N.D.A.G. Letter to Preszler (Dec. 12, 1988)

December 12, 1988

Commissioner Gary Preszler
Department of Banking and
Financial Institutions
State Capitol
Bismarck, ND 58505

Dear Commissioner Preszler:

Thank you for your letter dated November 2, 1988, regarding the corporate farming law.

In your letter you ask whether, under the facts recited in your letter, the Union Bank of Halliday may retain mineral interests it acquired after July 1, 1985. These interests were acquired by deeds given in lieu of foreclosure of mortgages entered into on February 3, 1983. The real property which was the subject of these mortgages was apparently used in farming or ranching.

As you indicated, N.D.C.C. § 10-06-01 prohibits a corporation, which may not own or lease land used in farming or ranching, from retaining mineral interests acquired through foreclosure or in lieu of foreclosure. In the words of the statute, "the mineral interests must be passed with the surface estate of the land when the corporation divests itself of the land pursuant to this chapter."

You enclosed with your letter a copy of a legal opinion, dated October 5, 1988, prepared by the bank's attorney, James D. Geyer of the Dickinson firm of Mackhoff, Kellogg, Kirby, & Kloster, P.C. Mr. Geyer's opinion is that the bank may retain the severed mineral interests. He supports his opinion with the following three arguments:

1. The bank's 1983 mortgages fixed the bank's right with respect to the property and the contract clauses of the United States and North Dakota Constitutions prevent any impairment of those rights. He cites the case of First Federal S & L v. Haley, 357 N.W.2d 492 (N.D. 1984), as authority for this argument.

2. The bank's interest in the minerals was "acquired" at the time the mortgages were given. Since this date was prior to July 1, 1985, he argues that the statute does not apply.

3. Enforcement of the statute in this case violates the bank's constitutional right to due process and equal protection. The violation, he asserts, stems from the fact that the statute excepts mineral interests which are separately valued at the time of the

> mortgage. Since the statute was enacted after the mortgage had been executed, the bank could not have known how to qualify under this exception by specifically valuing the mineral interests at the time of the mortgage.

I must respectfully disagree with the bank's counsel's conclusions. It is my opinion that the bank may not retain these severed mineral interests and must transfer them immediately to the owner of the surface rights of each parcel.

Counsel is correct when he asserts that the contract clauses of the federal and state constitutions prevent the state from impairing the bank's rights under the mortgage. But none of the bank's rights under the mortgage have been impaired. Nothing in N.D.C.C. ch. 10-06 restricts, burdens, alters, or in any way limits the right of the bank to foreclose its mortgages. The mortgagors performed their contractual obligations under the mortgages by giving deeds to the bank and the bank did, in fact, acquire ownership of both the surface rights and the minerals rights to the parcels.

By their very terms, the contract clauses prohibit the impairment of "obligations of contracts." I am not aware of any case interpreting either of these clauses to extend the protection of contract rights to protect property interests acquired by means of a contract after their acquisition. Such a broad reading of these clauses would prohibit virtually all state regulation of property ownership rights as most property interests are acquired at one time or another by means of contract.

First Federal does not support counsel's argument. That case stands for the limited proposition that the state may not, by changing mortgage and foreclosure redemption procedures, alter the respective rights and obligations of the parties to an existing mortgage. In the present case, the mortgagors' obligations have been performed, unimpaired, by the mortgagors' conveyance of the property to the mortgagee. Thus, there remain no contractual obligations which might be impaired.

Counsel's argument that the mineral interests were "acquired" at the time the mortgage was entered into is similarly unpersuasive. This argument is contrary to the plain meaning of N.D.C.C. § 1-0-06-01. That section refers not merely to the acquisition of mineral interests, but rather the acquisition of mineral interests "through foreclosure or in lieu of foreclosure." Had the Legislature meant to refer to property rights acquired at the execution of a mortgage, the above-quoted "foreclosure" language would have been unnecessary surplusage. Moreover, if ownership were "acquired" upon the execution of the mortgage, then no corporate lender would be permitted to hold a mortgage on farm or ranch land beyond three years. This conclusion results from the requirement of N.D.C.C. § 10-06-13(5) that a corporate lender dispose of all farmland or ranch land within "three years of acquiring ownership of the property." Surely, bank counsel would not contend that the bank violated North Dakota's corporate farming law by holding its mortgages in this case more than three years.

Neither is there a violation of any due process or equal protection right by the application of N.D.C.C. § 10-06-01 to the bank in this case. North Dakota's corporate farming law has withstood two constitutional challenges. Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971); Asbury Hospital v. Cass County, 326 U.S. 207 (1945). Equal protection is not violated as long as there is any conceivable state of facts which could support a permissible legislative purpose. Asbury Hospital, 326 U.S. at 275.

North Dakota has long had a public policy against corporate ownership of farm or ranch land. The Legislature recognized that corporate ownership of the mineral estate presented a threat to that policy. Hearing on H. 1547 Before the Senate Committee on Agriculture, 49th Leg. (March 15, 1985). Thus, the Legislature enacted House Bill No. 1547 which was codified at N.D.C.C. § 10-06-01. 1983 N.D. Sess. Laws ch. 142. The same legislative purpose which underlies the ban on corporate ownership of farm and ranch land underlies the prohibition on severing the mineral estate from the surface estate. As stated above, the North Dakota Supreme Court has held that this ban is constitutional.

The Legislature was also concerned that the routine mortgage of farm and ranch land includes inadequate or no consideration for the mortgage of the mineral estate. Consequently, the Legislature provided an exception to the ban on severing the mineral estate for those instances in which it appears that adequate consideration was given for that estate, that is, for those cases in which the mineral rights were "specifically valued at the time the security interest in minerals was acquired." N.D.C.C. § 10-06-01. Due process is not violated because the bank could not have anticipated the enactment of this exception. First, the Legislature had no obligation to provide lenders with this exception since, under Asbury Hospital, it is clear that the state has the power to ban all corporate ownership of mineral rights underlying farm and ranch land. Second, the bank in this case could have availed itself of the exception after enactment of the prohibition on severing mineral rights by entering into a new or amended mortgage with the mortgagor specifically valuing the mineral estate. Had it done so, the bank would have been able to retain the mineral interests after receiving its deed in lieu of foreclosure.

Consequently, for the above-reasons, it is my opinion that mineral interests acquired in lieu of foreclosure are acquired at the time the deed in lieu of foreclosure is conveyed. Further, any mineral interests so acquired after July 1, 1985, and not specifically valued at the time of the execution of the mortgage, must be passed with the surface estate of the land at the time the bank divests itself of the land, notwithstanding the fact that these mineral interests were acquired under a mortgage acquired prior to July 1, 1985.

I understand that you will be conveying this opinion to the bank. If they fail to comply with the law within a reasonable period of time, please advise my office so that appropriate enforcement action may be taken.

Sincerely,

Nicholas J. Spaeth

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