

LETTER OPINION
93-L-372

December 23, 1993

Mr. Stephen J. Rice
Walsh County State's Attorney
Walsh County Courthouse
Grafton, ND 58237

Dear Mr. Rice:

Thank you for your letter inquiring whether a home rule county with the powers listed in N.D.C.C. ? 11-09.1-05 in its charter and proper implementation through an ordinance may levy and collect a severance tax on gravel. For the following reasons, it is my opinion that a home rule county may not levy and collect a severance tax on gravel.

Counties are creatures of the constitution and have only those powers provided by the North Dakota Legislature. N.D. Const. art. VII, ? 2; County of Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985). The powers a home rule county may have in its charter and implement through ordinances are described in N.D.C.C. ? 11-09.1-05. Subsection 2 provides as follows:

11-09.1-05. Powers. After the filing with the secretary of state of a charter approved in reasonable conformity with this chapter, the county and its citizens may, if included in the charter and implemented through ordinances:

. . . .

2. Control its finances and fiscal affairs; appropriate money for its purposes, and make payments of its debts and expenses; subject to the limitations of this section levy and collect property taxes, sales taxes, motor vehicle fuels and special fuels taxes, motor vehicle registration fees, and special assessments for benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements; contract debts, borrow money, issue bonds, warrants, and other evidences of indebtedness; establish charges for any county or other services to the extent authorized by state law, and establish debt and mill levy limitations; provided, that all property in order to be subject to the assessment provisions of this subsection must be assessed in a uniform manner as prescribed by the state board of equalization and the

state supervisor of assessments. A charter or ordinance or act of a governing body of a home rule county may not supersede any state law which determines what property or acts are subject to, or exempt from, ad valorem or sales and use taxes.

(Emphasis supplied.)

County home rule was established by the enactment of House Bill 1083 by the 1985 Legislative Assembly. 1985 N.D. Sess. Laws, ch. 152. A review of the legislative history reveals that the Legislative Assembly intended to limit a county's taxing authority to only general ad valorem and sales and use taxes.

The last sentence of subsection 2, underlined above, was adopted by amendment to the original bill. While explaining the effect of this amendment at the March 15, 1985, hearing of the Senate Political Subdivisions Committee, John Walstad, of the Legislative Council, assured Senator Holmberg that this legislation would not authorize a home rule county to enact a tax not specifically authorized by state law.

Therefore, it is my opinion that a home rule county lacks statutory authority to levy and collect a severance tax on gravel.

However, if a home rule county enacted general sales and use taxes similar to the state's sales and use taxes, the severing of sand or gravel could be a taxable "use" under the use tax because that act is a taxable "use" under the state's use tax. N.D.C.C. ? 57-40.2-01(9).

Because of my opinion that a home rule county may not levy and collect a severance tax on gravel, it is not necessary to address your subsidiary question, "whether such a gravel extraction tax could be imposed only where the gravel was to be ultimately removed and used outside of Walsh County or outside of the state of North Dakota." However, I must note that to only tax property intended to be used outside of the state would be a violation of the Commerce Clause of the United States Constitution. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988); Service Oil, Inc. v. State, 479 N.W.2d 815 (N.D. 1992).

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rww/pg