**OPINION**
**75-65**

February 19, 1975 (OPINION)

The Honorable Robert F. Reimers
Speaker, House of Representatives
Forty-fourth Legislative Assembly
State Capitol
Bismarck, ND 58505

RE: HOUSE BILL 1062

Dear Representative Reimers:

This is in reply to your letter of February 17, 1975, in which you ask the following question:

> "If we pass this bill will it have any effect on the contract or leases that are in effect at the present time?"

House Bill 1062 is an Act to: require written notice and approval before a permit to surface mine land is issued by the Public Service Commission: to provide for surface damage and disruption payments; to provide for a financial obligation to reclaim land disturbed by a mining operation. The copy of the bill enclosed with your letter contains certain proposed amendments which we do not understand to be pertinent to the question you have presented.

While House Bill 1062 does not contain any statements as to its effect in point of time, it provides that the Public Service Commission must receive written consent of the surface owner before it may issue a mining permit or, if the mineral owner has not consented, a court order authorizing the Commission to issue a permit to mine land without the consent of the surface owner. The bill thus appears to apply to those leases already in effect as well as those to be executed after the effective date of the Act.

The bill is a product of an interim study by the Legislative Council. At page 188 of the Council's 1975 Report we find the following statement:

> "The interested landowners and area citizens responded by enumerating problems which, to a large extent, indicated dissatisfaction with the terms of leases which were already in effect. The Committee was made aware of the problem of the person who owned the surface of the land separate from the mineral estate. It was pointed out that the surface of the land might be disturbed by strip mining without the consent of the surface owner. The Committee recognized that any recommended legislation, in order to be constitutional and valid, cannot impair the obligation of contract nor can it be interpreted to take any private property without compensation, except pursuant to valid exercise of the police power by the State."

The Council then recommended three bills. The first bill is the

North Dakota Coal Leasing Practices Act (Senate Bill 2059). Section 1 of that bill provides in part: "The provisions of this Act shall apply to all leases for the mining of coal entered into after the effective date of this Act." The same statement is not contained in the second of the three bills recommended, House Bill 1062, the bill with which we are concerned. It seems rather clear, therefore, that House Bill 1062 is intended to apply to all coal mining permits, regardless of whether the coal rights were severed from the surface or leased prior to or after the effective date of the bill, if passed.

We could reasonably conclude our answer to your question at this point. However we believe it only fair to allude to the basic question prompting the question presented, i.e., the constitutionality of the legislation. In this respect we note Section one of the bill is predicated on the exercise of the police power of the state to "protect the public welfare of North Dakota, which is largely dependent on agriculture, and protect the economic well-being of individuals engaged in agricultural production." Whether the requirements of the bill constitute a valid exercise of the police power of the state is the ultimate question to be determined and may well involve questions of fact as well as questions of law. This office cannot ultimately determine the factual questions since our authority is based on executive rather than judicial powers.

In this respect we note the statements of the North Dakota Supreme Court in Christman v. Emineth 212 N.W.2d. 543 (N.D. 1973) in which the Court stated, page 550 of the reported case: "The language in the instant case is clear, unambiguous, and without limitation. It severs the minerals from the surface of the land, retaining in the grantor the right to enter and use the surface for any purpose reasonably necessary to the use of his mineral rights. His rights are a fee simple estate in the minerals 'in or under' the land in question. Northwestern Imp. Co. v. Morton County 78 N.D. 29, 47 N.W.2d. 543, 550 (1951). It is then reasonable to assume that the parties intended that the grantor should have the right to use the surface to whatever extent reasonably necessary to remove fifty percent of 'all oil, gas, and other minerals'."

The Court, in answer to the argument that the agricultural use of the land in question would be destroyed by the strip method of mining and that it therefore should not be allowed or found to be within the intention of the parties, noted the Legislature had foreseen this problem and dealt with it by enacting the reclamation of strip mined lands act.

In a recent decision, not yet final, the Court again spoke with regard to the strip method of mining and its previous decision in Christman. In the case Olson v. Dillerud Civil No. 9056, decided on February 13, 1975, the Court stated: "Recent events have raised doubts in the minds of some as to whether strip mined lands have been, or can be, restored to productive use. If a case should come before us in the future, based on factual data in evidence as to whether strip mining constitutes 'use' as distinguished from destruction of, or permanent damage to, the surface, it may be necessary to reexamine the language of Christman 212 N.W.2d. 543 at

550-551 (N.D. 1973). There is no basis in the record in the instant case for reexamining what we said in Christman.

> "Because of possible consequences of inadequate restoration of the surface following strip mining of coal, we urge the Legislature to take whatever steps may be reasonably necessary to ensure that the surface is restored for agricultural and ranching purposes.
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> "We do not write the contracts, deeds, or lease that come to us for our consideration, and we cannot rewrite them to suit our view of justice in each case when there is no evidence of fraud, duress or undue influence; but the Legislature can ease the hardship that may be presented by legislation enacted under the police power. We hope that in this day of advanced technology when men can be sent to the moon and returned safely, that means can be devised for restoring the topsoil and that legislation can be enacted to require that it be done if it is not now being satisfactorily restored." (Emphasis ours)

The decision of the Court is not yet final in that the time to petition for rehearing had not expired at the time we write this opinion. However if the decision stands in its present form, it appears to indicate that based on factual data in evidence the Court might alter some of its statements in Christman. As indicated above, we have no authority to judicially determine factual situation. The Olson case also is a clear appeal to the legislature to take reasonably necessary steps to ensure the restoration of the surface for agricultural and ranching purposes. Whether that appeal extends to the enactment of a surface owners protection act which requires the payment of damages to a surface owner is not as clear and such determination must await a future decision of the Court if House Bill 1062 is enacted.

While the above discussion may not appear necessary to respond to the question presented, we note some rules of constitutional construction:

1. A law enacted by the legislature is presumed to be constitutional, unless it is shown that it is manifestly violative of the organic law.

2. Courts will construe statutes so as to harmonize their provisions with the Constitution if it is possible to do so, to the end that they may be sustained.

3. State legislatures are presumed to have within their constitutional power despite the fact that, in practice, their laws result in some inequality.

4. If the act is susceptible of two constructions, one which would make the statute constitutional and the other which would make it void, the Court will, if possible, construe the statute in a manner to support its constitutionality.

While the above listing is by no means exclusive, it does include some of the standards which the Court would apply in construing House

Bill 1062. Thus if the Court were to determine that construing House Bill 1062 to apply to minerals severed from the surface prior to the effective date of the Act was to take property without due process of law or unlawfully impair contracts, the Court might decide, in order to save the Act, that it applies only to those minerals severed from the surface subsequent to the effective date of the Act. Thus we believe this discussion is pertinent to the question you have presented.

However on the face of the bill, without considering any constitutional issues, it is our impression the bill, if enacted, would apply to leases that are in effect at the present time, i.e., minerals which have been severed or are under lease the present time.

Sincerely,

ALLEN I. OLSON

Attorney General