

OPINION
65-445

January 8, 1965 (OPINION)

Mr. Albert Schmalenberger

Land Commissioner

RE: University and School Lands - Coal Leases - Renewal

This is in response to your letter in which you enclosed the action taken by the Board of University and School Lands with reference to the following lease. The following facts are pertinent in answering the questions you submitted.

On or about December of 1943 the Board entered into a twenty year lease with the Traux-Traer Coal Company under which the Truax-Traer Coal Company was permitted to mine and remove coal located in section 16, township 145, range 86, Mercer County, North Dakota. The lease expired on January 1, 1965.

In consideration for this, Truax-Traer Coal Company agreed to pay a minimum royalty of \$5,000.00 per annum for the first ten years, beginning with the calendar year of 1945. This payment was permitted to be paid in quarterly installments of \$1,250.00 each. The lease further provided for the payment of \$10,000.00 per annum for the next ten years. It contained the provision that the coal so paid for may be removed by the lessee at any time during the term of this lease without further payments.

In addition to this, the lessee agreed to weigh the coal and to pay royalties on the coal at the rate of ten cents per long ton (2,240 pounds) and that such payment would be on a quarterly basis.

In further consideration of the lease, the lessee paid the sum of \$160.00, which was at the rate of twenty-five cents per acre of the land so leased. The lessee also paid a five dollar leasing fee. Further, the lease also required the lessee to furnish a surety bond payable to the State of North Dakota, conditioned on the faithful accounting of the royalties and the faithful performance of the contract, and was in the amount of \$5,000.00. The lease also contained a provision that the same could be renewed on the same terms and conditions for such additional period necessary to remove the coal deposits from said premises. The lease also contained a provision that the lessor may terminate the contract after thirty days written notice and that the lessee may terminate the contract upon ninety days written notice.

In July of the year 1956 the lease was amended to permit the Truax-Traer Coal Company to pay the minimum royalty of \$10,000.00 for the second ten year period per annum on a quarterly installment (per year) basis. The amendment further provided that the deferred payments would carry interest at the rate of five percent per annum.

It has now been proposed that the twenty year lease be renewed with the following amendments:

1. That the payments of royalties be stricken from the lease;
2. That the lease be negotiated at a standard rate of one dollar per acre rental and fifteen cents per ton (2000 pounds) royalty; and
3. That royalties on coal mined during term of lease shall be applied to advance payment of royalties but not to interest accumulated under previous lease contract for this tract.

You then ask for our opinion whether or not the proposed action is permissible or would be legal.

As stated above, the original lease and the amendment thereto provided for a minimum royalty of \$5,000.00 per annum for the first ten years and \$10,000.00 per annum for the second ten years. From the language of the lease the amounts paid as minimum royalties would be paid regardless of the amount of coal removed from the tract of land leased. The consideration was for the privilege of removing the coal. We must assume that the consideration for the lease was valid and that the arrangement was satisfactory to the parties because no effort was made by either party to terminate the lease as permitted under its provisions. The Traux-Traer Coal Company was permitted to remove any coal and there is no indication of any kind that the lessor in any way prevented or infringed upon the right of the lessee to remove any coal during the period of the lease. The lease as such has now run its course.

The proposed action by the Board to renew the lease with the amendments would, in effect, give credit to payments already made. The primary consideration for amended lease would consist of the previous payments made. It would, in effect, extend the credit of the State or make a donation to the lessor, which is prohibited by Section 185 of the North Dakota Constitution.

On the basis of this, it is our opinion that the proposed action of the Board of University and School Lands would not be proper and legal but would be in contravention of Section 185 of the North Dakota Constitution.

ATTORNEY GENERAL

Helgi Johanneson