

On October 10, Representative Rick Berg, ask for an attorney general's opinion interpreting Measure 3. When interpreting an initiated measure the most important interpretation aids, beyond the plain meaning of the measure's language, is the voters' understanding of the measure when they cast their ballots. In many cases this understanding is based on the explanations provided by the sponsors of the measure. Accordingly, the following is Measure No. 3 sponsor's response to Rep. Rick Berg's questions (**Berg questions in bold type**).

When North Dakota citizens use the power of initiative they act as a coordinate legislative body and the same rules of construction, and the same tests of constitutionality, that bind the legislature also bind the people. State, ex rel. Eckroth v. Borge, 283 N.W. 521 (N.D. 1939). When enacting legislation through an initiated measure, the people of North Dakota have the same authority as the legislature. Anything the legislature can enact into legislation, the people can enact by initiated measure. And just like the legislature, a measure enacted by the people has a presumption of constitutionality.

**1. Does Measure 3 require the Legislature to appropriate funds to meet the U.S. Centers for Disease Control and Prevention's minimum recommended amount for a comprehensive tobacco control program for the state of North Dakota?**

Measure No. 3 allocates a portion of the tobacco settlement payments, i.e. strategic contribution fund payments, into a new fund called the tobacco prevention and control fund (TPC fund). Measure No. 3 requires that the TPC fund be used for a Centers for Disease Control (CDC) qualifying tobacco prevention and control program.

Measure No. 3 does not appropriate money. The power to appropriate dollars from the TPC fund remains with the legislature.

The question of whether the legislature can legally refuse to appropriate money for a CDC qualified program, while debatable, does not need to be answered. If Measure No. 3 passes, a majority of the legislators will act responsibly and will fulfill the mandate of the voters by funding a comprehensive CDC qualifying tobacco control program. In any case the legislature, for seven years, may not reallocate the strategic contribution tobacco settlement payments to another use or spend the money placed in the TPC fund for a purposes other than a CDC qualified program without amending the initiated measure by a 2/3 vote.

*Although it is not specifically asked in his opinion request, Rep Berg complained to the media that this measure inappropriately delegates North Dakota legislative authority to the CDC. His complaint is unfounded. Measure 3 requires that an advisory committee develop a CDC qualified program. This requirement was adopted because public health experts know that CDC qualified programs work. The reference to CDC in this measure is no different from the legislature mandating other state agencies use third party standards. For instance, pursuant to legislative mandate, the state seed department determines an agency of another state or territory is qualified to certify seed by looking to "standards and procedures approved by the United States secretary of agriculture to assure the genetic purity and identity of the seed certified." N.D.C.C. § 4-09-01. Referencing to CDC in Measure No. 3 is no different.*

- 2. Measure 3 creates an executive committee to administer a proposed state tobacco control program. It gives the committee the authority to "employ staff and fix their compensation," and the power to "make loans, provide grants, borrow money (and) lease property...and take any action any private citizen...may do..." What limits, if any, are there on staff compensation, amounts of loans, or the duration of terms of lease agreements the executive committee may approve or authorize? Does this act prohibit the hiring of lobbyists or political contributions to candidates or ballot measures?**

The measure's language "take any action any private citizen...may do" was adopted from the law relating to the powers and duties of the State Mill and Elevator. In interpreting the limits of the executive committee authority, the legislature should look to the limits imposed on the State Mill.

In response to the specific questions, unless the legislature acts to remove the committee's employees from the state personal system, a committee employee will be within the classified state system and will be subject to the same benefits and restrictions as any other North Dakota state employee. As is true of all state agencies, compensation will be set by the committee consistent with the state classification system and the committee's legislative appropriation. The terms of the committee's contracts and loans are also subject to the same restrictions as any other state entities, i.e. two years. As explained above, the people in enacting laws through an initiated measure have no greater power or lesser power than the legislature itself.

Regarding political activity, the executive committee, as a state entity funded by public money, is subject to the restrictions imposed by the state's Corrupt Practices Act which prohibits the use of any state property, including money, to support a political candidate, N.D.C.C. § 16.1-10. In addition, a political contribution to a candidate is a gift to a private individual and thereby directly prohibited by the ND Constitution prohibition against gifts, N.D. Const. Art. X §18. Neither the people acting as a legislature or the legislature can constitutionally allow the use of state money to fund a political candidate.

- 3. Measure 3 also states that funds needed to implement a comprehensive tobacco control program should be taken from the state water development trust fund if the newly created tobacco prevention and control trust fund does not have sufficient money to pay for the plan. What effect does this provision have if the water development trust fund revenues have already been appropriated by the Legislature, with the approval of the Governor?**

First, if this transfer ever occurs, it will occur well into the future. In fact, by conservative estimates, deposits of the state's strategic contribution fund dollars into the tobacco prevention and control fund will be adequate to fund a CDC program for over 20 years before any transfer from the water development fund would be required.

Second, every two years the legislature assembly meets to forecast state revenues and appropriate state monies. Accordingly, each biennium the legislature will forecast the projected revenue for the tobacco prevention and control fund and the water development trust fund.

Knowing the projected revenue, the legislature will then appropriate money and authorize spending from both the tobacco prevention and control fund and the water development trust fund. Consequently, before the water development trust funds are ever transferred to the tobacco prevention and control fund, the legislature will know, based on its revenue forecast and appropriations, if a transfer is necessary. If the legislature does appropriate money in excess of the money in the water development trust fund two year forecast, the fault lies with the legislature and not Measure 3.