LETTER OPINION
72-360

January 10, 1972 (OPINION)

Mr. John Greenslit

State Liaison Officer

North Dakota State Recreation Agency

RE: State - Uniform Relocation Assistance Act - Compliance

This is in reply to your letter of December 10, 1971, with regard to the application of Pub. L. 91-646, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, to activities of this state and particularly your agency.

You enclose a memorandum from the United States Department of the Interior, Bureau of Outdoor Recreation, and call our specific attention to the question and answer number 1 thereof.

> 1. At what period do we require assurances from the states on the extent to which they have legal authority to comply with the terms of Pub. L. 91-646?
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> Immediately. The Act requires that each state enact by July 1, 1972, laws to enable it to comply with the Act in order to be eligible for Fund assistance on acquisition projects under grant agreements executed after that date. Prior to that date, increasing a grant to a state to cover the first $25,000 for each displacement can only be made to the extent that the state is authorized to expend such funds. In the interim period the departmental regulations specifically require an opinion from each state's Attorney General, identifying those areas with which his state is unable to comply."

You indicate that in response to this question you are requesting an attorney's opinion on whether or not North Dakota, and specifically the State Outdoor Recreation Agency, has the legal authority to comply with the terms of Pub. L. 91-646.

You indicate that if the authority does not exist, then, as stated in the memorandum, an opinion is needed defining the areas in which state law is deficient. Looking to the provisions of the State Outdoor Recreation Agency Act, Chapter 53-07 of the 1971 Supplement to the North Dakota Century Code, it would appear that generally the State Outdoor Recreation Agency will probably not be acquiring lands, though in most instances it will obviously be working with both state and federal agencies and departments which agencies and departments will probably be acquiring lands.

As to the federal Act and specific state enactments thereto, we are enclosing herewith a copy of a letter of this office to the Regional Attorney of the Department of Health, Education and Welfare, with regard to same which may be of some assistance to you in regard,

pertaining as it does, to recent history of both the federal and state enactments.

The purpose of Pub. L. 91-646 is stated in Section 201 thereof as:

> Section 201. The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Looking to the other provisions of the federal enactment, it apparently intends to accomplish such purpose by means of payments to such displaced persons.

With relation to state actions Section 208 thereof provides:

> "Section 208. Whenever real property is acquired by a state agency at the request of a federal agency for a federal program or project, such acquisition shall, for the purposes of this Act, be deemed an acquisition by the federal agency having authority over such program or project."

Section 210 of the federal enactment provides, in effect, that the head of a federal agency shall not approve any grant to, or contract or agreement with, a state agency, under which federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of the title, unless he receives satisfactory assurances from the state agency that relocations payments, assistance and help as defined therein will be made to such displaced persons.

To the extent the State Outdoor Recreation Agency does not acquire title to lands, we would assume it will be unaffected by the provisions of the act. We would further assume, however, that in many instances the State Outdoor Recreation Agency will be working with, cooperating with, etc., another state agency or agencies that will be acquiring lands, federal aid to which acquisitions will, or course, be subject to the provisions of the federal enactment.

As explained in our letter of November 4, 1971, while there were state acts in existence prior to the enactment of Pub. L. 91-646, in recognition of the provisions of the predecessor to the federal enactment, the 1971 Legislature of this state did not take action with regard to Pub. L. 91-646. As presumably the North Dakota Legislature will not again convene until the year 1973, we believe we can assume for purposes of the question you present, that the state of North Dakota will not enact by July 1, 1972, further legislation which will "enable it to comply with the 'federal' act. Your question therefore must really come down to whether or not the state of North Dakota acting through its various agencies and departments will be able to comply with the federal enactment prior to 1973. At the current moment and speaking in general terms, we do not see there should be any real difficulty in such compliance in the usual instance.

The State Outdoor Recreation Agency does not have specific land acquisition statutory authority. It will, of course, be working with state agencies and departments that do have statutory land acquisition authority. The usual methods of state agency acquisition of titles to lands, is by gift, purchase or condemnation. We would assume that acquisition by gift would not be affected in the usual instance by the federal enactment. Acquisition by purchase and by eminent domain probably would be affected by the federal enactment.

We would assume that in any voluntary purchase and sale of real property, the sale is generally consummated at the point in time where the seller feels that the named sum of money is worth more to him than the land and the purchaser feels that the named sum of money is worth less to him than the land. Many criteria may exist which lead each party to the transaction to his ultimate conclusion which results in the sale being consummated. Relocation costs, or completely irrelevant matters, such as, for example, the cost of a new automobile, or of sending the children to college may motivate the seller to reach this conclusion to consummate the sale. While the motivation of the seller may not be of interest in the usual instance to the purchaser, at such point as an amount of money, which he considers less than the value of the land to him, will satisfy the seller's desires, we would assume it would be possible to consummate the sale. The usual statutory provisions for state agency purchase of land do not specify the item or items that may be included in the purchase price, or specify formal procedures, in arriving at such a purchase price. Section 185 of the North Dakota Constitution does forbid the state, its counties and cities to loan or give its credit or make donations to or in aid of any individual, association or corporation except for the reasonable support of the poor, on which basis we would assume that a state agency could not pay more for the acquisition of land that the value of such acquisition to it. We would thus assume that in usual instance the effect of the federal enactment on a state of North Dakota agency's purchase of a particular tract of land would be that the documentation evidencing completion of transaction would necessarily include an agreement either separately or included in other title documentation settling for the relocation costs according to the standards specified in the federal enactment. While each state agency having land acquisition authority generally has it own statute, either general, covering all of its land acquisitions, or specific, covering particular acquisitions, and while there may be particular inhibiting provisions in some of these specific statutes as to purchase of particular tracts of land, we know of no generally applicable standard in the state law that would prevent utilization of such a procedure.

Where the property cannot be purchased but must be taken by eminent domain proceedings utilization of the procedures specified in Pub. L. 91-646 may require slightly more complex agreements or proceedings. Thus, we note that subdivision (b) of Section 102 of Pub. L. 91-646 provides:

> b) Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment

of this Act."

The basic element of damages in eminent domain proceedings prior to this type of federal enactment (including the predecessors to Pub. L. 91-646) was, of course, fair market value for the estate taken defined as the price between a willing seller and a willing buyer. Whether this would include actual, as opposed to average relocation costs, could be a matter of some speculation. However, the North Dakota Legislature in Section 32-15-22.1 of the 1971 Supplement provided:

> 32-15-22.1. EMINENT DOMAIN - COMPENSATION FOR MOVING PERSONAL PROPERTY. Whenever property is taken or is about to be taken under eminent domain, and the owner or former owner of such property has, at the time of the taking or of taking possession of the property, personal property located on it, he shall be compensated for the cost of moving such personal property to a new location within this state, selected by him, such cost to be determined on the basis of reasonable estimates or to be evidence by actual paid receipts to be produced to the condemning authority; provided, however, that such cost shall not exceed the value of the property to be moved. The amount therefor shall be paid directly to the owner or former owner by the condemning authority, and in case of inability to agree, either party may bring an action in the same court in which the condemnation action has been or might have been brought, for a judicial determination of the issues between the parties, or, the matter may be determined in the condemnation action itself."

There may, of course, be some questions as to whether this provision necessarily of itself guarantees compliance with the provisions of Section 210 of the federal enactment providing:

> Section 210. Notwithstanding any other law, the head of a federal agency shall not approve any grant to, or contract or agreement with, a state agency, under which federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the displacement of any person on or after the effective date of this title, unless he receives satisfactory assurances from such state agency that:
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> (1) fair and reasonable relocation payments and assistance to or for displaced persons, as are required to be provided by a federal agency under sections 202, 203, and 204 of this title;
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> (2) relocation assistance programs offering the services described in section 205 shall be provided to such displaced persons;
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> (3) within a reasonable period of time prior to displacement, decent, safe, and sanitary replacement dwellings will be available to displaced persons in accordance with section 205(c)(3)."

It is perhaps questionable whether the elements of "Fair Market Value" plus the additional specifications of compensations for moving personal property specified in said Section 32-15-22.1 are precisely equal to the criteria specified in the federal enactment. It is at least conceivable that the federal standards, for example, those specified in Section 202, could include such items as railroad fare for the persons moved, costs of moving beyond the state boundaries, etc., which items are conceivably not included in the state enactment. On the other hand, condemnation by federal agencies has always been conducted with strict specifications as to the step-by-step handling of the case, including appraisals, offers, etc., to the point of actually prescribing a precise percentage of original offer that can be added for the purposes of avoiding litigation. There are no such specifications as to step-by-step negotiations, handling, etc., of this state's condemnation cases. Likewise, the mere fact that any lawsuit has gone to judgment does not necessarily indicate that same will terminate at such point. There is almost always the possibility that an appeal, motion for new trial, etc., can be made. On such basis, it is always possible that a matter that has been brought even to the point of judgment will be settled for either more or less than the amount specified in the judgment. Likewise, in some instances, in recognition of earthmoving and construction equipment sometimes available to the condemnor and not available to the condemnee, some condemnation proceedings in this state have been settled on a basis of such features as cattle guards, ditches, small canals, surface drainage, earth leveling, etc., rather than on mere monetary figures, and in some instances such items of settlement have actually appeared in the judgments entered. On such basis we would also assume relocation assistance could be a proper part of settlements. While, of course, the state agency could not violate the heretofore considered provision of Section 185 of the North Dakota Constitution, looking to the terms of the federal enactment, it would appear that adequate consideration would be forthcoming from the federal agencies to justify a state agency in contracting to furnish such relocation assistance even in instances where the possibilities of avoiding litigation, etc., were not of themselves adequate consideration for such agreement.

In conclusion, it seems possible that in 1973 consideration of the revision of the heretofore quoted Section 32-15-22.1 to precisely conform to the federal enactments may be in order. However, in the interim period, we know of no general prohibition in our statutes that would prevent state agencies from complying with the provisions of Pub. L. 91-646. We might mention, however, that aside from the general eminent domain statutes, the laws of this state do not generally provide authority for all state agencies to acquire lands. Each state agency having land acquisition authority has statutes applying only to that agency specifying such authority. Such statutes are usually quite general in nature, not specifying in detail the procedure, prices, etc., that may properly be utilized and paid. In some instances, where a state agency does not need general land acquisition authority but does need a specific tract of land, a special enactment is passed by the legislative assembly providing for the acquisition of that particular tract of land. Such special enactments may get very specific in detailing price, matters that may be taken into consideration in determining price, etc. It may not be possible to comply with the provisions of Pub. L. 91-646 in the

instance of some of these special enactments currently existent, though we would assume that where future special enactments are planned where Pub. L. 91-646 may be applicable, the Legislature will take such federal consideration into account in the measure that will be passed.

As heretofore indicated, we have assumed herein that the state agency acquiring land will not be your agency, but a state agency cooperating with you on a particular project. The statutory authority for the acquisition of the lands, terms of purchase, etc., will therefore have to be the statutory authority of that agency rather than yours. We can, of course, at this time only speculate as to which agency's statutory authority under the state law, will be considered in any specific instance, on which basis our answer must necessarily be quite general in scope. We hope, therefore, that the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General