

LETTER OPINION
93-L-329

November 12, 1993

Ms. Carla J. Smith, CEO
North Dakota Future Fund, Inc.
Mr. Warren Enyart, CEO
Technology Transfer, Inc.
1833 East Bismarck Expressway
Bismarck, ND 58504

Dear Ms. Smith and Mr. Enyart:

Thank you for your August 19, 1993, and September 9, 1993, letters asking when the amounts appropriated by the 53rd North Dakota Legislative Assembly in Senate Bill 2021 to the North Dakota Future Fund and Technology Transfer, Inc., must be transferred. You specifically ask whether the Office of Management and Budget may prorate transfers throughout the biennium, and how interest to the funds must be credited.

Section 1 of Senate Bill 2021 (1993 N.D. Sess. Laws ch. 42) made an appropriation from the general fund "to the various divisions of the Department of Economic Development and Finance for the purpose of defraying the expenses thereof" for the 1993-1995 biennium. Thereafter, a list of line items was provided, including line items for the "Future Fund" and "Technology Transfer, Inc."

Section 23 of Senate Bill 2021 declared the line items for the Future Fund and Technology Transfer, Inc., in section 1 of the bill to be emergency measures.

The administration of the Department of Economic Development and Finance appropriations that are transferred to the North Dakota Future Fund and to Technology Transfer, Inc., vary in design, but are similar in operation. The first appropriation moneys are transferred directly to the North Dakota Future

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Fund as a statutorily created revolving fund with a continuing appropriation. N.D.C.C. ? 10-30.3-10. The North Dakota Future Fund, Inc., board of directors invests money in the fund with the primary purpose of developing and expanding primary sector business in North Dakota. N.D.C.C. ? 10-30.3-02. North Dakota Future Fund, Inc.'s operating costs are paid out of Department of Economic Development and Finance agency appropriations.

The second appropriation moneys are transferred directly to Technology Transfer, Inc., a nonprofit corporation. N.D.C.C. ? 10-30.4-04. It is my understanding that Technology Transfer, Inc., has established an account as a revolving fund in the Bank of North Dakota for the purpose of implementing N.D.C.C. ch. 10-30.4. As indicated in Technology Transfer, Inc.'s enacting legislation, a part of this transfer is set aside for corporate operating expenses. See 1991 N.D. Sess. Laws ch. 95, ? 54. However, the majority of the money transferred is expended in pursuit of Technology Transfer, Inc.'s mission of "provid[ing] leadership and financial resources toward the commercialization of new technology in North Dakota." Technology Transfer, Inc., Annual Report, p. 1 (1991-1992). Technology Transfer, Inc.'s authority for the establishment of its revolving fund is found in its authority as a nonprofit corporation (see N.D.C.C. ? 10-24-05), its certification as a nonprofit development corporation under N.D.C.C. ? 10-24-40, and its authority to "[r]eceive funds from private and public sources to be expended by the corporation in a manner that effectuates the purposes of [N.D.C.C. ch. 10-30.4]." N.D.C.C. ? 10-30.4-04(6).

Both corporations, the North Dakota Future Fund, Inc., and Technology Transfer, Inc., share common policy objectives, the promotion of primary sector development in North Dakota. Both corporations have invested in the same economic development projects, although because of the nature of Technology Transfer, Inc., that corporation generally invests first. Once

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the need for commercialization of the technology is set and the focus is on the manufacturing of that technology with a corresponding increase in the amount of funding needed, the North Dakota Future Fund, Inc., may be called upon to assist in providing that funding. Both corporations are charged with the responsibility of divesting their investment when the corporation's investment reaches "certain levels of profitability." N.D.C.C. ?? 10-30.3-06 and 10-30.4-09.

The North Dakota Future Fund, Inc.'s primary purpose is "to provide capital for new or expanding businesses in North Dakota," whereas Technology Transfer, Inc.'s primary purpose is to "provide a program and budgetary interface between the department of economic development and finance and the North Dakota university system." N.D.C.C. ?? 10-30.3-02 and 10-30.4-02. Apparently, because of the differences in these two priorities, the Legislature sought to finance economic development by the North Dakota Future Fund, Inc., through the establishment of a revolving fund and to finance the mission of Technology Transfer, Inc., directly through its corporate identity.

Agencies generally may expend their appropriations at the rate they deem appropriate, except as provided for salaries, wages, and operating expenses under N.D.C.C. ? 54-27-10. Because the line item appropriations in question to the Department of Economic Development and Finance were intended to be transferred directly to the North Dakota Future Fund and Technology Transfer, Inc., those transfers must be given immediate effect. When the Legislature has intended transfers to occur at times other than the effective date of the legislation, the Legislature has so indicated in the bill. See 1993 N.D. Sess. Laws ch. 13 (fifty percent transferred within ten days of July 1, 1993, and the remaining fifty percent within ten days of July 1, 1994) and 1993 N.D. Sess. Laws ch. 38 (funds shall be transferred upon order of the Industrial Commission).

The Office of Management and Budget may control the rate of expenditures from funds by a system of allotments of expenditures from each specific fund on a uniform basis for all agencies receiving appropriations from that fund. N.D.C.C. ?? 54-44.1-03(5) and 54-44.1-12. However, the required transfer

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of an appropriated amount from one fund or appropriation to another does not relate to the rate of expenditures from the fund as provided in N.D.C.C. ?? 54-27-10 and 54-44.1-12.

It is therefore my opinion that the Office of Management and Budget does not possess the statutory authority to limit the timing of transfers of appropriations from one fund to another unless the Legislative Assembly has specifically provided that authority.

If the cyclical cash flow needs of state government require it, the Office of Management and Budget may engage in cash flow financing as provided in N.D.C.C. ? 54-27-23 by issuing certificates in anticipation of revenue, notes, or bonds to special funds on deposit in the state treasury. The use of N.D.C.C. ? 54-27-23 is limited as to the duration of the cash flow financing, as well as the payment of interest to special funds which would otherwise be invested by the State Investment Board. When certificates are issued to funds which would otherwise be invested, N.D.C.C. ? 54-27-23 further requires the State Investment Board to agree to a rate of interest on the certificate which is commensurate with the yield to be reasonably expected if invested in alternate securities.

Because the appropriations to the fund and corporation were declared to be an emergency, it is my opinion that both the North Dakota Future Fund and Technology Transfer, Inc., should have received the transfer on April 30, 1993, the date the approved bill was filed with the Secretary of State, and therefore should be credited with the interest earned on the appropriation. N.D. Const. art. IV, ? 13.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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