, or if the description in

the title will allow the subsection standing alone to be understood in the proper context, it is probably advisable to amend only the subsection. An example of an amending clause (with a section identification number) to amend a subsection is:

> **SECTION 7. AMENDMENT.** Subsection 2 of section 26.1-04-05 of the North Dakota Century Code is amended and reenacted as follows:

In some cases it may be advisable to amend more than one subsection in the same Century Code section. This may occur when amending a very long section. An example of an amending clause (with a section identification number) to amend multiple subsections is:

> **SECTION 8. AMENDMENT.** Subsections 2 and 5 of section 26.1-04-05 of the North Dakota Century Code are amended and reenacted as follows:

In very limited instances, special amending clauses are necessary due to the nature of the subject matter being considered. **Contact the Legislative Council staff whenever the use of a special amending clause is being considered.** Examples of two special amending clauses are:

> **SECTION 9. AMENDMENT.** Section 26.1-36-06 of the North Dakota Century Code as created by Senate Bill No. 2078, as approved by the sixty-fifth legislative assembly, is amended and reenacted as follows:
>
> **SECTION 10. AMENDMENT.** If Senate Bill No. 2078 does not become effective, section 40-15-06 of the North Dakota Century Code is amended and reenacted as follows:

The complete text, including the Century Code number and caption, of the amended section of law follows the amending clause. If only a subsection is amended, only the number and text of the subsection follow the amending clause, and the Century Code number and caption are not used. If a subdivision, paragraph, or subparagraph is to be amended, it is usually advisable to include the text of the subsection (and thus amend the subsection) so the amendment is understandable by the reader.

Always proofread amended sections carefully against the Century Code volume or the supplement in which the most recent version of the section appears.

Creating Clause

Creation of new Century Code numbers should be avoided when creating a new chapter, section, or subsection of the Century Code. Any assignment of new Century Code chapter, section, or subsection numbers must be cleared with the Code Revisor of the Legislative Council. When a proposed law of a general and permanent nature is enacted and contains no Century Code numbers, the proper numbers will be inserted by the Code Revisor at the time the new law is published as a part of the Century Code. Avoiding the use of new chapter, section, or subsection numbers in bills creating new law will help to eliminate duplicate numbers appearing in other introduced bills. Also, Century Code numbers may not be reused after a section has been repealed. In addition, a section number may not be changed by overstriking the section number and inserting a new underscored section number. To change a section number, the section must be repealed and recreated.

In some cases, it may be important to locate new material in a specific title or chapter in order to use general provisions contained in the chapter or title, such as definitions or penalty provisions. In such a case, the new material may be unnumbered but located in the specific title or chapter desired. The creating clause (with a section identification number) for a new unnumbered chapter to a title of the Century Code should read as follows:

SECTION 1. A new chapter to title 34 of the North Dakota Century Code is created and enacted as follows:

The creating clause (with a section identification number) for a new unnumbered section to a chapter of the Century Code should read as follows:

SECTION 2. A new section to chapter 40-47 of the North Dakota Century Code is created and enacted as follows:

The creating clause (with a section identification number) for a new numbered section of the Century Code should read as follows:

SECTION 3. Section 40-57-03.1 of the North Dakota Century Code is created and enacted as follows:

If the section is long, it may be easier to create a new subsection rather than amend the entire section. The creating clause for an unnumbered subsection is:

SECTION 4. A new subsection to section 49-22-20 of the North Dakota Century Code is created and enacted as follows:

In limited instances, special creating clauses are necessary due to the nature of the subject matter being considered. **Contact the Legislative Council staff whenever use of a special creating clause is being considered.** Examples of special creating clauses are:

SECTION 5. If Senate Bill No. 2460 is approved by the sixty-fifth legislative assembly and becomes effective, a new section to chapter 54-24.3 of the North Dakota Century Code is created and enacted as follows:

SECTION 6. If Senate Bill No. 2460 as approved by the sixty-fifth legislative assembly becomes effective, a new section to chapter 54-24.3 of the North Dakota Century Code is created and enacted as follows:

Caption

The complete text, including the Century Code number (if used) and caption (headnote), of the relevant section of law follows the amending or creating clause. When a new section is created, a descriptive caption should be included. A caption gives a brief notice of the content of a section. Well-written captions allow the section listing preceding a chapter to be used as a chapter table of contents. Section 1-02-12 provides that a caption is not part of the law. When a caption is not included in a new section, it will be inserted by the Code Revisor at the time the new law is published as part of the Century Code. A caption should not list every item contained in the section. However, the wording of a caption is important because Century Code index entries are based on the caption.

A dash is used to separate subject headings in a caption. The first word following a dash is capitalized. A period is used at the end of a caption. An example of a caption is:

60-02-07. Public warehouse license - How obtained - Fee - Financial statement.

SPECIAL CLAUSES

Special clauses, although an integral part of certain bills, are usually not published as permanent law in the Century Code. Therefore, special clauses do not have to be underscored. However, some special clauses, such as penalty clauses, are published as permanent law and must be underscored.

Savings or Constitutionality Clause

A clause intended to protect the validity of certain portions of an Act is usually termed a savings, severability, or constitutionality clause. **Do not use these clauses.** This type of

clause is not necessary in North Dakota because the courts will generally hold all portions of an Act which stand alone to be constitutional even though some other portion of the Act may be unconstitutional. See *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979); *Baird v. Burke County*, 205 N.W. 17 (N.D. 1925). Additionally, Section 1-02-20 is a statutory savings clause.

Repealer Clause

All provisions to be repealed by a bill must be referred to in the title of the bill. If several sections and a chapter of the Century Code are being repealed, the repeal section (with a section identification number) may read as follows:

> **SECTION 1. REPEAL.** Sections 1-01-01, 1-01-02, 1-01-10, 1-01-14, and 1-01-16 and chapter 1-21 of the North Dakota Century Code are repealed.

Both sections and chapters of the Century Code may be repealed. However, **do not repeal parts of sections** such as subsections, subdivisions, paragraphs, or subparagraphs. The preferred method of deleting such material from the Century Code is to amend the section by overstriking the material to be deleted and renumbering the remaining material accordingly in the amendment.

When a bill draft is to repeal a provision of the Century Code, please search the Century Code for any references that will require change. If you are uncertain how to do this, **contact the Legislative Council staff prior to completing the bill draft.** The Council office will provide assistance in determining whether any references to the provision proposed for repeal, deletion, or renumbering need to be corrected (and thus included in the bill draft). **All references to the repealed, deleted, or renumbered provision throughout the entire Century Code should be corrected at the same time the provision is repealed, deleted, or renumbered in order to avoid future statutory construction problems.**

Suspending Clause

Suspending the operation of a law should be used only in limited circumstances. Please contact the Legislative Council staff when considering suspension of a law.

Penalty Clause

A provision for a penalty must be noted in the title of the bill. The penalty section should indicate the intended offense classification. Offense classifications are contained in Section 12.1-32-01. An example of a penalty clause **for a law to be codified outside Title 12.1** is:

> **SECTION 1. Penalty.** Any person who willfully violates this (Act, chapter, etc., as appropriate) is guilty of a class B misdemeanor.

Any penalty clause to be codified outside of Title 12.1--the Criminal Code--must contain culpability language or the offense may be considered a strict liability offense. *State v. Rippley*, 319 N.W.2d 129 (N.D. 1982). Section 12.1-02-02 defines various kinds of culpability. Although "willfully" furthers the purpose of subsection 2 of Section 12.1-02-02, it does not encompass "negligently". The appropriate level of culpability depends on the substantive provisions. An example of a penalty clause for a law to be codified within Title 12.1 (thus not containing culpability language) is:

> **SECTION 2. Penalty.** Any person who violates this (Act, chapter, etc., as appropriate) is guilty of a class B misdemeanor.

A penalty must also be noted in the title if found in a section containing other substantive provisions.

Appropriation Clause

An appropriation must be noted in the title of the bill.

The standard form for a lump sum general fund appropriation clause is:

> **SECTION 1. APPROPRIATION.** There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $(amount in numerals), or so much of the sum as may be necessary, to (name of agency) for the purpose of _____, for the biennium beginning July 1, 2017, and ending June 30, 2019.

If funds are available from more than one source and detail regarding estimated expenditures is available, the following is the standard appropriation clause:

> **SECTION 2. APPROPRIATION.** The funds provided in this section, or so much of the funds as may be necessary, are appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, and from special funds derived from federal funds and other income, to (name of agency) for the purpose of _____, for the biennium beginning July 1, 2017, and ending June 30, 2019, as follows:

Salaries and wages	$(amount in numerals)
Operating expenses	(amount in numerals)
Equipment	(amount in numerals)
Capital improvements	(amount in numerals)
Grants, benefits, and claims	(amount in numerals)
Total all funds	$(amount in numerals)
Less estimated income	(amount in numerals)
Total general fund appropriation	$(amount in numerals)

However, if the entire appropriation is from federal or other funds, the "Total all funds", "Less estimated income", and "Total general fund appropriation" lines should be replaced with a "Total special funds appropriation" line and the language in the first paragraph relating to the general fund should be eliminated.

Also, if the entire appropriation is from the general fund, the "Total all funds" and "Less estimated income" lines should be eliminated and the language in the first paragraph relating to special and other funds should be eliminated.

To be valid, an appropriation of public moneys must make a specific and direct appropriation of a definite sum of money for a specified purpose. *Menz v. Coyle*, 117 N.W.2d 290 (N.D. 1962); *Campbell v. Towner County*, 71 N.D. 616, 3 N.W.2d 822 (1942); *Langer v. State*, 69 N.D. 129, 284 N.W. 238 (1939).

If the appropriation is to be made from a special fund, the special fund should be named in place of the general fund. The time period during which the appropriation will be available should be specified in the bill.

If the appropriation includes the authority to transfer, the name of the agency given the authority to transfer and the fund to which the funds are to be transferred should be named. The transfer authorization must be noted in the title of the bill.

> **SECTION 3. APPROPRIATION - TRANSFER.** There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $(amount in numerals), or so much of the sum as may be necessary, which the (name of agency) shall transfer to the (name of fund) during the biennium beginning July 1, 2017, and ending June 30, 2019.

Application Clause

An application clause may be used to indicate a date or occurrence to which the bill or a portion of the bill applies.

SECTION 4. APPLICATION. This Act applies to construction contracts executed on and after the effective date of this Act.

SECTION 8. APPLICATION. Sections 1 and 2 of this Act apply to any public improvement project for which a contract or agreement for plans, drawings, or specifications is executed after the effective date of this Act.

SECTION 9. APPLICATION. The change in term limits for board members under section 1 of this Act applies to board member appointments and reappointments made after July 31, 2017.

Retroactive Application Clause

The application of an Act or part of an Act may be made retroactive. An emergency clause is not required when using this type of clause. Two examples of this type of clause are:

SECTION 1. RETROACTIVE APPLICATION. This Act applies retroactively to cases arising after July 31, 2015.

SECTION 2. RETROACTIVE APPLICATION. This Act is retroactive in application.

Effective Date Clause

An effective date clause must be noted in the title of the bill. An effective date clause is used to provide an effective date for the bill, or specified sections in the bill, if an effective date is required other than the effective date provided by law. Article IV, Section 13, of the Constitution of North Dakota provides the time a bill becomes effective if the bill does not contain an effective date. Section 1-02-42 provides rules of construction relating to determining effective dates of legislation under the constitutional provision. If a bill is to become effective before the time it would normally become effective under Article IV, Section 13, the bill requires an emergency clause. Examples of types of effective date clauses are:

SECTION 1. EFFECTIVE DATE. This Act is effective for taxable years beginning after December 31, 2016.

SECTION 2. EFFECTIVE DATE. This Act becomes effective on January 1, 2018.

SECTION 3. CONTINGENT EFFECTIVE DATE. This Act becomes effective on the date the governor certifies to the secretary of state and to the director of the department of transportation and the legislative council that the federal restrictions on speed limits exceeding fifty-five miles per hour are no longer in effect, but only if that day is before August 1, 2019.

SECTION 4. EFFECTIVE DATE. Sections 4 and 5 of this Act become effective immediately upon its filing with the secretary of state and sections 1, 2, and 3 of this Act become effective on August 1, 2017.

SECTION 5. CONTINGENT EFFECTIVE DATE. Section 4 of this Act becomes effective on the date that the proposed amendment to section 21 of article X of the Constitution of North Dakota as contained in Senate Concurrent Resolution No. 4037, as agreed to by the sixty-fifth legislative assembly and approved by the electors, becomes effective.

SECTION 6. CONTINGENT EFFECTIVE DATE. This Act is contingent on the passage of Senate Concurrent Resolution No. 4002 by the sixty-fifth legislative assembly and approval of that resolution by the electors of this state. If this Act takes effect, it becomes effective on January 1, 2019.

Please note that use of the "effective immediately" language in the fourth example requires that an emergency clause be part of the bill. The Act in the third example may also be effective before the usual effective date and may require an emergency clause.

Note the difference between examples 1, 2, and 4 and examples 3, 5, and 6 with respect to whether the effective date will take effect without action by anyone or whether the effective date is contingent on an event that may or may not happen.

Note that any bill passed in a special session of the Legislative Assembly must have an effective date clause. Article IV, Section 13, of the Constitution of North Dakota provides an effective date only for bills passed during regular legislative sessions.

Expiration Date Clause

An expiration date clause must be noted in the title of the bill. An expiration date clause is used to provide a time at which the bill, or a specified provision of the bill, expires. Examples of expiration date clauses are:

> **SECTION 1. EXPIRATION DATE.** This Act is effective through July 31, 2018, and after that date is ineffective.
>
> **SECTION 2. EXPIRATION DATE - SUSPENSION.** This Act is effective through July 31, 2019, and after that date is ineffective. North Dakota Century Code sections 9-10-07 and 32-03-07 are suspended from the effective date of this Act through July 31, 2019. Sections 9-10-07 and 32-03-07 as they existed on the day before the effective date of this Act become effective as of August 1, 2019.

Emergency Clause

To be passed as an emergency measure a bill must have a reference to the emergency in its title. The preferred terminology is **and declaring an emergency** or **and to declare an emergency** at the end of the title. Examples of emergency clauses are:

> **SECTION 1. EMERGENCY.** This Act is declared to be an emergency measure.
>
> **SECTION 2. EMERGENCY.** Sections 3 and 4 of this Act are declared to be an emergency measure.

Short Title Clause

Short titles should not be used. With statutory codification, every codified section has a Century Code number and is placed with provisions reflecting the subject matter involved. In addition, a chapter caption is developed based upon the chapter's content. Such clauses are usually not codified as part of the Century Code.

AMENDMENTS TO CENTURY CODE SECTIONS WITH EFFECTIVE DATE NOTATIONS

In a Century Code section that contains an effective date or expiration date notation preceding the caption, the notation is considered to be of the same effect as adding an effective date or expiration date clause to the bill draft, except the notation relates only to the version of the section with which it appears. Any amendment made to the version will be effective for the time shown in the notation. The effective date or expiration date for the version can also be changed by overstriking and underscoring a new date in the notation. If such a change is made, the phrase "to provide an effective date" or "to provide an expiration date" should be included in the bill title.

There are situations that require special consideration:

1. If a bill has multiple sections, some having effective date or expiration date notations and some having none, and an effective date or expiration date clause is added at the end of the bill, it is necessary to avoid conflict between the effective

date or expiration date clause and any effective date or expiration date notations. An exception is needed in the effective date or expiration date clause, such as:

SECTION 12. EFFECTIVE DATE. Except as otherwise provided in this Act, this Act is effective January 1, 2018.

SECTION 12. EXPIRATION DATE. Except as otherwise provided in this Act, this Act is effective through July 31, 2019, and after that date is ineffective.

An alternative would be to specify in the effective date or expiration date clause the sections of the bill which are affected by the clause.

2. Amending less than an entire section is strongly discouraged if the section has alternative versions with different effective date notations. Amend a subsection of such a section only if there would be a substantial (two or more pages) savings in the length of the bill. Separate sections of the bill must be used for each version of the subsection being amended, a single reference to the Century Code section in the bill title is adequate, and the bill section amending clauses must refer to the effective date notation for each subsection. Examples of bill section amending clauses for these special circumstances are:

SECTION 1. AMENDMENT. Subsection 3 of section 39-02-03 of the North Dakota Century Code, as effective through December 31, 2017, is amended and reenacted as follows:

. . .

SECTION 2. AMENDMENT. Subsection 3 of section 39-02-03 of the North Dakota Century Code, as effective after December 31, 2017, is amended and reenacted as follows:

. . .

Senate Rule -

405. Approval of measures as to form and style.

1. When a bill or resolution, with the requisite number of copies, is filed with the Secretary without a notation attached to the covered copy stating that the bill or resolution was approved as to form and style by the Legislative Council, the Secretary immediately shall cause that bill or resolution to be delivered to the Legislative Council with a written request that the bill or resolution be examined and receive a notation approving its form and style.
2. When the Legislative Council receives a bill or resolution from the Secretary pursuant to this rule, it shall see that the bill or resolution is in the form and style required by law, legislative rule, and the drafting rules promulgated by the Legislative Council.
3. When the Legislative Council has ensured that the bill or resolution meets all requirements regarding form and style, the bill or resolution and all copies must be returned to the Secretary with a notation of approval attached to the covered copy.
4. If the Legislative Council, due to the exercise of its responsibilities under this rule, is not able to deliver an approved bill or resolution to the Secretary before expiration of the last legislative day for normal introduction, the Secretary, whenever such an approved bill or resolution is received, shall proceed to file it as if it had been received on the final legislative day for normal introduction.

House Rule –

405. Approval of measures as to form and style.

1. When a bill or resolution, with the requisite number of copies, is filed with the Chief Clerk without a notation attached to the covered copy stating that the bill or resolution was approved as to form and style by the Legislative Council, the Chief Clerk immediately shall cause that bill or resolution to be delivered to the Legislative Council with a written request that the bill or resolution be examined and receive a notation approving its form and style.
2. When the Legislative Council receives a bill or resolution from the Chief Clerk pursuant to this rule, it shall see that the bill or resolution is in the form and style required by law, legislative rule, and the drafting rules promulgated by the Legislative Council.
3. When the Legislative Council has ensured that the bill or resolution meets all requirements regarding form and style, the bill or resolution and all copies must be returned to the Chief Clerk with a notation of approval attached to the covered copy.
4. If the Legislative Council, due to the exercise of its responsibilities under this rule, is not able to deliver an approved bill or resolution to the Chief Clerk before expiration of the last legislative day for normal introduction, the Chief Clerk, whenever such an approved bill or resolution is received, shall proceed to file it as if it had been received on the final legislative day for normal introduction.

Legal Opinions

One of the duties of the Attorney General is to give written opinions on legal questions. State law restricts who may request an Attorney General's Opinion.

The Attorney General is authorized to issue opinions only to state agencies and officials, the state legislature, county state's attorneys, certain city officials, water resource districts, soil conservation districts, health district boards, the Judicial Conduct Commission, and the Garrison Diversion Conservancy District.

Some situations are unsuited for an Opinion. These include when the question presented:

- involves the constitutionality of a statute;
- is moot or hypothetical;
- concerns the internal operation or management of the judicial branch of government;
- calls for interpreting a local ordinance or charter;
- should be, or already has been, addressed by the political subdivision's legal advisor;
- involves matters regarding whether a criminal offense has occurred;
- is likely to be or presently is pending before a court or a court already has ruled on the issue; or
- amounts to private legal advice.

An Attorney General's Opinion governs the actions of public officials until such time as the question presented is decided by the Courts.

LEGISLATIVE ASSEMBLY'S REQUESTED MODIFICATIONS TO SECTION 1, SECTION 3, AND SECTION 12 OF SENATE BILL 2013, 2017 N.D. LEG., IN THE EVENT THE COURT DETERMINES BUDGET SECTION PROVISION IS UNCONSTITUTIONAL.

SECTION 1. APPROPRIATION. The funds provided in this section, or so much of the funds as may be necessary, are appropriated from special funds derived from the state lands maintenance fund, the strategic investment and improvements fund, the energy impact fund, and the oil and gas impact grant fund in the state treasury, to the commissioner of university and school lands for the purpose of defraying the expenses of the commissioner of university and school lands, for the biennium beginning July 1, 2017, and ending June 30, 2019, as follows:

	Base Level	Adjustments or Enhancements	Appropriation
Salaries and wages	$6,123,516	($117,966)	$6,005,550
Operating expenses	2,019,637	(243,914)	1,775,723
Capital assets	0	~~3,600,000~~	~~3,600,000~~
		1,800,000	1,800,000
Grants	99,300,000	(59,300,000)	40,000,000
Contingencies	100,000	0	100,000
Energy infrastructure and impact office	700,000	(700,000)	0
Total special funds	$108,243,153	~~($56,761,880)~~	~~$51,481,273~~
		($58,561,880)	$49,681,273
Full-time equivalent positions	33.00	(2.00)	31.00

SECTION 3. ONE-TIME FUNDING - EFFECT ON BASE BUDGET - REPORT TO THE SIXTY-SIXTH LEGISLATIVE ASSEMBLY. The following amounts reflect the one-time funding items approved by the sixty-fourth legislative assembly for the 2015-17 biennium and the 2017-19 biennium one-time funding items included in the appropriation in section 1 of this Act:

One-Time Funding Description	2015-17	2017-19
Oil and gas impact grants - airports	$0	$25,000,000
Other grants - airports	0	15,000,000
Information technology project	0	~~3,600,000~~1,800,000
Total special funds	$0	$43,600,000

The 2017-19 biennium one-time funding amounts are not a part of the entity's base budget for the 2019-21 biennium. The commissioner of university and school lands shall report to the appropriations committees of the sixty-sixth legislative assembly on the use

of this one-time funding for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 12. INFORMATION TECHNOLOGY PROJECT ~~– BUDGET SECTION APPROVAL –~~ – LEGISLATIVE INTENT – AGENCY EFFICIENCIES. The capital assets line item and the total special funds line item in section 1 of this Act include ~~$3,600,000~~$1,800,000 from the state lands maintenance funds for an information technology project. ~~Of the $3,600,000, $1,800,000 may be spent only upon approval of the budget section.~~ It is the intent of the sixty-fifth legislative assembly that during the 2017-18 interim, the governor and the commissioner of university and school lands achieve efficiencies and budgetary savings within the department of trust lands through the use of innovative ideas and through alternative solutions relating to information technology.