STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-24

Date issued: October 8, 1990

Requested by: Representative Charles F. Mertens
Chairman, North Dakota Legislative Council

- QUESTIONS PRESENTED -

I.

Whether the Board of University and School Lands may use rental income from original grant lands to make in lieu of tax payments to political subdivisions.

II.

Whether the Legislative Assembly may require the Board of University and School Lands to use rental income from original grant lands to make in lieu of tax payments to political subdivisions.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the Board of University and School Lands may use rental income from original grant lands to make in lieu of tax payments to political subdivisions, provided the payments fund services beneficial to original grant lands.

II.

It is my further opinion that the Legislative Assembly may require the Board of University and School Lands to use rental income from original grant lands to make in lieu of tax payments to political subdivisions, provided the payments fund services beneficial to original grant lands.

- ANALYSES -

I.

Original grant lands were given to North Dakota by the federal government in trust for the benefit of state schools and certain specified institutions. Unique legal principles apply to the original grant lands. 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. . . ."

North Dakota formally accepted the grant in its constitution and agreed that its acceptance was "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) (the grant "was accepted by the State . . . under the terms of the offer"). N.D. Const. art. IX, ' 1 is more explicit about the limited uses to which original grant lands can be put: "All proceeds of the public lands that have . . . been . . . granted by the United States for the support of the common schools in this state . . . shall be and remain a perpetual trust fund for the maintenance of the common schools of the state." In addition, N.D. Const. art. IX, ' 2 provides: "The interest and income of this fund . . . shall be faithfully used and applied each year for the benefit of the common schools of the state . . . and no part of the fund shall ever be diverted, even temporarily, from this purpose or used for any other purpose whatever . . . ." Thus, the state agreed to hold title to these lands as a trustee and to fulfill the purposes of the grant. State Highway Comm'n v. State, 297 N.W. 194, 195 (N.D. 1941). Furthermore, these purposes, as is apparent from the language quoted above from the Enabling Act, express Congress's intent to establish a trust "to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems." State of Utah 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).

Because of the nature of the limitations imposed on the manner of state use of original grant lands, the North Dakota Supreme Court has expressed in strong language the unique nature of the trust. The court has said original grant lands "'came to us as a sacred trust, to be applied exclusively to school purposes. . .'" Erickson v. Cass County, 92 N.W. 841, 848 (N.D. 1902) (quoting Edgerton v. Huntington School Tp., 26 N.E. 156, 156 (Ind. 1890)); that the lands are a "magnificent trust," State ex rel. Bd. of Univ. and School Lands v. Hanson, 256 N.W. 201, 205 (N.D. 1934); and that by accepting the land grant "the honor of the state was pledged to the observance of the obligation of the trust. . . ." State ex rel. Bd. of Univ. and School Lands v. McMillan, 96 N.W. 310, 315 (N.D. 1903). See also Kleppe, 586 F.2d at 758 (1980) (states hold original grant lands under a "solemn compact" with the federal government to use the lands solely for the benefit of the public school system).

Because original grant lands are dedicated to specific purposes, it is unlawful for the Board of University and School Lands as manager, to divert them or income received from them to other purposes. The Board must manage these lands for the exclusive benefit of the trust's beneficiaries. See Lassen v. Arizona, 385 U.S. 458, 467 (1967); Oklahoma Ed. Ass'n, Inc. v. Nigh, 642 P.2d 230, 235-36 (Okla. 1982); Erickson v. Cass County, 92 N.W. 841, 848 (N.D. 1902) quoting Edgerton v. Huntington School Tp., 26 N.E. 156, 156 (Ind.

1890) (original grant lands must "'be applied exclusively to school purposes'").

Therefore, because the trust is dedicated solely to benefit schools and certain institutions, it is my opinion income from the trust may be used only for limited purposes. Many uses to which property taxes are put by political subdivisions do benefit original grant lands, as well as all other land within the jurisdiction of the taxing authority. The services of city and rural fire departments protect original grant lands as do services supplied by local law enforcement agencies. Maintaining roads and controlling weeds are examples of other beneficial services funded by taxes. Thus, it is my opinion the Land Board has the authority to make in lieu of tax payments which fund services beneficial to the trust.

II.

The unique nature of original grant lands was explained above, as were the consequent limits on the Board of University and School Lands' authority to use the fund. The present question, however, is whether the Legislative Assembly has the authority to enact a statute modifying the purposes of the trust. It is true that the trust is subject in some degree to laws enacted by the Legislative Assembly. N.D. Const. art. IX, ' 3 appears to indicate the trust is subject to laws enacted by the Legislative Assembly. In State ex rel. Bd. of Univ. and School Lands v. Hanson, 256 N.W. 201, 204 (N.D. 1934), the North Dakota Supreme Court indicated the constitution contemplates legislative control of the trust. Such constitutional language and judicial comment, however, do not give the Legislative Assembly carte blanche to do what it wishes with the school trust. Were it otherwise, "a potentially self-defeating incompatibility [would exist] between the stated purpose and objective 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). The state's duty to manage the trust solely for the benefit of the schools is "irrevocable" and "[n]o Act of the Legislature can validly alter, modify or diminish the State's duty as trustee of the school land trust to administer it in a manner most beneficial to the trust estate. . . ." Id. at 235, 236.

Recently, the United States Supreme Court addressed this issue. In Asarco, Inc. v. Kadish, 109 S.Ct. 2037 (1989), the court considered the Jones Act, 44 Stat. 1026, which extends the terms of the original grant of lands in the western states to include mineral lands. A provision of the Jones Act gives states authority to lease minerals in the newly granted land "'as the State legislature may direct.'" Id. at 2051. The Court rejected the view that this provision gave state legislatures blanket authority to lease minerals on whatever terms they wish. Id. The Court noted that if the provision was interpreted to give state legislatures blanket authority over the leasing of minerals, it "would leave room for all the abuses that the establishment of a school trust was designed to prevent." Id. at 2052.

The North Dakota Supreme Court has said that legislation regarding original grant lands "must not conflict either with the terms of the grant in the Enabling Act or the provisions of the Constitution relating to such lands." State Highway Comm'n v. State, 297 N.W. 194, 195 (N.D. 1941). Furthermore, the court has stated that the authority of the Legislature with regards to original grant lands must be exercised "within the limits of the Constitution." State ex rel. Bd. of Univ. and School Lands v. Hanson, 256 N.W. 201, 204 (N.D. 1934). See also 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) (legislative action regarding the land grant is "subject to the conditions under which the grants were made").

In Erickson v. Cass County, 92 N.W. 841, 848 (N.D. 1902), the court quoted the Indiana Supreme Court: "'the people, by their fundamental law, have placed [the trust] beyond the power of even the legislature of the state to make any provision by which the principal of the funds arising from such lands shall be diminished.'" This statement has equal application to income produced by the trust. Therefore, it is my opinion the Legislative Assembly may not require the Board of University and School Lands to divert trust income from trust purposes. However, the Legislature can, under its general authority to control the trust, N.D. Const. art. IX, ' 3, require the Land Board to take action that benefits the trust. As explained in Section I, in lieu of tax payments are lawful if the payments fund governmental services that benefit the trust. The Legislature may therefore require the Land Board to make such payments.

- 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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