

Date Issued: May 1, 1986 (AGO 86-18)

Requested by: Walter R. Hjelle, Highway Commissioner

- QUESTION PRESENTED -

Whether the State of North Dakota holds title to the oil, gas and fluid minerals or any other minerals not necessary for highway purposes underlying highway rights of way purchased by the state prior to 1953 and conveyed to the state by deeds that do not contain mineral reservations.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the State of North Dakota does not hold title to the oil, gas and fluid minerals or any other minerals not necessary for highway purposes underlying rights of way purchased by the state prior to 1953 and conveyed to the state by deeds that do not contain mineral reservations.

- ANALYSIS -

It appears that the question presented arises as a result of the confusion and uncertainty which has historically evolved respecting the nature of the estate the state acquires in land obtained for highway purposes. The State of North Dakota first began its involvement with the highway system of this state in 1917, when the Legislative Assembly approved an Act establishing the State Highway Commission. 1917 N.D.S.L. 131. In 1919, the Legislature amended the 1917 Act and for the first time authorized the state to obtain, by purchase or eminent domain, property for construction of state highways. 1919 N.D.S.L. 141, Section 6.

While this statute was subsequently repealed, 1927 N.D.S.L. 159, Section 26, nearly identical language was included within the provisions of 1927 N.D.S.L. 159, Section 20, and subsequent amendments. 1933 N.D.S.L. 128, Section 1. 1927 N.D.S.L. 159, Section 20, as amended 1933 N.D.S.L. 128 (hereinafter "Chapter 159") provided in part as follows:

SECTION 20. PURCHASE OF RIGHT OF WAY, GRAVEL, ETC., BY STATE HIGHWAY COMMISSION. The State Highway Commission or its successor, by resolution or order may, on behalf of the state, and as part of the cost of construction, reconstruction, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining, or for providing a temporary road for public use, may purchase, acquire, takeover or condemn under the right and power of eminent domain, for the state, any and all lands which it shall deem necessary for present public use, either temporary or permanent, or which it may deem necessary for reasonable future public use, and to provide adequate drainage in the improvement, construction, reconstruction, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining of a state highway. It may, by the same means, secure any and all materials, including clay, gravel, sand or rock, or the lands necessary to secure such material, and the necessary land,

lands or easements thereover, to provide ways and access thereto. It may so acquire such land, lands or materials notwithstanding that the title thereto now or hereafter be vested in the State or any division thereof.

* * *

The State Highway Commission may vacate any land or part thereof, or rights in land which have been taken or acquired for highway purposes under the provisions of this Act by executing and recording a deed thereof, and said vacation shall revert the title to the lands or rights so vested in the persons, their heirs, successors or assigns in whom it was vested at the time of the taking. The Governor, on recommendation of the State Highway Commission, is authorized to sell and convey on behalf of the state the interests of the state in property acquired by purchase under this Section and deemed no longer necessary for the purposes of the Act, and the proceeds of such sale so far as practicable be credited to the funds from which such purchase was originally made.

The nature and extent of the estate obtained under this statute was first construed in 1939. By a letter dated December 15, 1939, an assistant attorney general expressed the opinion that the title to property obtained by the state for highway purposes was in the nature of an easement. The opinion, however, was overruled following the North Dakota Supreme Court's decision in *State Highway Commission v. State*, 297 N.W. 194 (N.D. 1941). See letter from Attorney General E. T. Christenson to North Dakota Highway Commissioner S. W. Thompson (September 22, 1951).

In *State Highway Commission*, the highway commission sought to obtain a right of way for highway purposes across a section of school land pursuant to the provisions of Chapter 159. The case was decided on the issue of whether Chapter 159 authorized the highway commission to obtain easements for highway rights of way. The court stated as follows:

It is manifest from the wording of this statute that it contemplates not the acquisition of easements for rights of way or other purposes, but the acquisition of land and materials when necessary to acquire the same for highway purposes, and that the title thereto shall be taken and vested in the State. 297 N.W. at 197.

A number of years passed before the court again had the opportunity to construe the nature of the estate obtained by the state for highway rights of way. In *Rutten v. Wood*, 57 N.W.2d 112 (N.D. 1953) the controversy centered on the issue of what title the state obtained in congressional section lines opened for public highways. The court held that under the provision of Section 24-07-03, R.C. 1943, the thirty-three feet on either side of a congressional section line is an easement for highway purposes only and the fee remains with the contiguous landowners.

Rutten was a prelude to legislative intervention construing the nature of the estate obtained by the state for highway rights of way.

On March 11, 1953, the Legislative Assembly of North Dakota approved an Act declaring the intent of the Legislature with regard to the "taking or acquiring of property for highway purposes." 1953 N.D.S.L. 212. The statute declared the intent of the Legislature that only an easement was to be taken in property for highway purposes and that any estate obtained greater than an easement was to be reconveyed. (See N.D.C.C. Sections 32-15-03, 32-15-03.2).

In addition, the Legislative Assembly, in conjunction with comprehensive changes to the laws governing the state's highway system, repealed Chapter 159 as set forth above. In lieu thereof, the Legislature enacted 1953 N.D.S.L. 177, Sections 90, 100, the provisions of which are presently contained virtually unchanged in N.D.C.C. Sections 24-01-18, 24-01-28, and provide as follows:

24-01-18. RIGHT OF WAY AND MATERIALS MAY BE ACQUIRED BY PURCHASE OR EMINENT DOMAIN. The commissioner, by order, on behalf of the state, and as part of the cost of constructing, reconstructing, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining a state highway, or of providing a temporary road for public use, may purchase, acquire, take over, or condemn under the right and power of eminent domain, for the state, any and all lands in fee simple or such easements thereof which he shall deem necessary for present public use, either temporary or permanent, or which he may deem necessary for reasonable future public use, and to provide adequate drainage in the improvement, reconstruction, widening, altering, changing, locating, relocating, aligning, realigning, or maintaining of a state highway, provided however, as to any and all lands acquired or taken for highway, road or street purposes, he shall not obtain any rights or interest in or to the oil, gas or fluid minerals on or underlying said lands. No county shall be required to participate in the cost, or expense of right of way for the state highway system. By the same means, he may secure any and all materials, including clay, gravel, sand or rock, or the lands necessary to secure such material, and the necessary land or easement thereover, to provide ways and access thereto. He may acquire such land or materials notwithstanding that the title thereto may be vested in the state or any division thereof; provided, however, that no interests in gas, oil or fluid minerals shall be acquired by this procedure.

24-01-28. VACATING HIGHWAYS BY COMMISSIONER - SALE OF PROPERTY. The commissioner may vacate any land or part thereof, or rights in land taken or acquired for highway purposes under the provisions of this title, by executing and recording a deed thereof, and said vacation shall revest the title to the land or rights in the persons, their heirs, successors, or assigns, in whom it was vested at the time of the taking. As oil, gas and fluid minerals are not a part of and essential for highway purposes, all such rights heretofore taken, if any, are hereby vacated and returned to the person or persons in whom the title was vested at the time of taking, their heirs, administrators, executors or assigns. Such reconveyance shall be subject to any existing contracts or

agreements covering such property, and all rights and benefits thereof shall accrue to the grantee. The governor, on recommendation of the commissioner, may sell and convey on behalf of the state the interests of the state in property acquired by purchase under this title and deemed no longer necessary for the purposes thereof, and the proceeds of such sale so far as practicable shall be credited to the funds from which such purchase was made originally.

The first controversy to arise after the Legislature adopted the 1953 enactments involved an action against the state to quiet title to the oil and gas and other minerals in and under certain lands which had been obtained by the state for highway purposes by eminent domain. In *Wallentinson v. Williams County*, 101 N.W.2d 571 (N.D. 1960), the North Dakota Supreme Court held that title to oil and gas interests underlying rights of way obtained by the state by eminent domain were reconveyed to their former owners.

The controlling statute was N.D.C.C. Section 24-01-28. (1953 N.D.S.L. 177.) It was urged that N.D.C.C. Section 24-01-28, constituted a violation of Section 185 of the North Dakota Constitution (currently renumbered as Article VI, Section 18) prohibiting the state from making gifts. Rejecting this argument, the court examined the provisions of Chapter 159. The court noted that the statute contained provisions for the vacation of land "taken or acquired" for highway purposes under the provisions of the Act by revesting the title, or a part thereof, in the person, their heirs, successor or assigns in whom title was vested at the time of taking. *Id.* at 577, 579.

After outlining the holding in *State Highway Commission*, the court held that the title acquired by the state in rights of way obtained by eminent domain under the provision of Chapter 159 was something "more than an easement" but less than a "fee simple absolute". *Wallentinson* at 576. The court went on to state that since the statute under which the state acquired title provided for revesting of title when the land or rights were no longer needed for highway purposes, it is presumed that the owners received less consideration than they would have received if the possibility of reverter had not been present. Accordingly, revesting of rights in lands deemed no longer necessary for highway purposes by the highway commission would not constitute a gift in violation of the constitution. Similarly, revesting of interests deemed by the Legislature in 1953 to be no longer necessary for highway purposes was not a violation of the constitution. As the court stated:

Revesting of such title to lands or to rights acquired by the State, when it was determined in 1953 by the Legislative Assembly itself that such rights were no longer needed for the purposes for which such title was acquired; was as effectual as if such revesting had been done by the highway commission. All oil, gas, and fluid-mineral rights acquired by the State when the land was taken for highway purposes were, by Chapter 177, determined not to be necessary or required for the purposes for which the land was taken. Since the statute under which the lands were condemned provided that the lands or any rights in such lands should be revested when, as we have herein

determined, any of the lands or rights in lands no longer were needed for highway purposes, no provision of the Constitution was violated.

Id. at 578.

The quoted language makes it clear that the state does not hold title to the oil, gas and other fluid minerals underlying rights of way obtained by the state by condemnation. Similarly, the court's decision in *Rutten* reveals that the state takes only an easement when it opens congressional section lines for use as a highway. Accord, *Lalim v. Williams County*, 105 N.W.2d 339 (N.D. 1960); *Small v. Burleigh County*, 225 N.W.2d 295 (N.D. 1974); *Minot Sand & Gravel Co. v. Hjelle*, 231 N.W.2d 716 (N.D. 1975). Accordingly, the state does not hold title to the minerals underlying the thirty-three feet on either side of a section line.

As can be seen, however, from our review and analysis of the decisions cited above, the question of whether the state holds title to the mineral estate underlying rights of way purchased rather than condemned by the state prior to 1953 has never been ruled on by the courts. Moreover, while previous attorney general opinions have apparently ruled both ways on the issue, subsequent legislative enactments and decisions of the courts have left those opinions inconsistent with the law of this state. Nevertheless, the conclusion we reach here has been implicitly approved by the court decisions cited above.

The controlling statutes are N.D.C.C. Section 24-01-28, as quoted above, and N.D.C.C. Section 32-15-03.2, which provides as follows:

32-15-03.2. TERMINATION OF ESTATES GREATER THAN AN EASEMENT. No transfer to the State of North Dakota or any of its political subdivisions of property for highway purposes shall be deemed to include any interest greater than an easement, and where any greater estate shall have been so transferred, the same is hereby reconveyed to the owner from which such land was originally taken, or to the heirs, executors, administrators, or assigns of such owner. Such reconveyance shall be subject to any existing contracts or agreements covering such property, and all rights and benefits thereof shall accrue to the grantee.

N.D.C.C. Section 32-15-03.2 provides, inter alia, that where any estate greater than an easement has been transferred to the state for highway purposes the same is reconveyed. N.D.C.C. Section 24-01-28 provides that "as oil, gas and fluid minerals are not a part of and essential for highway purposes, all such rights heretofore taken, if any, are hereby vacated and returned to the person or persons in whom the title was vested at the time of taking, their heirs, administrators, executors or assigns."

If strict adherence is given to N.D.C.C. Section 32-15-03.2, the end result is that it conflicts with the provisions of N.D.C.C. Section 24-01-18. The language of N.D.C.C. Section 24-01-18, as set forth above, provides that the state may secure either by purchase or eminent domain "all materials including clay, gravel, sand, or rock,

or the lands necessary to secure such material . . . provided, however, that no interest in gas, oil or fluid minerals shall be acquired by this procedure."

If the statutes are to be harmonized, N.D.C.C. Section 32-15-03.2 must be read in conjunction with N.D.C.C. Section 24-01-18, and interpreted broadly enough to authorize the state to obtain that estate necessary to secure the property and "all materials, including clay, gravel, sand, or rock" necessary for highway purposes. Yet, N.D.C.C. Section 32-15-03.2 must be read strictly enough to prohibit acquisition by the state of oil, gas and other fluid minerals and require a reversion with the former owner of any such minerals ever obtained.

Considering our interpretation of N.D.C.C. Sections 24-01-28, 32-15-03.2, we must next determine if these statutes are in conflict with the constitutional provision prohibiting the state from making gifts. N.D. Constitution Article VI, Section 18. We noted in our discussion of Wallentinson that the lands involved in that case were obtained by the state by eminent domain under the provisions of Chapter 159. Chapter 159 also authorized the state to obtain highway rights of way by purchase. Consequently, the question becomes whether the same reasoning applied in Wallentinson is applicable to situations where the rights of way are obtained by purchase rather than eminent domain.

At the outset, we note that to the extent the court in Wallentinson relied on Chapter 159 and N.D.C.C. Section 24-01-28, (1953 N.D.S.L. 177, Section 20) it would appear that these sections are equally applicable whether the rights of way were obtained by eminent domain or purchase. Moreover, considering rights of way that are purchased are often purchased under the threat of condemnation, it is logical that the same estate must have been obtained. The fact that the language of Chapter 159 draws some distinction between the vacation or disposal of land which was "acquired by purchase" and that land which was taken by eminent domain, is, therefore, in my opinion of no consequence.

A careful examination of Chapter 159 supports this conclusion. As we noted above, the last paragraph of Chapter 159 provides as follows:

SECTION 20. PURCHASE OF RIGHT OF WAY, GRAVEL, ETC., BY STATE HIGHWAY COMMISSION.

* * *

The State Highway Commission may vacate any land or part thereof, or rights in land which have been taken or acquired for highway purposes under the provisions of this Act by executing and recording a deed thereof, and said vacation shall revert the title to the lands or rights so vested in the persons, their heirs, successors or assigns in whom it was vested at the time of the taking. The Governor, on recommendation of the State Highway Commission, is authorized to sell and convey on behalf of the state the interests of the state in property acquired by purchase under this Section and deemed no longer necessary for the purposes of the Act, and the

proceeds of such sale so far as practicable be credited to the funds from which such purchase was originally made.

The first sentence of this paragraph provides that the highway commission may vacate any land or part thereof, or rights of land "taken or acquired" for highway purposes. The last sentence states that the governor, on recommendation of the highway commission, may sell and convey "property acquired by purchase under this title" which property is deemed surplus. The first sentence refers to lands "taken", which clearly indicates lands obtained by eminent domain. That sentence, however, also refers to lands "acquired". The term "acquire" or its derivative "acquired" means:

To gain by any means, usually by one's own exertions; . . . to obtain by . . . purchase . . . (Emphasis supplied).

Black's Law Dictionary, 41 (4th ed. 1968).

Accordingly, the word "acquired" can be given a broad enough meaning to include lands obtained by purchase.

Under this construction, to reconcile any possible conflict between the first and last sentence, the word "may" must be emphasized. Applying this interpretation, Chapter 159 would authorize the highway commission, with respect to rights of way obtained by eminent domain, the authority to retain the interests not needed, or reconvey the interests to the former owners. With respect to rights of way "acquired" by purchase, however, Chapter 159 would authorize the highway commission the option to retain the interests not needed, reconvey to the former owners, or sell the interests not needed. Applying this interpretation, the court's holding in Wallentinson would be applicable regardless of whether the rights of way were acquired by purchase or eminent domain. Furthermore, the same rationale utilized by the court to hold N.D.C.C. Section 24-01-28 constitutionally firm, would be equally applicable to N.D.C.C. Section 32-15-03.2. In that respect, when the Legislative Assembly enacted N.D.C.C. Sections 24-01-28, 32-15-03.2, oil, gas and fluid minerals or any other interests not necessary for highway purposes were revested with their former owners. It is therefore my opinion that the State of North Dakota does not hold title to the oil, gas and fluid minerals or any other minerals not necessary for highway purposes underlying rights of way purchased by the state prior to 1953 and conveyed to the state by deeds that do not contain mineral reservations.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. Section 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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