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ATTORNEY GENERAL

15-017
NO.
STATE OF NEBRASKA
OFFICIAL
NOV 30 2015
DEPT. OF JUSTICE

SUBJECT: Whether Legislation Requiring Fifty Percent of the Revenues Generated From School Lands, That Are Placed In the Temporary School Fund, Be Kept For the Benefit of the School District in Which It Was Produced Would Be Constitutional

REQUESTED BY: Senator Dan Hughes, Nebraska State Legislature

WRITTEN BY: Douglas J. Peterson, Attorney General
John L. Jelkin, Assistant Attorney General

In your opinion request letter, you make the following comments:

"My office has been doing research on educational lands and funds in Nebraska. I would like to know if the following idea would be constitutional. I would like to have 50% of the revenue generated on school lands, that is placed in the temporary school fund, be kept for the benefit of the school district in which it is produced."

ANALYSIS

On April 19, 1864, the U.S. Congress passed and President Abraham Lincoln signed the Enabling Act. (U.S. Stat. at Large, Vol. 13, p. 47.) The Enabling Act enabled the people of Nebraska to form a Constitution and State Government, and allowed the State of Nebraska admission into the Union on an equal footing with the original States. Section 7 of the Act provides:

> "And be it further enacted, that sections number sixteen and thirty-six in every township.., shall be, and are hereby granted to said State for the support of the common schools." (U.S. Stat. at Large, Vol. 13, p. 47).

Thereafter, the people of Nebraska did form a Constitution and State Government and by proclamation of then President Andrew Johnson, the State of Nebraska was admitted to the Union on March 1, 1867.

It appears to us that the threshold question is, "May the State provide more support to those school districts in which school lands are located, or must all of the funds be used for the benefit of all school districts, regardless of the location of the school lands?"

"In some parts of the State of Nebraska, most of the school's land have been sold." Op. Att'y Gen. No. 93035 (May 4, 1993). Currently, Colfax County, Dodge County, Fillmore County, Hamilton County, Nance County, Saunders County, Thurston County and Wayne County, Nebraska have no school lands. Douglas County has only 142.84 acres of school lands and Lancaster County, Nebraska has only 534.27 acres of school lands. On the other hand, Perkins County, Nebraska has 28,519.26 acres of school lands. Source: Nebraska Board of Educational Lands and Funds website at http://belf.nebraska.gov. Accordingly, under your proposal, some Nebraska school districts would receive more income from the school lands than other Nebraska school districts.

In 1989, we were asked if the legislature could abolish the in lieu of tax payment to schools in counties wherein school lands are located and substitute a formula diverting the income and interest on school funds and lands into the equalization portion of the School Foundation and Equalization Act. In response, we stated:

> The law is well settled. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. *Alabama v. Schmidt*, 232 U.S. 168, 34 S.Ct. 301, 58 L.Ed.2d 555 (1914). Hence, section 7 of the Enabling Act and section 9 of Article VII of the Constitution of Nebraska mandate that income from the unsold school lands "be exclusively used for the support and maintenance of the common schools in each school district in the state." As noted in your inquiry, some school districts do not receive funds pursuant to the equalization portion of the School Foundation and Equalization Act, and, therefore, your above described amendment to L.B. 807 would, in our opinion, be unconstitutional.

Op. Att'y Gen. No. 89022 (March 24, 1989).

Further, in a subsequent opinion, we stated:

> The fact that these lands are held in trust pursuant to the Nebraska Constitution and Enabling Act has the effect of incorporating the rules of law regulating the administration of trusts and the conduct and duties of trustees. Consequently, the

> State as trustee of these lands, and of the income therefrom, is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. *State ex. Rel. Ebke v. Board of Educational Lands and Funds*, 159 Neb. 79, 65. N.W.2d 392 (1954). This means, among other things, that the State in its capacity as trustee has duties to **all** beneficiaries of the school trust and cannot lawfully confer special benefits on some to the detriment of others, nor can it lawfully impose special detriments on some to the benefit of others.

Op. Att'y Gen. No. 89030 (April 5, 1989) (Emphasis added).

CONCLUSION

The answer to your question then, as to whether it would be constitutional to have 50% of the revenue generated on school lands be kept for the benefit of the school district in which it was produced, is clear. The State cannot discriminate against school districts in which little or no school lands are located, in favor of school districts in which more school lands are located. To do so would violate the sacred trust that was placed on the State to use the school lands for the support and maintenance of the common schools in each school district in the State.

Sincerely yours,

DOUGLAS J. PETERSON
Attorney General

John L. Jelkin
Assistant Attorney General

Approved by:

Attorney General

pc: Patrick J. O'Donnell
Clerk of the Nebraska Legislature

25-093-29