

May 7, 2001

FORMAL OPINION NO. 2001-001

TO: Cynthia Lummis
Wyoming State Treasurer

FROM: Gay Woodhouse
Attorney General

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QUESTION PRESENTED: Will a new town incorporated under Wyoming law on or before July 1, 2001 participate in the distribution of the Municipal Mineral Trust Fund under subparagraph (b) of Section 6 of Senate Enrolled Act No. 74 of the 2001 General Session?

SHORT ANSWER: Yes, please see discussion.

DISCUSSION

As you know, Section 6 of Senate Enrolled Act No. 74 provides as follows:

Section 6. The municipal mineral trust fund is repealed effective July 1, 2001. Not later than December 31, 2001, the state treasurer shall distribute all funds within the municipal mineral trust fund to cities and towns in Wyoming as follows:

(a) Twenty-five percent (25%) shall be distributed equally among all cities and towns in Wyoming;

(b) Seventy-five percent (75%) shall be distributed to cities and towns in the proportion which the population of the city or town bears to the population of all cities and towns in Wyoming, **based upon the most recent federal decennial census**. (emphasis added)

Senate Enrolled Act No. 74 modifies the plan adopted last year for the earmarking of federal mineral royalties and severance taxes. As part of the new plan, the

Municipal Mineral Trust Fund is repealed and the monies therein are distributed as provided above. A new town called "Bear River" in Uinta County plans to incorporate on or before July 1, 2001. The question is whether or not "Bear River" will participate in the distribution provided by subparagraph (b) of Section 6.

Subparagraph (a) would clearly apply because the plain language requires distribution "equally among all cities and towns in Wyoming." However, subparagraph requires distribution "based upon the most recent federal decennial census." Since "Bear River" was not in existence at the time of the most recent federal decennial census, the question is whether or not the new town can participate in the distribution under subparagraph (b).

A. General Rules of Interpretation

In interpreting statutes, the Wyoming Supreme Court will look first to the language of the statute, and if the language is clear and unambiguous, the Court will not look at rules of statutory construction, nor will it attribute another meaning to the statute, but will give the statute effect according to its plain and obvious meaning. *Amoco Production Co. v. Hakala* 644 P.2d 785 (Wyo. 1982); *Board of County Com'rs of Campbell County v. Ridenour*, 623 P.2d 1174 (Wyo. 1981); *Hayes v. State*, 599 P.2d 558 (Wyo. 1979); *Mountain Fuel Supply Co. v. Emerson*, 578 P.2d 1351 (Wyo. 1978). In *Allied-Signal, Inc. v. Wyoming State Board of Equalization*, 813 P.2d 214 (Wyo. 1991), the Court explained:

When the words used are clear and unambiguous, a court risks an impermissible substitution of its own views, or those of others, for the intent of the legislature if any effort is made to interpret or construe statutes on any basis other than the language invoked by the legislature. Our precedent demonstrates that this rule also is an absolute. If the language selected by the legislature is sufficiently definitive, that language establishes the rule of law

Id. 813 P.2d at 219.

When a word or phrase in a statute is susceptible of more than one meaning, it must be considered ambiguous. *State Bd. of Equalization v. Tenneco Oil*, 694 P.2d 97, 99 (Wyo. 1985). In *Allied-Signal, Inc.*, *supra*, the court stated:

We previously have articulated the proposition that a statute is ambiguous only if it is found to be vague or uncertain and subject to varying interpretations. (citations omitted)

Id. at pp. 219-220.

B. Rules of Statutory Construction

1. Legislative Intent

Legislative intent is the primary and foremost consideration in statutory construction. *State Board of Equalization v. Tenneco Oil, supra*, 694 P.2d at 100. If the language of the statute is not clear the court must look to the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the State, the conclusions of law, and other prior and contemporaneous facts and circumstances, making use of the accepted rules of construction to ascertain a legislative intent that is reasonable and consistent. *State ex rel. Motor Vehicle Division v. Holtz*, 674 P.2d 732, 736 (Wyo. 1983). It is axiomatic that a statute be viewed in terms of the object and purpose to be accomplished. *State Bd. of Equalization v. Tenneco Oil, supra*, 694 P.2d at 100.

2. Ordinary and Usual Sense

The fundamental rules for statutory interpretation and construction are applicable. The Wyoming Legislature has provided at WYO. STAT. § 8-1-103 the following rules to be applied to the construction of Wyoming statutes:

(a) **The construction of all statutes** of this state **shall be** by the following rules, unless that construction is plainly contrary to the intent of the legislature:

(i) **Words and phrases shall be taken in their ordinary and usual sense**, but **technical words and phrases** having a peculiar and appropriate meaning in law shall be understood according to their technical import; (emphasis added)

The Wyoming Supreme Court agrees that words and phrases used in a statute shall be taken in their ordinary and usual sense. *Belco Petroleum Corp. v. State Board of Equalization*, 587 P.2d 204, 209 (Wyo. 1978); *Johnson v. Safeway Stores, Inc.*, 568 P.2d 908 (Wyo. 1977). In interpreting statutes, it is presumed that the legislature intended the ordinary meaning of the language. *Ward v. Board of Com'rs*, 36 Wyo. 460, 256 P. 1039 (1927). Wyoming law creates a presumption that the words utilized in a statute are to be given their natural, ordinary and everyday meanings, unless the statutes provide to the contrary.

In *Parker Land & Cattle v. Wyo. Game and Fish*, 845 P.2d 1040, 1042 (Wyo. 1993), the Court noted “[T]he initial step in arriving at a correct interpretation . . . is an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection.”

In 14 AM. JUR. 2d *Census*, § 1, p. 603 (2000) it provides:

The term “census” is commonly understood as meaning the United States decennial census, particularly where that is the only census which is regularly and periodically taken in a state. The words “federal census” are generally accepted to mean a census taken by and under the direction and supervision of the census department of the United States.

However, the statutory language in question does not clearly and unambiguously require that the specific city or town be in existence at the time of the most recent federal decennial census. The statutory language simply requires the distribution be “**based upon** the most recent federal decennial census.”

In *City of Pataskala v. Fraternal Order of Police*, 2000 WL 192583 (Ohio App.10 Dist.), the court explained in an unpublished opinion:

The court below held that the statute is clear and unambiguous and mandates a finding that appellee is not a public employer, because it did not exist at the time of the 1990 federal census. We disagree, finding that the language of R.C. 4117.01(B) does not clearly and unambiguously require that the specific municipal entity itself have been in existence at the time of the most recent federal decennial census.

The statutory language of R.C. 4117.01(B) requires only two things. First, the entity must be a municipality, which the city of Pataskala clearly is.

Second, the entity must have a population of at least five thousand *according* to the most recent federal decennial census. As noted above, the trial court interpreted the phrase ‘according to the most recent federal decennial census’ to essentially mean ‘as reported for that entity in the most recent federal decennial census.’ As such, only those entities in existence at the time of the census and having a reported population of at least five thousand in that census can qualify as a public employer.

However, such an interpretation is neither the only nor the most reasonable interpretation. The phrase ‘according to’ means ‘in conformity with,’ ‘as stated or attested by,’ or ‘depending on.’ Merriam Webster’s Collegiate Dictionary (10 Ed. 1994) 8. **Thus, in context, the phrase ‘according to the most recent federal decennial census’ reasonably means that the population determination must be made only in**

reference to (i.e., in conformity with or depending on) the most recent federal decennial census. In other words, the most recent federal decennial census must be the only source from which the population determination is made. See *In re Mingo Junction Safety Forces Assn., Local No. 1* (1991), 74 Ohio App.3d 313, 319, 598 N.E.2d 1233 (holding that R.C. 4117.01(B) looks to a 'clearly specified census' to determine whether a municipality is a public employer and that Secretary of State's designation of a municipality as a city pursuant to R.C. Chapter 703 is immaterial). (emphasis added)

Id. 2000 WL 192583, pp. 2-3 (Ohio App. 10 Dist.)

The Montana Supreme Court noted in *State v. State Board of Equalization*, 17 P.2d 68, 73, 93 Mont. 19 (1932), "the ordinarily accepted meaning of the words 'based upon' is an initial or starting point for calculation." In WEBSTER'S NEW COLLEGIATE DICTIONARY (G & C Merriam Company 1980), the term "base" is defined as follows:

²base vt based; bas-ing 1: to make, form, or serves as a base for 2: to find a base or basis for – usu. used with *on* or *upon*

Thus, the initial calculation or the starting point for the determination of the population of the Wyoming cities and towns for purposes of the distribution under Section 6(b) of Senate Enrolled Act No. 74 would be the 2000 federal decennial census. The 2000 federal decennial census would serve as the basis for determining the population of "Bear River" for purposes of the distribution.

Only the residents located within the boundaries of the new town as provided in the 2000 federal census would be counted. The 2000 federal census numbers would be used as the basis for the population numbers used in the distribution. The numbers would not be updated or adjusted at the time of the distribution. There is no language suggesting that updated numbers be used.

In 1978, this office rendered an official opinion regarding the population data to be used in distributing federal government royalties to incorporated cities and towns. 1978 WYO. OP. ATTY. GEN. No. 78-3 (January 10, 1978). The opinion explained:

The Bureau of Census conducts a myriad of censuses and surveys, but the only ones of concern herein are those which would provide data as to the populations of the incorporated cities and towns in the State of Wyoming. Such information is currently provided by the Bureau of the Census in only three ways: decennial census; special census; and population estimate.

A “Census of the Population” is taken at ten-year intervals in the years ending with “0”. **It is this Census of the Population to which 9-577.1(a)(vi)(B) refers with the language “latest federal census.” Obviously, once the information is obtained from this decennial census, such would be the basis for the computation of distribution under W.S. 9-577.1(a)(vi)(B) until an update as contemplated by that section occurs.**

Special censuses and population estimates are the two methods by which information contained in the Census of the Population and relevant to W.S. 9-577.1(a)(vi)(B) is updated. (emphasis added)

The statute reviewed in WYO. OP. ATTY. GEN. No. 78-3 provided “based on the latest federal census as periodically updated by the bureau of the census.” The opinion concluded that population updates should be used to make the distributions.

In another opinion to the State Treasurer, this office in 1982 opined that a special census of a particular county could not be used for distribution of severance taxes and royalty revenues. 1982 WYO. OP. ATTY. GEN. No. 82-7. The opinion noted:

Former State Treasurer Ed Witzemberger posed a question to this office in 1978 regarding the use of periodic updates of population counts by the Census Bureau. At that time the Bureau was providing updated data for the entire State at regular intervals. As mentioned, these periodic updates have been discontinued. In response to the Treasurer’s 1978 request, this office discussed the statutory significance of regular censuses, periodic updates and special local counts, Opinion 78-003.

The writers of that opinion referred to the statute authorizing distribution of federal mineral royalties, ‘. . . based on the latest federal census as periodically updated by the bureau of the census;’ Section 9-7-901, W.S. 1977. The same language is found at Section 39-6-305(k), supra, (oil and gas severance tax). It was concluded that the Legislature intended for distribution to be based only upon the decennial census and periodically updated official Bureau counts. ‘Special censuses are not periodic and do not occur at regular intervals . . .’ Opinion 78-003. Following their careful statutory construction, the writers concluded:

The distribution of federal government royalties to be made by the State Treasurer to all incorporated cities

and towns pursuant to W.S. 9-577.1 (9-7-901) is to be based upon information contained in the latest federal decennial census until such has been periodically updated by the Bureau of the Census.

We see no reason to depart from this conclusion. Because the Legislature used the same language for mineral royalty and oil and gas severance tax distributions, this conclusion applies equally to both programs.

The opinion concluded, "Use of results of special local census data is inconsistent with the statutes governing mineral royalty and severance tax."

We would conclude that "Bear River" would participate in the distribution under subparagraph (b) of Section 6 of Senate Enrolled Act No. 74, based upon the population located within the boundaries of the new town as provided in the 2000 federal census.