

**LETTER OPINION
2004-L-17**

March 2, 2004

Honorable Stan Lyson
State Senator
1608 4th Ave W
Williston, ND 58801

Dear Senator Lyson:

Thank you for your letter asking whether a political subdivision may take mineral rights when it condemns land under eminent domain if the mineral rights are not necessary for the domain. You included information from a case in Grand Forks County involving condemnation of some lands where apparently there was a request by the landowner to reserve gravel, sand, and clay.

A preliminary issue concerns what is meant by the term "mineral" when used in a land transaction. The word "mineral" does not have a common meaning. In 1991, this office issued an opinion relative to the word "mineral" and its multiple definitions. N.D.A.G. 91-24. Whether a substance constitutes a mineral depends on the type of instrument involved, its date and the applicable statutes. Id. (citing N.D. Mineral Title Standards 1-04.) For example, oil, natural gas, and coal are generally classified as minerals. Lee v. Frank, 313 N.W.2d 733, 734-35 (N.D. 1981). Gravel, clay, and scoria, however are generally not considered minerals. N.D.A.G. 91-24 (citing N.D. Mineral Title Standards 1-04.7). To the extent that clay, gravel or scoria may be viewed as an inherent part of the land and surface rights, the Supreme Court has stated that a reservation of minerals will not be interpreted to defeat the conveyance of the soil itself. Lee v. Frank, 313 N.W.2d at 737

The 1991 opinion relied upon N.D.C.C. §§ 47-10-24 and 47-10-25 to determine that the word "mineral" could mean all minerals of any nature whatsoever, except gravel, clay and scoria. Section 47-10-24, N.D.C.C., provides that when mineral rights are conveyed pursuant to North Dakota law, all conveyances "shall be construed to grant or convey to the grantee . . . all minerals of any nature whatsoever" except those excluded by name plus gravel, clay, or scoria unless specifically included. In addition, a simple reservation of minerals will reserve "all minerals, of any nature whatsoever," except minerals specifically excluded from the transaction plus gravel, clay and scoria.

N.D.C.C. § 47-10-25. Thus, clay, or scoria are not included in a grant or reservation of minerals unless they are specifically mentioned in the grant or reservation. This distinction is important because gravel, clay, and scoria may be a part of the condemned interest depending on the estate or rights taken.

North Dakota's eminent domain law provides:

The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, for an outlet for a flow or a place for the deposit of debris or tailings of a mine, or for the construction of parking lots and facilities for motor vehicles.
2. An easement, when taken for highway purposes or for any other use except, upon a proper allegation of the need therefor, the court shall have the power to order that a fee simple be taken for such other use.¹
3. The right of entry upon and occupation of lands and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for a public use.

However, the provisions of this section shall not authorize the state or any political subdivision thereof to obtain any rights or interest in or to the oil, gas, or fluid minerals on or underlying any estate or right in lands subject to be taken for a public use.

N.D.C.C. § 32-15-03.

Eminent domain law is to be construed to leave the owner with the greatest possible estate. Feiler v. Wanner, 340 N.W.2d 168, 171 (N.D. 1983). It is important to determine whether the statute authorizing a condemnation specifies the nature of the estate to be taken because "the nature or extent of a title or rights taken in the exercise

¹ In Wallentinson v. Williams County, 101 N.W.2d 571, 576 (N.D. 1960), the North Dakota Supreme Court recognized that the title acquired by the State in taking land for highway purposes by the power of eminent domain under the provisions of Chapter 149 of the 1927 Session Laws, as amended by Chapter 128 of the 1933 Session Laws, is more than an easement. It is not, however, a fee simple absolute title. Id.

of eminent domain depends on the statute conferring that power.” Feiler, supra, quoting Wallentinson v. Williams County, 101 N.W.2d at 575. For example, if the statute authorizes the government to acquire a fee simple interest, the interest acquired includes gravel, clay and scoria, and other minerals except oil, gas, or other fluid minerals which are specifically excluded by N.D.C.C. § 32-15-03. See State of North Dakota ex rel. Bd. of Univ. and School Lands v. City of Sherwood, 489 N.W.2d 584, 589 (N.D. 1992) “Where the estate or interest to be taken is not definitely set forth, only such estate or interest may be taken as is reasonably necessary to carry out a public purpose for which the land is being taken.” Id. (quoting Feiler and Wallentinson, supra). Moreover, the nature of the estate could be separately defined, further limiting the extent of the estate acquired. See N.D.C.C. § 24-01-01.1(18). That subsection defines “fee simple” as an absolute ownership in property but further defines fee simple as to lands acquired for highway, road, or street purposes, as not including “any oil, gas, or fluid mineral rights.” Id.

Therefore, it is my opinion that N.D.C.C. §32-15-03 permits the condemnation and acquiring of rights to minerals or to gravel, clay or scoria under certain conditions, but does not permit the condemnation of oil, gas, or fluid minerals. If a fee simple interest is acquired or it is necessary for the government to own certain mineral rights to effectively manage the land for the purposes it is condemned, then those rights may be condemned. The converse is that if mineral rights are not necessary, then the general rule is that they may not be condemned unless fee simple interest is acquired. Even then, N.D.C.C. § 32-15-03 does not allow oil, gas, or other fluid minerals to be condemned. Any specific application of these principles, however, depends on the individual facts and the governing statute of each situation.

Sincerely,

Wayne Stenehjem
Attorney General

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