OPINION
69-344

May 29, 1969 (OPINION)

Mr. Albert Schmalenberger

State Land Commissioner

RE: State - Land Department - Mineral Reservations

This is in reply to your letter of April 29, 1969, wherein you request an opinion regarding the above captioned lands and mineral reservations thereon, also submitting the file for review of facts which have transpired in connection with the sale of gravel from said premises.

You refer to a letter of March 4, 1969, from Mr. John R. Kerian, wherein request has been made for refund of certain monies which were received by the State Land Department form the sale of gravel from the above premises. You then ask for information as to the State Land Department's rights in connection with the matter.

A review of the file in question evidences the following facts:

On August 21, 1954, the Butler Machine Company of Fargo, North Dakota, purchased gravel from the SE 1/4 Section 4-146-80, McLean County, North Dakota, amounting to $4,726.62. This land was purchased on contract for deed by Charles Schlickenmayer, Turtle Lake, North Dakota, on February 28, 1953. Payment for the gravel taken was made by two checks dated August 21, 1954. The checks were issued jointly to the State Land Department and Charles and Caroline Schlickenmayer. One check was in the amount of $2,365.92; the other check in the amount of $2,360.70. It was decided that the State Land Department and the purchaser should each receive 50 percent of the income from gravel. The check in the amount of $2,365.92 was endorsed over to the Schlickenmayers by the State Land Department. The check in the amount of $2,360.70 was endorsed by Charles and Caroline Schlickenmayer. The Schlickenmayers paid the balance of $2.61 in cash to make the amounts an equal 50 percent for each party. Request has now been made by Mr. Jon R. Kerian, Attorney at Law, in behalf of his client, Mr. Charles Schlickenmayer, for the refund of the monies which were accepted by the State Land Department.

On March 6, 1969, Mr. Lynn E. Erickson, Legal Counsel for the State Land Department, submitted a letter to Mr. Kerian, and provided in part:

> "I do not note, however, that a gravel permit was issued by the State Land Department in connection with the sale of said gravel. The file does not indicate whether the sale was in fact negotiated by the department or by the contract purchaser. However, it would be a fair assumption that it was negotiated by the contract purchaser for the reason that a permit would necessarily have been needed had the department negotiated the sale. The question then arises whether authority was granted by the department for the sale and severance of said gravel.

Under the theory that severing or permitting severance of the gravel constituted waste on lands held under contract and the consequent reduction of the State's security therefor, it occurs to me that a division of the proceeds of gravel may have been arrived at by consent to the parties on the basis of settlement rather than on the basis of the mineral reservation contained in the contract itself or by the statute.

Your contentions with regard to the reservation of gravel under the general mineral reservation clause seem quite conclusive in view of the rulings in the Salzseider case and the Convis case. We must agree in that connection.

"It would appear, however, that this situation is somewhat academic to the initial problem presented regarding the payment of any sum as reimbursement. The funds received by the department have been credited to the permanent fund. There appears to be no way of making reimbursement to Mr. Schlickenmayer short of a special legislative appropriation therefor. There is no fund or appropriation from the permanent fund for refunds of any nature. It would appear that one may have to start with the Board of University and School Lands and then seek the special appropriation for such a refund if the same should be determined to be due your client."

Before considering the legal problems involved, it would appear that the following questions of fact would need be resolved by the Board of University and School Lands in determining disposition of the matter:

1. Whether the amounts so credited by the State Land Department were based upon the theory that the mineral reservation included gravel, hence the funds were credited to the permanent fund;

2. Whether the amounts so credited by the State Land Department were based upon the theory that the severance of gravel constituted waste upon the lands held under contract and consequent reduction of State's security;

3. Whether the State Land Department can make refund from the permanent fund for monies received in reliance upon their conclusion that gravel constituted a mineral under the mineral reservation as set forth in the sale.

With regard to questions numbered 1 and 2 above, it would appear that the same must find their basis in the facts involved in the transaction of the sale of gravel and subsequent negotiations between the State Land Department and the Schlickenmayers.

With regard to question numbered 3, assuming that the funds were credited to the permanent fund in reliance on the gravel as being included in the 50 percent mineral reservation is concerned, we would first note Section 153 of the North Dakota Constitution, which provides in part:

"All proceeds of the public lands that have heretofore been, or

> may hereafter be granted by the United States for the support of the common schools in this state; * * *, shall be and remain a perpetual fund for the maintenance of the common schools of the state. It shall be deemed a trust fund, the principal of which shall forever remain inviolate and may be increased but never diminished. The state shall make good all losses thereof."

Also, Section 159 of the North Dakota Constitution provides, in part:

> "* * * The principal of every such fund may be increased but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses thereof."

While it would seem that the department may make refund or adjustment in cases where there exists a clerical or mathematical error in the crediting of monies to the permanent fund, there seems to be no method, short of special appropriation, to refund amounts which were credited to the permanent fund in reliance upon the interpretation that gravel was and in fact constituted a mineral within the meaning of the mineral reservation contained in the Contract for Sale of Land, which was held by Mr. Schlickenmayer, according to the strict interpretation of the constitutional provisions hereinbefore mentioned. It would appear that if the Board of University and School Lands approved a sale to the purchaser in full reliance that gravel was included in the mineral reservation contained in the contract for sale, the sale price of such land would be correspondingly less than had it intended that gravel was not reserved under the said reservation. Consequently, it would appear that a loss has been sustained by the permanent funds which would, in fact, require the state to make good such loss in accordance with the constitutional provision therefor.

While the question of whether "gravel" constituted a mineral within the mineral reservation has been determined by the Supreme Court of North Dakota in the Salzseider case, 94 N.W.2d. 502, it is apparent that, should a special appropriation be made to make good the loss sustained by the permanent funds by reason of reliance on such reservation prior to the decision referred to, the state would likely become liable to make special appropriations to cover the losses likewises sustained to the permanent funds in the cases of Oster, 61 N.W.2d. 276, Convis, 104 N.W.2d. 1, etc., and others of a like class not specifically determined by the courts, which by cursory examination only would reflect an amount consisting of several million dollars.

In view of the constitutional provisions and the nature of the crediting of such funds by the State Land Department to the permanent funds, we are of the opinion that the Board of University and School Lands may not refund the payment credited for the sale of gravel, but that the same must be recovered, if at all, by an appropriate judgment rendered in the courts of law and followed by a special appropriation of the Legislature to make good the loss otherwise occurring to the permanent funds.

HELGI JOHANNESON

Attorney General