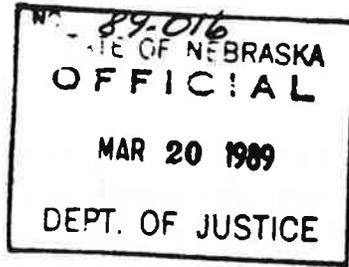


Linda Willard

DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: March 15, 1989

SUBJECT: Constitutionality of legislative act that would divert income earned from the lease of school lands to the counties at the expense of the common schools.

REQUESTED BY: Senator Loran Schmit
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Harold Mosher, Assistant Attorney General

In your letter of March 10, 1989, you have asked this office to provide you as soon as possible with an in-depth analysis of proposed legislation that would create an in lieu of tax on school lands to be paid to the county when collected equal to the amount that the land would pay in property taxes if the school lands were on the tax rolls. Due to time restraints and the press of other state business, including prosecuting or defending at this time more than 500 civil and criminal cases, it is impossible for us to do an in-depth analysis. We trust, however, the following will suffice.

Much of the law relating to school land grants is now of importance only historically, so that a detailed discussion thereof would serve little or no practical purpose. However, we deem it appropriate to set forth a short historical background and selected citations which deal with certain aspects of the subject which are of present-day importance.

It is a matter of history that the United States acquired great areas of the public domain by discovery, conquest, and purchase. Obviously, there were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were

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subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories. The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states. The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.¹

Section 7 of the 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, provides:

And be it further enacted, That sections number sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto, in legal sub-divisions of not less than one quarter-section, and as contiguous as may be, shall be, and are hereby granted to said state for the support of the common schools. (Emphasis added.)

(U.S. Stat. at Large, vol. 13, p. 47). The people of Nebraska, of course, formed a Constitution and State Government and thereafter by proclamation of then President Andrew Johnson, the State of Nebraska was admitted to the Union on March 1, 1867.

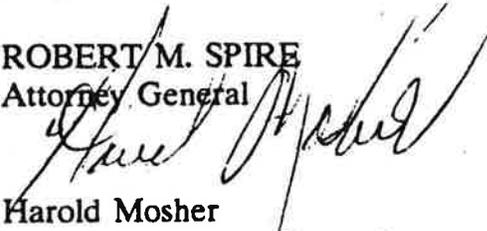
¹ See, State of Utah v. Kleppe, 586 F.2d 756 (10th Cir. 1978), rev'd on other grounds, 446 U.S. 500 (1980), reh'g denied, 448 U.S. 907 (1980).

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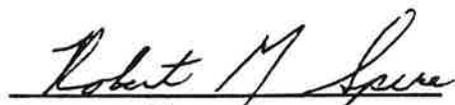
A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. Alabama v. Schmidt, 232 U.S. 168, 34 S.Ct. 301, 58 L.Ed.2d 555 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. State of Nebraska v. Platte Valley Public Power and Irrigation District, 147 Neb. 289, 23 N.W.2d 300 (1946). Hence, the State of Nebraska, as trustee of the lands and of the income therefrom, is required to administer the trust estate under 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). Consequently, legislation which would divert income earned from the lease of school lands to the counties at the expense of the common schools would violate section 7 of our Enabling Act and section 9 of Article VII of the Constitution of Nebraska.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General


Harold Mosher
Assistant Attorney General

Approved:


Attorney General

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

20-599-8