STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-23

Date issued: October 3, 1988

Requested by: James E. Sperry, Superintendent
State Historical Society

- QUESTIONS PRESENTED -

I.

Whether N.D.C.C. §55-02-07, providing for the preservation of historical, archeological, and paleontological artifacts and sites, applies to tracts of land in which the Board of University and School Lands owns only a mineral estate.

II.

Whether compliance with N.D.C.C. §55-02-07 requires the Board of University and School Lands and political subdivisions of the state to include in their oil and gas leases a provision retaining ownership of historical, archeological, and paleontological artifacts and sites.

III.

Whether the Board of University and School Lands may deal with historical, archeological, paleontological artifacts and sites without supervision of the State Historical Board.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that N.D.C.C. §55-02-07, providing for the preservation of historical, archeological, and paleontological artifacts and sites, may, under certain circumstances, apply to tracts of land in which the Board of University and School Lands owns only a mineral estate.

II.

It is my further opinion that although N.D.C.C. §55-02-07 does not require the Board of University and School Lands and political subdivisions of the state to include in their oil and gas leases a provision retaining ownerships of historical,archeological, and paleontological artifacts and sites, N.D.C.C.

§55-03-06 does require that a similar provision be included.

III.

It is my further opinion that the Board of University and School Lands may deal with historical, archeological, paleontological artifacts and sites without supervision of the State Historical Board when such supervision would conflict with the Land Board's fiduciary responsibilities to trust property.

- ANALYSES -

I.

The first sentence of N.D.C.C. §55-02-07 states as follows:

> Any historical, archaeological, or paleontological artifact or site that is found or located upon any land owned by the state of North Dakota or its political subdivisions or otherwise comes into its custody or possession and which is, in the opinion of the superintendent, significant in understanding and interpreting the history and prehistory of the state, shall not be destroyed, defaced, altered, removed, or otherwise disposed of in any manner without the approval of the state historical board.

Ownership of land carries with it title to all things on and under the land. N.D.C.C. §47-01-12. Thus, if the state owns fee title, it also owns artifacts and sites that lay upon or under the surface. The purpose of N.D.C.C. §55-02-07 is to regulate this ownership. Any mineral interest the state may have in a tract does not include title to any artifacts or sites that are part of that tract. Therefore, application to N.D.C.C. §55-02-07 to land in which the state owns only minerals is beyond the statute's purpose of regulating government-owned artifacts and sites.

However, where the state owns only the minerals of a tract it may at one time have owned the surface. Indeed, it is likely that most of such mineral ownership is the result of reserving minerals upon sale of the surface. Since 1939 a statute has provided that upon transfer of state land, the state retains title to historical materials. The original law said that in such transfers "title to any and all archeological materials, whether such material are found upon the surface or below the surface of such land, shall be retained by the state." 1939 N.D. Sess Laws ch. 223, §6. In 1965 the statute was revised to also include retention of title to paleontological materials. 1965 N.D. Sess. Laws ch. 379, §24. Presently, the law is codified at N.D.C.C. §55-03-06.

The significance of this statute for the present inquiry is that the state may own the archeological and paleontological materials on a tract of land even though mineral ownership is its only other property right. In such a circumstance, N.D.C.C. §55-02-07 places such historical materials under the

Historical Board's supervision. N.D.C.C. ' 55-02-07 not only give the Board supervision over historical objects found on state-owned land, but also over such objects that otherwise come into the state's custody or possession. (The extent of the Historical Board's supervision vis-a-vis historical objects on lands controlled by the Board of University and School Lands is discussed in Section III of this opinion.)

In summary, where the state's property interest in a tract is confined to minerals, N.D.C.C. §55-02-07 does not apply. Where the property interest also includes archeological and paleontological materials, §55-02-07 does apply, subject to the limitations described below in section III.

II.

Nothing in N.D.C.C. §55-02-07, either explicitly or implicitly, requires a government body to include in its oil and gas leases a provision retaining ownership of historical, archeological, and paleontological artifacts and sites. The statute only defines the State Historical Board's authority over such government-owned materials. N.D.C.C. §55-03-06, however, does require governmental bodies to retain ownership of archeological and paleontological materials. Thus, it is this statute, not N.D.C.C. §55-02-07, that requires the Board of University and School Lands and political subdivisions to include in their oil and gas leases a provision retaining ownership of certain historical materials.

III.

The State Historical Board is given authority to regulate historical, archeological, and paleontological artifacts and sites. N.D.C.C. §55-02-07. The Historical Board also has significant authority over areas of historical and archeological value that are listed in the state historical sites registry. N.D.C.C. §§55-10-02, 55-10-08(2). Such artifacts and sites may exist on lands originally granted to North Dakota by the United States. Before answering the question whether such lands are subject to the State Historical Board's regulatory authority, it is necessary to set forth the unique legal principles that apply to these lands.

Original grant lands were given in trust for the benefit of the state's schools and certain specified state institutions. The terms under which North Dakota received these lands are set forth in the Enabling Act, 25 Stat. 676 (1889), reprinted in 13 N.D.C.C. 63. Section 10 of the Act states that the lands are granted "for the support of common schools." Section 11 provides that the lands "shall be reserved for the purposes for which they have been granted." Section 17 makes a land grant for certain educational, institutional, and charitable purposes and states that such lands "shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provided."

North Dakota's acceptance of the grants was made "under the conditions and limitations" of the Enabling Act. N.D. Const. art. XIII, §3. See also State

v. Towner County, 283 N.W. 63, 65 (N.D. 1938). Thus, the state agreed to hold title to these lands as trustee to fulfill the purposes of the grant. State v. McMillan, 96 N.W. 310, 315 (N.D. 1903). These purposes, as is apparent from the language quoted above from the Enabling Act, express the congressional intent to establish a trust "to be held and administered by the states under trust covenants for the perpetual benefit of the public schools systems." State of Utah, etc. v. Kleppe, 586 F.2d 756, 758 (10th Cir. 1978), rev'd on other grounds sub nom. Andrus v. Utah, 446 U.S. 500 (1980). Furthermore, North Dakota's constitution makes it clear that the original grant lands are only to be used for support of the common schools. N.D. Const. art. IX, §§1, 2.

It is true that sections 3 and 5 of North Dakota Constitution article IX provide that the trust is subject to laws enacted by the Legislature. Similarly, the North Dakota Supreme Court has said that throughout the state's history "it has been the legislative policy to control the . . .[land] board." State v. Hanson, 256 N.W. 201, 204 (N.D. 1934). But such constitutional language and judicial comment do not give the Legislature carte blanche to do what it wishes with the school trust. Were it otherwise, "then a potentially self-defeating incompatibility exists between the stated purpose and objectives of the trust on the one hand, and the alleged unbridled authority granted the State Legislature to defeat the strategy by means of creative rules and regulations on the other hand." Oklahoma Ed. Ass'n, Inc. v. Nigh, 642 P.2d 230, 237 (Okla. 1982). See also Fox v. Kniep, 260 N.W.2d 371, 374 (S.D. 1977), cert. denied, 436 U.S. 918 (1978); State v. Reynolds, 378 P.2d 622, 627 (N.M. 1963).

The North Dakota Supreme Court has indirectly said the same thing. "The provision in [art. IX, §3] of the Constitution, giving to the board the power 'to direct the investment of the funds' subject to 'any law that may be passed by the legislative assembly,' contemplates legislative control of the school funds within the limits of the Constitution." State v. Hanson, 256 N.W. at 204. The phrase "within the limits of the Constitution" is significant. It qualifies the legislature's authority. It requires that legislation be compatible with the Lands Board's fiduciary duties. See also State Highway Commission v. State, 297 N.W. 194, 195 (N.D. 1941); State v. Towner County, 283 N.W. 63, 66 (N.D. 1938); State ex rel Sathre v. Bd. of Univ. and School Lands, 262 N.W. 60, 65-66 (N.D. 1935) (any diversion of the trust's principal, interest, or income to purposes other than those for which the land grants were made is unconstitutional); State Bd. of Educational Lands and Funds v. Jarchow, 362 N.W.2d 19, 26 (Neb. 1985) (the legislature is without power to bestow a special benefit upon any public or private entity at the expense of the beneficiary, the public school system of the state).

It is clear that school lands have a unique status in North Dakota law. "These lands are to be administered by the state for the sole interest of the trust beneficiaries. . . . We find nothing in either the Enabling Act or the constitution of this state granting an exception to this protection when trust lands are to be used for a public purpose no matter how meritorious the purpose." 1986 N.D. Op. Att'y Gen. 18, 21. See also Gladden Farms, Inc. v. State, 633 P.2d 325, 330 (Ariz. 1981) ("The Enabling Act does not allow trust

lands to be used for the purpose of subsidizing public programs no matter how meritorious the programs").

In light of these principles, does the State Historical Board's authority take precedence over the purposes for which the Land Board administers school lands. An Attorney General's opinion, a North Dakota Supreme Court decision, and a United States Supreme Court decision, are helpful in answering this question.

A 1986 Attorney General's opinion considered N.D.C.C. § 61-24.3-03. This statute was enacted to further construction of the Southwest Pipeline Project by the State Water Commission. The statute states that a "right of way is hereby given, dedicated, and set apart, to locate, construct, and maintain such works over and through any of the lands which are or may be property of the state." I was asked whether this statute authorized the Water Commission to acquire without compensation a pipeline right of way over original grant lands. Interpreting the statute in light of the purposes for which school lands are held, I concluded that the Water Commission does not have the authority to acquire a right of way over such lands without compensation. 1986 N.D. Op. Att'y Gen. Op. 18, 21-22.

The relevant Supreme Court decision, State Highway Comm'n v. State, 297 N.W. 194 (N.D. 1941), concerned a statute that gave the Highway Commissioner the right to acquire by eminent domain land needed for construction of state highways. The statute provided that if the commissioner could not buy the land through negotiation, the land could be condemned in a proceeding brought before the county commissioners. The question was whether the condemnation statute applied to school lands. The court stated that the constitution sets forth the only manner for disposal. The court held that because of the statute's inconsistency with the constitution and Enabling Act, it was not applicable to school lands. Id. at 197.

There is a clear analogy between the scope of the Historical Board's authority over school lands and the circumstances giving rise to the Attorney General's Opinion and the Supreme Court decision. Each situation involves a broadly written statute that seemingly gives an agency authority over school lands. But as the opinion and decision make clear, such authority must be read in light of the constitutional mandate that school lands are held in trust for a special purpose, and this purpose is paramount.

In Lassen v. Arizona Highway Dep't 385 U.S. 458 (1967), the United States Supreme Court addressed an issue similar to that analyzed by the North Dakota Supreme Court in State Highway Comm'n v. State. In Lassen the Supreme Court considered the Arizona Land Commissioner's rule governing acquisition of highway rights of way upon trust lands. The rule restated a provision in Arizona's Enabling Act requiring full payment of the appraised value of land to be granted. Id. at 460, 472. The Arizona Supreme Court found that the actual value of areas taken need not be paid. Id. The United States Supreme Court, however, after noting the special purposes to which trust lands are dedicated, asked whether these purposes could be disregarded in favor of other important public activities. Id. at 468. The court answered that the trust's

beneficiaries are entitled to the full benefit of the grant and, thus, all acquisitions -- even those by the state itself for other public purposes and even though less than a fee interest is sought -- must comply with the Land Commissioner's rule that full compensation be paid.

While N.D.C.C. §55-02-07 applies to historical, archeological, and paleontological artifacts and sites on school lands, the authorities discussed above make clear that situations may occur that prohibit or limit this statute's application. These instances occur when application of the statute is incompatible with the trust and the Land Board's fiduciary responsibilities to the trust. Since "the honor of the state was pledged to the observance of the obligation of the trust," State v. McMillan, 96 N.W. 310, 315 (N.D. 1903), subjecting the trust, in instances of incompatibility, to purposes for which the Historical Board was established would violate this pledge.

The Legislature has made clear that historical, archaeological, and paleontological artifacts or sites are valuable assets that require protection. The Historical Board is the guardian of these assets. When the Historical Board's authority is compatible with the Land Board's fiduciary duties, the Land Board must recognize the Historical Board's authority under N.D.C.C. ' 55-02-07. Should an incompatibility occur, however, the Land Board is not subject to the statute. But even in these cases, the Land Board, to carry out the legislature's wish to protect artifacts and sites, should do whatever its fiduciary responsibilities allow.

There is a way to find the statute applicable to the Land Board in all situations. This would require the Historical Board to compensate the Land Board for any loss incurred by the trust due to the Historical Board's exercise of authority under N.D.C.C. title 55. See Andrus v. Utah, 446 U.S. 500, 524 (1980) (Powell, J., dissenting) ("no State could divert school lands to other public uses without compensating the trust for the full market value of the interest taken").

Over 90% of the land managed by the Land Board is original grant land. The remaining land is acquired land. "Acquired lands are those which were not originally granted by the North Dakota Enabling Act as school or institutional lands but have since been acquired by the various school and institutional trusts." 1986 N.D. Op. Att'y Gen. 18, 25. Despite their different origin, acquired lands are part of the fund dedicated to the maintenance of state schools. N.D. Const. art. IX, " 1, 2. Therefore, the analysis of the application of N.D.C.C. §55-02-07 to original grant lands also applies to acquired lands.

Though state school and acquired lands may not always be subject to the Historical Board's regulatory authority, it has been the policy of the Land Board to cooperate with the Historical Board for the protection of historical, archeological, and Paleontological artifacts and sites. As a member of the Land Board, I will encourage continuation of this policy.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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