OPINION
64-35

April 21, 1964 (OPINION)

BOARD OF UNIVERSITY AND SCHOOL LANDS

RE: Land Patents - Mineral Reservations

This is in reply to your letter of March 25, 1964, in regard to patents for lands and mineral reservations therein. You inform us that land concerned was sold to a private individual on the twenty-third day of February, 1946, on contract for patent. The contracts were paid in full and patents issued on the third day of April, 1958. Patents issued apparently purported to reserve all the coal that might be found on or underlying said lands. An attorney for the present holder of the lands is now requesting that the department issue new patents covering the lands concerned, said new patents to grant to the original purchaser fifty percent of the coal.

On the basis of the above, you request an opinion as to the necessity and legality of issuing patents on land already patented and as to fees, if any, to be charged if such patents are to be issued.

We believe it proper prior to going to the specific question asked to consider and present for you information some of the results of recent litigation and legislation in regard to these lands, minerals and instruments of contract and conveyances.

The first case we believe appropriate is State v. Oster, 61 N.W.2d. 276. As of the date of the transaction there concerned Section 155 of the North Dakota Constitution provided in part:

> The coal lands of the state shall never be sold, but the legislative assembly may by general laws provide for leasing the same. The words coal lands shall include lands bearing lignite coal."
>
> (Note: Said Section 155 has since been amended to provide instead of the above-quoted language)
>
> In all sales of land subject to the provisions of this article all minerals therein, including but not limited to oil, gas, coal, cement materials, sodium sulphate, sand and gravel, road material, building stone, chemical substances, metallic ores, uranium ores, or colloidal or other clays, shall be reserved and excepted to the state of North Dakota,* * * * *."

In the Oster case the contract provided:

> That if the described land shall be found to be 'coal land' and that the same has been sold in violation of Section 155 of the Constitution of the State of North Dakota, then, and in that case, the said land shall immediately revert to the State and this contract shall at once become null and void;* * * *."

The patent provided that if "reserved and excepted from the operation of this grant all rights and privileges vested in the state of North Dakota under the provisions of the constitution and laws of said state;* * * *."

The Oster case was initiated as an action to cancel the patent on the basis of determination that the lands concerned were "coal lands." A demurrer was interposed to the state's complaint and same was sustained by the Supreme Court of this state.

The court's decision in the Oster case was decided in part on such authorities as Cowell v. Lammers, C.C., 21 F. 200, 2-8, 10 Sawy. 246, from which it quotes:

> A patent upon its face should either grant or not grant. It must be seen from a construction of the language of the grant (patent) itself whether anything is granted or not, and, if anything be granted, what it is. There is no authority to issue a patent which, in effect, only says if the lands herein described hereafter turn out to be agricultural lands, then I grant them, but if they turn out to be mineral lands, then I do not grant them. Such a patent would be so uncertain that it would be impossible to determine, from the face of the patent, whether anything is granted or not."

And Burke v. Southern Pacific, R. Co. 234 U.S. 669, 34 S. Ct. 907, 921, 58 L. Ed. 1527, 1553, from which it quotes:

> What is the significance of, and what effect can be given to, the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide, and not to decline to decide; to execute, and not to refuse to execute the will of Congress."

In conclusion in the Oster case, the Supreme Court of this state quoted the statutory provision, section 32-1201, North Dakota Revised Code of 1943, as follows:

> The state may bring an action to vacate or annul letters patent for lands granted by this state in any of the following cases:
>
> 1. * * * * *;
>
> 2. When they are issued in ignorance of a material fact or through mistake;
>
> * * * * *."
>
> and states:
>
> We are of the opinion that the above statute has no application to a case where a sale of land has been strictly in accord with statute, with respect to selection for sale, approval of the

> contract for sale and the issuance of a patent. It is the existence of these facts which are material to the validity of the sale. The statute does not grant a right to question the good faith decision of the board that the lands sold were legally subject to sale. To so hold would be to reverse the prior holding of this court that the board's decision approving or disapproving a sale is conclusive. Fuller v. Board of University and School Lands, supra. Such a decision would also be contrary to the well established rule of statutory construction existing in other jurisdictions in the United States."

The next case we believe of importance is Salzseider et al v. Brunsdale et al, 94 N.W.2d. 502, an action for declaratory judgement decreeing that a mineral reservation in a contract for deed did not include the gravel that might be found in or underlying the lands described in the contract.

In the language of the court:

> The reservation under consideration was made pursuant to the provisions of Section 38-0902 of the N.D.R.C. 1943 which provides:
>
> > (In every transfer of land, whether by deed, contract, lease or otherwise, by the State of North Dakota, or by any department thereof, fifty percent of all oil, natural gas, or minerals which may be found on or underlying such land shall be reserved to the State of North Dakota)"

The contract provided as to mineral reservations that:

> The grantor, however, reserves to itself fifty (50) percent of all oil, natural gas, or minerals which may be found on or underlying such land as required by Chapter 149 of the Session Laws of North Dakota for 1939 as amended by Chapter 165 S.L. of North Dakota for 1941 (Sec. 38-0901, Code 1943)."

The Salzseider case was an action for declaratory judgment decreeing that the mineral reservation in the contract for deed did not include the gravel that might be found in or on the lands described in the contract.

Our Supreme Court after citing a number of cases stated:

> We are in accord with the reasoning of the cases and are agreed that a reservation of 'minerals' contained in a grant of agricultural lands does not, in the ordinary or commonly understood meaning of the word 'minerals' when so used include gravel. We are also agreed that the word 'minerals' as used in the statute was intended by the legislature to have the meaning, which is ordinarily accorded it in the construction of conveyances and wills."

In Convis v. State, 104 N.W.2d. 1, the reservation in the contract reserved "all coal, oil, natural gas, and other minerals" as further limited and defined, and patent had not as yet been issued. The

plaintiffs asked that defendants be required to issue patent conveying title containing only the 38-09-01 reservation and title to gravel, etc., be quieted in plaintiffs.

The court in the Convis case decided that:

> Pursuant to the provisions of the Enabling Act and our State Constitution hereinafter mentioned, our state legislature has adopted Sec. 38-0901 N.D.R.C. which very definitely defines and limits the power of the Board in selling state lands. This statute contains a double restriction. First it provides: 'In every transfer* * * * *fifty percent of all oil,* * * * *gas, or minerals* * * * *shall be reserved to the state of North Dakota.' It further provides that 'any deed* * * * *made after February 20, 1941, which does not contain such reservation shall be construed as if such reservation were contained therein.' This means that the interest in the land which the state may reserve in any transfer, is limited to one-half of the 'gas, oil, and other minerals.' Where land is sold by the State, no further reservation of any title or interest in the land may be made. In this case the contract purported to reserve title to the gravel. The state had no power to reserve any part of the gravel.
>
> Subsequent to the commencement of this action this Court has held in construing Section 38-0901 N.D.R.C. 1943, that the term 'all oil, natural gas, or minerals' does not include gravel. Salzseider, et al v. Brunsdale, et al, N.D. 94 N.W.2d. 502.
>
> Section 10 of the Act of Congress known as 'The Enabling Act', as later amended, grants to this State certain lands which include the land involved here, for the support of the common schools. Sec. 11 of that Act states: 'Provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition.* * * *' Sec. 155 of our State Constitution provides that the legislative assembly shall provide for the sale of all school lands subject to the provisions of this article. The coal land of the state shall never be sold, but the legislative assembly may by general laws provide for leasing the same.' Section 156 of the Constitution says: 'Subject to the provisions of this Article and any law that may be passed by the legislative assembly, said board shall have control of the appraisement, sale, rental and disposal of all school and university lands.' The statutes adopted by our State Legislature for the purpose of disposing of the lands granted in the Enabling Act to this State for the benefit of the common schools, express the public policy of this state. The only limitations upon legislative power in the establishment of public policy are the restrictions contained in the State and Federal Constitutions. Chaffee v. Farmers Co-op, 39 N.D. 585, 168 N.W. 616, 618. The Legislature having acted, and the meaning of the statutes being clear and not questioned in this case, there is no basis for executive construction of the powers granted the Board since executive construction is restricted to cases in which the meaning of the statute is really doubtful. State v. Stockwell, 23 N.D. 70,

134 N.W. 767, 778. 'When the legislature acts with respect to the powers of the board, it acts in a restrictive capacity and not as a conferrer of authority,' State ex rel. Rausch v. Amerada, 78 N.D. 247, 49 N.W.2d. 14, 23. The contract must be construed to reserve no more and no less than the statute requires.

The reservations in the contract in question as quoted above included 'coal.' The sale of 'coal lands' is prohibited both by Section 155 of the State Constitution and by Secs. 15-0506 and 15-0620, N.D.R.C. 1943. No coal has been 'discovered' in the land in question. The purchaser is now entitled to receive a patent to the land and we hold under the rule announced by this court in State v. Oster, N.D., 61 N.W.2d. 276, that under the facts the defendant is estopped at this time from asserting a right to such reservation.

The judgment of the trial court provided:

1. That patent be issued to plaintiffs containing only the reservation provided for by Sec. 38-0901, N.D.R.C. 1943.

2. That the defendants be forever debarred and enjoined from further asserting any right, title or interest in the gravel.

3. The judgment of the trail court is affirmed."

The instant situation, we believe, presents several interesting questions. The letter you forwarded assumes that the Board of University and School Lands is the legal owner of fifty percent of the coal underlying the above described lands. We are definitely inclined to the same point of view. The statutory reservation is, however, of "fifty percent of all oil, natural gas, or mineral." We personally incline to the view that the word "mineral" as used therein can be separately considered, and we think that there is some support therein in the statement in the Salzseider case as quoted above that: "The word 'minerals' as used in the statute was intended by the legislature to have the meaning which is ordinarily accorded it in the construction of conveyances and wills." On such basis, obviously there is valid reason to construe it a reserving fifty percent of the coal. However, we have heard advocated and we believe there is a good deal of decided supreme court decisions from other states to the effect that "oil, natural gas and minerals" should be considered in context and that minerals as used in that phrase includes only those minerals produced with oil and gas. This would be supported to some extent if it were shown that section 38-09-01 of the North Dakota Century Code was enacted in conjunction with the commencement of the oil and gas development of this state.

Applying hindsight to the instant situation and with the benefit of the subsequently decided opinions of the Supreme Court of this state, our best "judgement" would be that the patent issued in the instant case should have carried a reservation quoting the pertinent language of section 38-09-01, i.e., "fifty percent of all oil, natural gas, or mineral which may be found on or underlying such land" is "reserved to the state of North Dakota." Unfortunately the Board of University

and School Lands and the State Land Commissioner's Office did not have the benefit of these decisions at the time the patent was issued.

As previously stated, we do believe that the Board of University and School Lands in the instant case has title to fifty percent of the coal that may be found on or underlying the lands concerned. We do not believe, however, that the board can act as a court or in judicial manner in making this determination. The language of the Convis case would militate against such a viewpoint. Also, considering that case as a whole, it even seems doubtful that the Board of University and School Lands could enter into a valid and binding contract, agreement or stipulation to the effect that fifty percent of the coal is reserved.

Looking to the cases considered above, the only instance where a patent had already been issued was the Oster case. In that case the Supreme Court decided that the patent could not be canceled. Looking to the statutory provision, it would appear that the provision as to the cancellation of such patents is applicable where there is a material mistake of "fact." If there is a mistake in the instant case it would appear to be a mistake of "law" and not of "fact."

The statutory provision in regard to patenting of state lands is section 15-08-16 of the North Dakota Century Code, which provides:

> PATENTS FOR PUBLIC LANDS - EXECUTION. Patents for original grant lands sold under the provisions of this title shall be issued to the purchaser, his heirs, or assigns, when payment is made in full for the lands and all the terms of the contract of purchase are performed. All such patents shall be signed by the governor and attested by the secretary of state with the seal of the state, and shall be countersigned by the commissioner of university and school lands with his seal affixed."

It would appear that pursuant to such statute, the Board of University and School Lands performed their statutory function, i.e., determined that the lands were subject to sale, that payment in full had made for the lands and that the terms of the contract of purchase were performed. Pursuant to such findings, the Board of University and School Lands determined that patent should be issued.

Considering the language of cases cited in the Oster case, it would appear that certain features of the patent as issued were not perfect. To quote from the court's quotation of the Cowell case, "A patent upon its face should either grant or not grant." As to coal, there is probably some question as to whether the instant patent "grants." However, we believe it does on its face show that so much of the coal as the board had authority to grant was granted by this instrument, on the basis of the Oster case reasoning, and it does at least show the board's findings that this was a proper case to issue a patent.

To conclude, it is the opinion of this office that the instant case does not present facts that would justify either vacation or cancellation of the instant patent, or that would justify issuance of

additional patents. We might add that in view of the state of the law here involved, additional patents would probably serve no purpose other than that of cluttering up local records of register of deeds' offices. The law of the matter is quite fully explained in the decisions of our Supreme Court as set out above, and we do not believe the Board of University and School Lands can act to decide the legal questions as to the amount of coal conveyed by the instrument in question.

A proceeding for a declaratory judgment might settle the title to coal on premises concerned, assuming there is a justifiable controversy here.

The fee for issuance of patent is as stated in subsection 4 of section 15-02-10 of the North Dakota Century Code, i.e. $5.00.

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