

OPINION
66-446

June 6, 1966 (OPINION)

Mr. Albert Schmalenberger

Land Commissioner

RE: University and School Lands - Utilization by Lessee

- Shelterbelt

This is in reply to your letter of June 1, 1966, requesting the opinion of this office in regard to utilization of original grant and nongrant lands.

Your first question relates to whether the Board of University and School Lands has authority to grant a lessee permission to plow up, plant and maintain trees for a shelterbelt on Original Grant Lands.

Your second question is stated as:

Does the Board of University and School Lands have authority to grant easements to construct, build and maintain roads on and across Original Grant Lands?"

Your third question is stated as:

Does the Board of University and School Lands have authority to grant easements to bury pipelines, telephone or other cable lines on and across Original Grant Lands?

Your fourth question is stated as:

We also request your opinion regarding acquired lands on the above three questions."

In reply to your first question, Section 161 of the North Dakota Constitution provides insofar as here applicable as follows:

SECTION 161. The Legislative Assembly shall have authority to provide by law for the leasing of lands granted to the state for educational and charitable purposes; but no such law shall authorize the leasing of said lands for a longer period than five years. Said lands shall only be leased for pasturage and meadow purposes and at a public auction after notice as heretofore provided in case of sale; provided, that all of said school lands now under cultivation may be leased, at the discretion and under the control of the Board of University and School Lands, for other than pasturage and meadow purposes until sold. All rents shall be paid in advance. * * *."

As you are well aware, the Legislative Assembly has made provision for leasing of said lands. Among such provisions are section

15-04-19 of the North Dakota Century Code, which provides:

LESSEE NOT TO BREAK OR PLOW UNCULTIVATED LAND - PENALTY. No lessee of land leased under the provisions of this chapter, his heirs or assigns, shall break, plow, or cultivate any unbroken land on any track leased, nor cause nor permit it to be done by any other person. Any person who shall violate the provisions of this section shall incur the same forfeitures and liabilities as are provided in section 15-04-18, and shall be guilty of a misdemeanor.

While establishment of a commercial forestry project might well constitute "cultivation" of otherwise unbroken land and a diversion of the premises from the "pasturage and meadow" purposes specified, establishment and maintenance of a shelterbelt would probably be another matter. It is our opinion that establishment and maintenance of same would not constitute breaking, plowing or cultivating unbroken land within the prohibition of the above quoted provisions of section 15-04-19 and would be within the "pasturage and meadow" purposes specified in the above quoted provisions of Section 161 of the Constitution. In view of the provisions of section 15-08-26 of the 1965 Supplement to the North Dakota Century Code, permission granted should probably be in writing signed by the Commissioner of University and Schools Lands.

In reply to your second question, chapter 15-09 of the North Dakota Century Code authorizes sales in lieu of condemnation for specified public uses, including "public highway purposes", (see subsection 8 of section 15-09-01 of the North Dakota Century Code). Section 15-09-04 of the North Dakota Century Code provides for fixing a price both where the "entire tract" is conveyed and where "less than an entire tract" is conveyed. On such basis, we know of no legal objection to utilizing the procedures outlined in said chapter 15-09 for granting either an entire tract, or for granting an easement for such purposes.

In reply to your third question, chapter 15-09 of the North Dakota Century Code authorizes sales in lieu of condemnation for specified public uses, including "Any of the other purposes for which the right of eminent domain may be exercised under the constitution and laws of the state." (See subsection 15 of section 15-09-01 of the North Dakota Century Code.) Section 32-15-02 of the North Dakota Century Code, including the 1963 amendment, provides in part as follows:

PURPOSES FOR WHICH EXERCISED. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

* * *

7. Telegraph and telephone lines;

* * *

0. Oil, gas, and coal pipelines and works and plants for supplying or conducting gas, oil, coal, heat, refrigeration, or power for the use of any county, city, or

village, or the inhabitants thereof, together with lands, buildings, and all other improvements in or upon which to erect, install, place, maintain, use, or operate pumps, stations, tanks, and other machinery or apparatus, and buildings, works, and plants for the purpose of generating, refining, regulating, compressing, transmitting, or distributing the same, or necessary for the proper development and control of such gas, oil, coal, heat, refrigeration, or power, either at the time of the taking of said property or for the future proper development and control thereof; and * * *."

On such basis it is our opinion that your third question must be answered in the affirmative.

In reply to your fourth question, the provisions of chapter 15-09 of the North Dakota Century Code pursuant to the provisions of section 15-09-01 refer to "* * * The State of North Dakota or any person, firm, or public or private corporations, desiring to acquire any school or institution lands of the state * * *." Insofar, as the statute does not distinguish between grant and non-grant lands, it is our opinion that for these purposes there is no distinction between same. On such basis, the opinion heretofore expressed would apply equally to either original grant or acquired lands.

HELGI JOHANNESON

Attorney General