



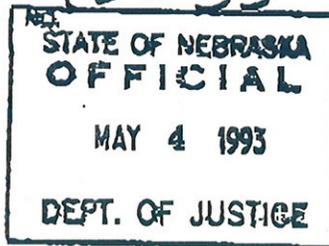
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#93035



**DATE:** April 29, 1993

**SUBJECT:** In making the apportionment of the school fund of the state, school districts with school lands cannot be paid more under any in-lieu-of tax scheme than they would receive if the school lands were taxable.

**REQUESTED BY:** Joe Lutjeharms, Commissioner of Education  
Lincoln, Nebraska

**WRITTEN BY:** Don Stenberg, Attorney General  
Harold Mosher, Senior Assistant Attorney General

On April 19, 1864, the Senate and House of Representatives of the United States of America in Congress assembled, passed an act to enable the people of Nebraska to form a Constitution and State Government and for the Admission of the State of Nebraska into the Union on an equal footing with the original States. See U.S. Stat. at Large, vol. 13, p. 47. Pursuant to section 7 of that Act, certain lands were granted to the State of Nebraska for the support of the common schools of the State. Generally, these lands included sections 16 and 36 of each township. See, 13 Stat. 47, 49 (1866).

In some parts of the State of Nebraska, most of the school land has been sold. School districts in which the school land has been sold are obviously able to receive tax revenue from the land which was formerly school land but is no longer exempt from taxation. On the other hand, school districts which contain school land which has not been sold are unable to levy taxes against such land. In order to equalize the distribution of income from the rental of school lands and income earned from the investment of the

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proceeds from school land which has been sold, the Legislature has provided that in-lieu-of-tax payments shall be made to school districts which contain school land which has not been sold. After the in-lieu-of-tax payments have been made, the balance of the income available for distribution is distributed to all school districts pro rata according to the enumeration of children between the ages of 5 and 18 years in each school district. See, Neb. Rev. Stat. § 79-1302 (Cum. Supp. 1992).

The Commissioner of Education has a statutory duty to apportion the school funds of the state. In connection therewith, you have asked if the language in Neb. Rev. Stat. § 79-1303 (Cum. Supp. 1992) is the same language the Nebraska Supreme Court found unconstitutional in *Bartels v. Lutjeharms*, 236 Neb. 862, 464 N.W.2d 321 (1991), and if so, can you, as Commissioner of Education, legally apportion the school fund of the state at the rate of 143 percent pursuant to Neb. Rev. Stat. § 79-1303 (Cum. Supp. 1992)?

In *Bartels v. Lutjeharms*, *supra*, the plaintiff brought the action to obtain a judgment declaring Neb. Rev. Stat. §§ 79-1302 and 79-1303 (Reissue 1987) unconstitutional and to enjoin the defendant from making in-lieu-of-tax distributions under the statutes cited. In examining the several contentions made by the plaintiff, the Nebraska Supreme Court noted that Neb. Rev. Stat. § 79-1303 (Reissue 1987) stated in part as follows:

The county superintendents shall certify to the Commissioner of Education the tax levy for school purposes of each school district and the nonresident high school tuition levy of the county wherein such school land or saline land is located, and the last appraised value of such school land which value shall be one hundred forty-three percent of the appraised value for the purpose of applying the applicable tax levy for each district in determining the distribution to the counties of such amounts. (Emphasis added).

The Nebraska Supreme Court then stated:

The result of this provision in § 79-1303 is to give school districts with school lands an additional amount from the trust income equal to the amounts other political subdivisions would receive if school lands were taxable.

Because the use of 143 percent of the valuation yields an amount which is equal to the total tax which would be imposed on the school land if it were taxable, school districts with school lands receive more under the in-lieu-of-tax scheme than they would receive if the

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lands were taxable. The use of 143 percent of the valuation factor thus confers a benefit or bonus upon the school districts with school lands to the detriment of the school districts without trust lands.

The statutory provision requiring use of 143 percent of the valuation in calculating in-lieu-of-tax payments of school districts is a violation of the duty of the state as trustee to treat all beneficiaries of the trust fairly and impartially and is, therefore, invalid. (236 Neb. at 868).

See also 1967-1968 Neb. Rep. Att'y General, pp. 33-34.

Neb. Rev. Stat. § 79-1303 (Cum. Supp. 1992) states in part as follows:

(2) The county superintendents shall certify to the Commissioner of Education the tax levy for school purposes of each school district and the nonresident high school tuition levy of the county in which the school land or saline land is located and the last appraised value of such school land, which value shall be one hundred forty-three percent of the appraised value for the purpose of applying the applicable tax levy for each district and for the nonresident high school tuition fund in determining the distribution to the districts and to the nonresident high school tuition fund of the counties of such amounts. (Emphasis added).

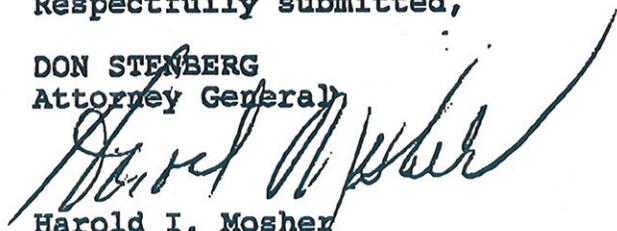
When the language underscored in Neb. Rev. Stat. § 79-1303 (Cum. Supp. 1992) is placed in juxtaposition with the language underscored in Neb. Rev. Stat. § 79-1303 (Reissue 1987), it is self-evident that the language underscored in the two statutes is identical. Moreover, it is that very same language the Nebraska Supreme Court found unconstitutional in *Bartels v. Lutjeharms*, supra. The question remains: Can you, as Commissioner of Education, apportion the school funds of the state pursuant to Neb. Rev. Stat. § 79-1303 (Cum. Supp. 1992)? We think not. Since the state's status as a trustee is established by the Constitution, a violation of its duty as trustee is a violation of the Constitution itself. *State ex rel. Ebke v. Board of Educational Lands and Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951). We simply cannot, and will not, knowingly advise you or any other officer of the State of Nebraska to violate the Constitution of our state. We therefore

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suggest that you seek a proper amendment to Neb. Rev. Stat. § 79-1303 (Cum. Supp. 1992).

Respectfully submitted,

DON STENBERG  
Attorney General



Harold I. Mosher  
Senior Assistant Attorney General

Approved:



Attorney General

cc: Patrick J. O'Donnell  
Clerk of the Legislature

20-224-3