



STATE OF ARKANSAS  
THE ATTORNEY GENERAL  
DUSTIN MCDANIEL

Opinion No. 2014-065

September 26, 2014

The Honorable Kim Hammer  
State Representative  
1411 Edgehill  
Benton, Arkansas 72051-3128

Dear Representative Hammer:

I am writing in response to your request for my opinion on the following questions:

1. Given the language of Ark. Const. amend. 75, section 1, is it constitutional for the Department of Arkansas Heritage ("DAH") to spend its Conservation Tax funds for purposes other than those enumerated in the amendment?
2. If the answer to question 1 is "yes," would those other purposes include the construction of a new headquarters for DAH and related professional fees?

As background, you report the following:

It has come to my attention that [DAH] plans to secure ADFA [Arkansas Development Finance Authority] Revenue Bonds with its share of Amendment 75  $\frac{1}{8}\%$  conservation sales tax ("Conservation Tax") in order to build a new headquarters. DAH would also like to pay \$510,000 in fees for professional services related to the headquarters' construction from the Conservation Tax funds.

You have further submitted in support of your request a letter opinion prepared by private counsel – addressed to and apparently prepared at the behest of the

Director of The Nature Conservancy – arguing that there is “very strong support in the language of Amendment 75, § 1, for an effort to urge [DAH] to consider using most, if not all, of its share of the conservation tax funds in support of the mission of its Arkansas Natural Heritage Commission [ANHC].”

## **RESPONSE**

Considered together, your questions express a concern that DAH’s proposed expenditure of Conservation Tax revenues to finance the construction of new DAH headquarters might offend possible use restrictions on those funds set forth in Ark. Const. amend. 75. In my opinion, a reviewing court would weigh at least the following factors in addressing this concern: (1) although Amendment 75 never uses the term “Conservation Tax,” it expresses a need for conservation through the preservation of “natural heritage”; (2) DAH is charged by other law with the preservation of “natural heritage” through ANHC, which is one of its agencies; (3) Amendment 75 does not expressly direct that DAH devote Conservation Tax revenues to restoring or preserving “natural heritage,” instead mandating only that DAH receive 9% of Conservation Tax funds to be used “as appropriated by the legislature”; and (4) the current appropriation neither dictates that DAH use the funds exclusively to preserve “natural heritage,” as distinct from its other missions, nor expressly precludes DAH from devoting tax revenues to capital improvements. I cannot predict with confidence how a court would balance these and, possibly, other considerations in addressing a challenge to the proposed expenditures. A court’s review would doubtless entail conducting a factual inquiry of the sort I am neither equipped nor authorized to undertake.

I can and will opine that a court would probably look askance upon any pattern of DAH expenditures from Conservation Tax revenues that does not reflect a significant commitment to the preservation and promotion, insofar as its statutory missions permit, of the “fish, wildlife, parks, tourism and natural heritage” exalted by declaration in Amendment 75, § 1. Nevertheless, neither the substantive text of Amendment 75 nor the popular name submitted to voters supports concluding that DAH’s Conservation Tax revenues must be earmarked exclusively for the protection of “natural heritage” through ANHC.

***Question 1: Given the language of Ark. Const. amend. 75, section 1, is it constitutional for the Department of Arkansas Heritage ("DAH") to spend its***

***Conservation Tax funds for purposes other than those enumerated in the amendment?***

I must note at the outset that this question, as phrased, is tendentious in that it assumes that DAH's proposed expenditure of "Conservation Tax" revenues<sup>1</sup> would indeed fall outside the scope of permitted uses recited in Ark. Const. amend. 75. I will simply acknowledge as obvious that tax funds may not be spent in a manner inconsistent with a constitutional provision unequivocally restricting their use. I assume, however, that you are seeking my opinion regarding whether the proposed expenditure would indeed violate this proscription – i.e., whether DAH's proposed expenditure for construction of its headquarters would exceed whatever use restrictions Amendment 75 might contain. I will address this question in the ensuing analysis.

Amendment 75, § 1 of the Arkansas Constitution provides as follows:

The people of the State of Arkansas find that fish, wildlife, parks, tourism and natural heritage constitute a major economic and natural resource of the state and they desire to provide additional funds to the Arkansas Game and Fish Commission, the Department of Parks and Tourism, the Department of Heritage and Keep Arkansas Beautiful.

The Conservation Tax generating the referenced "additional funds" is a 1/8-of-1% excise tax on sales of property specified in Amendment 75, § 2. Subsection 3(c) of the amendment provides as follows regarding the distribution of such funds to DAH:

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<sup>1</sup> The term "Conservation Tax" appears both in the legislation implementing Amendment 75, A.C.A. § 19-6-484 (Supp. 2013), initially enacted pursuant to Acts 1997, No. 156, § 1 (establishing the "Conservation Tax Fund" and mandating distributions therefrom to recipient agencies in the proportions recited in Amendment 75), and in the most recent appropriation, Acts 2014, No. 273, § 5 (appropriating such funds to DAH). The term, however, appears neither in the text of Amendment 75 nor in the popular name submitted to the voters who approved the tax. Although I will on occasion use this legislatively endorsed term to refer to Amendment 75 revenues, I do not believe that the General Assembly's use of the designation "Conservation Tax" in implementing legislation in itself resolves the threshold question of whether Amendment 75 revenues must be used exclusively or predominantly to support "conservation." I further discuss this issue in my text, *infra*.

Nine percent (9%) of all monies collected from the tax levied herein shall be deposited in the State Treasury as special revenues and credited to the Arkansas Department of Heritage Fund Account to be used exclusively by the Department of Heritage as appropriated by the General Assembly.

Quoting Amendment 75, § 1, you note in your request that “the amendment’s purpose is to support Arkansas’s ‘fish, wildlife, parks, tourism and *natural heritage*’” (emphasis yours). Amendment 75, § 1 declares that these priorities collectively constitute “a major economic and natural resource of the state.” Notwithstanding the primarily rhetorical nature of this recital, it appears intended to qualify the ensuing provision, which expresses a “desire to provide additional funds” to the agencies listed, by in effect earmarking those funds for support of the resources listed.

In accordance with your highlighting of the term “natural heritage” in the above passage, the letter opinion you have submitted in support of your request suggests that Conservation Tax revenues appropriated for DAH should be used mainly, if not exclusively, to support the preservation of “natural heritage” by ANHC,<sup>2</sup> rather than being used for other purposes that DAH is statutorily authorized to pursue.<sup>3</sup> You suggest that this restriction precludes the DAH from using such funds to finance the design and construction of “a new headquarters.”

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<sup>2</sup> See the Environmental Quality Act of 1973, A.C.A. §§ 15-20-301 through -319 (Repl. 2009) (establishing ANHC and defining its duties). Among the duties assigned ANHC is the acquisition of properties and the regulation of activities thereon “consistent with the preservation of natural heritage.” A.C.A. § 15-20-308(2)(B)(iii).

<sup>3</sup> The legislation creating and setting forth the various duties of the DAH are codified at A.C.A. §§ 25-3-101 through -108 (Repl. 2002 & Supp. 2013). DAH comprises seven divisions – four museums and three “heritage resource agencies.” The museums are the Delta Cultural Center, which, as characterized on the DAH web site, “chronicles the legacy of the Arkansas Delta”; the Historic Arkansas Museum, which “interprets pioneer life on the Arkansas frontier”; the Mosaic Templars Cultural Center, which “promotes the story of Arkansas’s African-Americans from 1870 to the present”; and the Old State House Museum, which “illustrates Arkansas’s political past.” The “heritage resource agencies” are the Arkansas Arts Council, which “empowers the arts in Arkansas”; ANHC, which “establishes and maintains a system of Natural Areas, including a central repository on endangered species”; and the Arkansas Historic Preservation Program, which “manages the state’s historic and cultural resources” and “operate[s] the Main Street Arkansas program.” <http://www.arkansasheritage.com/explore/default.aspx> (last visited July 25, 2014).

At issue initially in considering this proposition is whether Amendment 75, as counsel suggests in his letter opinion, indeed restricts DAH to using Conservation Tax revenues either predominantly or exclusively for “natural heritage.”<sup>4</sup> Counsel in his letter opinion suggests that each of the separately listed priorities set forth in Amendment 75, § 1 is assignable to only one of the recipient institutions listed in that subsection. He argues that the pertinent mission to be pursued by DAH is the preservation of “natural heritage,” meaning that its Conservation Tax revenues should be devoted to that end through the agency of ANHC.<sup>5</sup> Based on this reasoning, he suggests that DAH’s proposed use of these revenues to construct its general headquarters might amount to a diversion of Amendment 75 revenues from their intended use.

I am not persuaded that Amendment 75 imposes any such categorical restriction upon DAH. The assets recited in Amendment 75, § 1 are grouped together as “a major economic and natural resource” that “[t]he people . . . find” to be of value, prompting their “desire to provide additional funds” to the agencies listed. None of these resources is assigned for protection either expressly or by necessary implication to any one of the particular agencies listed. Indeed, reading § 1 as imposing any such lockstep association of one listed priority with one listed agency appears inconsistent with the fact that, in many pertinent respects, the listed agencies’ missions overlap. With respect to the DAH, for instance, the maintenance of museums and cultural centers clearly promotes “tourism” – an Amendment 75 goal whose realization DAH seeks in conjunction with at least one

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<sup>4</sup> Counsel in his letter opinion, having reported a dearth of pertinent case law or guidance in dictionaries, offers the following excerpt from a journal as aptly summarizing what the term “natural heritage” means:

“The Natural Heritage” is a fruitful and forceful concept, including both threatened nature and threatened species and subspecies. The word “heritage” denotes both values and duties. Combined with nature, this term suggests a consciousness about the task of preserving values attached to areas and life forms in the same way as “cultural heritage” defines our cultural roots. In many countries, “natural heritage” is now used as a heading and inspiration for conservation work.

Sigmund Hægver, “Preserving the Natural Heritage: The Process of Developing Attitudes,” *Ambio*, Vol. 23, No. 8 (Dec. 1994), at 515. In my opinion, this characterization both accords with the ordinary-language meaning of this term and with the conservation-oriented focus of ANHC, whose very name incorporates the term “natural heritage.”

<sup>5</sup> Specifically, he remarks: “By process of elimination, I conclude that ‘natural heritage’ is the purpose to be supported by the Amendment’s assignment of the Conservation Tax funds to the Department of Arkansas Heritage.”

other recipient agency, the Department of Parks and Tourism.<sup>6</sup> As its name reflects, moreover, the latter agency is statutorily charged with pursuing two of the recited priorities – as is DAH itself, which is charged both with advancing tourism, at least indirectly, through its museums and with protecting natural heritage through ANHC. Furthermore, Keep Arkansas Beautiful, charged primarily with beautification and litter control,<sup>7</sup> is difficult to assign exclusively to any one of the listed “economic” and “natural” interests, although it is statutorily associated with two by dint of its association with the Department of Parks and Tourism.<sup>8</sup> I question, therefore, that Amendment 75 on its face compels the DAH to use its Conservation Tax funds exclusively for the protection of “natural heritage.”

To suggest that DAH must use Conservation Tax revenues only to promote “natural heritage” further seems inconsistent with the fact that subsection 3(c) of Amendment 75 obliges a recipient agency only to use such funds “*as appropriated by the General Assembly*” (emphasis added). DAH’s actual Conservation Tax appropriation for the fiscal year ending June 30, 2015 does not even restrict the agency’s use of such funds to purposes expressly recited in Amendment 75, § 1; rather, it directs only that the funds be used “for personal services, operating expenses, grants and aid, construction and special maintenance *of the Department of Arkansas Heritage.*”<sup>9</sup> Nothing in this specific appropriation restricts DAH to using the funds only for “conservation” through the promotion of “natural heritage.” On the contrary, as previously noted, among the expenditures

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<sup>6</sup> Counsel for the Nature Conservancy concedes that the management of “fish and wildlife” resources – another Amendment 75 goal – while assigned primarily to the Game and Fish Commission, “has some bearing on the natural heritage duties of the Department of Arkansas Heritage.” He apparently does not, however, consider this overlap as undermining his suggestion that all or most Conservation Tax revenues allocated to DAH should be devoted to “natural heritage” as conserved through ANHC.

<sup>7</sup> See A.C.A. § 15-11-603 (Repl. 2009) (specifying the duties of the Keep Arkansas Beautiful Commission).

<sup>8</sup> See, e.g., A.C.A. §§ 15-11-602 and -603 (Repl. 2009) (directing that the Keep Arkansas Beautiful Commission serve in an advisory capacity to the Department of Parks and Tourism, locating the Administrative Office of the Keep Arkansas Beautiful Commission within the Department of Parks and Tourism and mandating that the Commission’s Director “be appointed by and serve at the pleasure of the Director of the Department of Parks and Tourism”).

<sup>9</sup> Acts 2014, No. 273, § 5. Among the itemized expenditures specifically appropriated are \$1,049,741 for “PROF. FEES” and \$600,000 for “DAH-MUSEUM/FACILITY CONSTRUCTION.” These figures, like the appropriation language set forth in my text, track verbatim the provisions of Acts 2013, No. 932, § 5, which set forth the appropriations for the preceding fiscal year.

specifically appropriated is \$600,000 for “DAH-Museum/Facility Construction” – an item that might reasonably be associated with the promotion of tourism but not with the protection of natural heritage. Indeed, literally read, the appropriation might be read as authorizing the DAH to use these tax revenues for *any* purpose that falls within its various missions, leaving subject to possible debate even whether such use is restricted to pursuit of any, much less one, of the priorities listed in Amendment 75, § 1. Although I question the propriety of any such extreme reading, which would call into question the significance of the recitations made in Amendment 75, § 1, I feel obliged to stress again that Amendment 75 only expressly requires that the funds be spent in accordance with the appropriation.

I am further struck by the fact that neither the text of Amendment 75 nor the popular name presented to the voters<sup>10</sup> specifies “conservation” as the point of the tax levy, instead merely directing that tax proceeds be distributed to the recipient agencies. These omissions strongly mitigate the effect of the General Assembly’s after-the-fact use of the term “conservation tax” in the implementing legislation. To be sure, the text of Amendment 75, in stressing the importance of the state’s “fish, wildlife, parks, tourism and natural heritage,” can – and, in my estimation, should – be read as exalting “conservation;” *inter alia*, as a proper use of tax revenues. Amendment 75, however, on its face further authorizes using the proceeds for only possibly coincident “economic” efforts, such as the promotion of “tourism” – an end whose realization lies clearly within the ambit of DAH’s authority as a promoter of both “natural” and “cultural” heritage. The legislature’s subsequent shorthand designation of the revenues as a “Conservation Tax” does not negate the clear import of this additional authorization. I am consequently

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<sup>10</sup> The popular name of the measure, which tracks verbatim the title of House Joint Resolution 1007 referring the measure to the people, reads as follows: “A Constitutional Amendment to Levy a Sales and Use Tax of One-eighth Percent (1/8 of 1%) for Support of the Arkansas Game and Fish Commission, the Department of Parks and Tourism, the Arkansas Department of Heritage and Keep Arkansas Beautiful.” Pursuant to Acts 1993, No. 512, § 12, this office, in Op. Att’y Gen. 96-096, fixed and declared this popular name. See Op. Att’y Gen. 2013-067 (noting that the popular name for a legislatively crafted constitutional amendment referred to the people pursuant to Ark. Const. art. 19, § 22 can substitute for a ballot title, subject to certification but not revision by the Attorney General, and, absent fraud, will withstand challenge so long as it “distinguishes the proposed amendment from others and is recognizable as referring to the amendment that was previously published in the newspapers,” quoting *Becker v. Riviere*, 277 Ark. 252, 255, 641 S.W.2d 2 (1982); see also *Thiel v. Priest*, 342 Ark. 292, 299, 28 S.W.3d 296 (2000); *Walmsley v. McCuen*, 318 Ark. 269, 272, 885 S.W.2d 10 (1994); *Becker v. McCuen*, 303 Ark. 482, 486, 798 S.W.2d 71 (1990)).

unable to opine that Amendment 75 on its face precludes DAH from devoting Conservation Tax uses other than the protection of “natural heritage.”

Finally, I feel obliged to note that resolving the question of whether the proposed construction would be warranted using Conservation Tax funds would necessarily require a factual inquiry regardless of how narrowly one reads Amendment 75. Even assuming DAH were indeed required to expend Conservation Tax revenues solely for the protection of natural heritage, this assumption would not in itself foreclose DAH from devoting at least some of such funds to capital construction of its headquarters. DAH, after all, needs facilities in order to fulfill its various missions, including the protection of natural heritage. The question of whether DAH’s proposed construction would rely inordinately on Conservation Tax revenues to finance such construction is one of fact that I am neither authorized nor equipped to address.

***Question 2: If the answer to question 1 is "yes," would those other purposes include the construction of a new headquarters for DAH and related professional fees?***

For reasons related to my objections to the form of your first question, I will interpret this question as being simply whether DAH may permissibly devote Conservation Tax revenues to the construction of a new headquarters.

In response to this inquiry, I can do no more than echo the foregoing analysis. I do not believe the text of Amendment 75 on its face forecloses the legislature from appropriating these funds to support DAH capital expenditures. As noted above, the current appropriation does not categorically prohibit the DAH from using Conservation Tax revenues to finance construction of its own – as distinct from, say, ANHC’s – facilities. Although I believe that DAH expenditures from this funding source must relate reasonably to the preservation and promotion of “fish, wildlife, parks, tourism and natural heritage,” I cannot opine (a) that Amendment 75 obligates DAH to use Conservation Tax revenues solely for the protection of “natural heritage”; or (b) that, as a matter of law, DAH’s construction of new headquarters would of necessity serve a primary end other than protection of the state’s “natural heritage.”

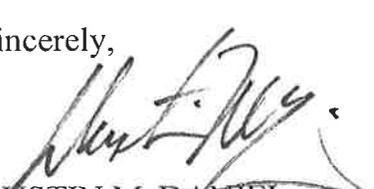
Having offered these tentative opinions, I must add that the amendment, while far from a model of clarity, reflects a strong legislative concern for conservation.

This concern might indeed support an argument that DAH, as the guardian through ANHC of “natural heritage,” should rightly devote significant portions of these tax proceeds to the goal of preserving that resource.<sup>11</sup> A court might well be disturbed, in this regard, by the low proportion of DAH appropriations counsel reports as having historically been channeled to ANHC. Whatever might be the significance of these figures – whose accuracy, given their source, I will take as a given – they do not in isolation warrant my opining that Conservation Tax revenues will necessarily be misdirected if used as DAH proposes.

I am not charged with rendering advice regarding the wisdom of either legislative appropriations or discretionary agency spending. I cannot formally opine, moreover, that the proposed DAH expenditures run afoul either of the appropriations themselves or of overarching constitutional mandates. I will merely note as significant for purposes of possible judicial review the considerations recited in my opening summary paragraph. Only a finder of fact acquainted with all the surrounding circumstances could weigh these considerations in determining the propriety of the proposed spending.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,



DUSTIN McDANIEL  
Attorney General

DM/JHD:cyh

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<sup>11</sup> Indeed, counsel’s summary advice to The Nature Conservancy might be read as thus limited. He concludes his analysis offering only a guarded suggestion that “the language of Amendment 75, § 1” would strongly “support . . . an effort to *urge* the [DAH] to *consider using* most, if not all,” of its Conservation Tax revenues to support ANHC. (Emphases added.) I read this language as suggesting no more than that the DAH’s proposed use of the funds might offend the spirit, as distinct from the express letter, of Amendment 75.