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STATE OF NEBRASKA
OFFICIAL
JUN 7 1991
DEPT. OF JUSTICE

DATE: June 5, 1991

SUBJECT: The status of Attorney General Opinion #20, 1983 and Attorney General Opinion #27, 1983 relating to the authority of the Nebraska Legislature to direct the sale of public school lands.

REQUESTED BY: Senator Cudaback

WRITTEN BY: Don Stenberg, Attorney General
David Edward Cygan, Assistant Attorney General

You have requested that this office review two earlier Attorney General Opinions relating to the authority of the Nebraska Legislature to direct the sale of public school lands and their application to LB 223.

In Opinion No. 20 (#83020), which became official on February 9, 1983, the question of whether the Legislature could constitutionally direct and limit the sale or rental of School Trust Lands as proposed by certain sections of the then pending legislation was reviewed. The opinion responded in the negative, stating that, to the extent such sections would purport to assume direct control over the public school lands and remove the Board of Educational Lands and Funds' exclusive management and control thereof, said sections would be unconstitutional, null and void.

In Opinion No. 27 (#83027), which became official on February 18, 1983, the issue was whether existing constitutional provisions would allow the Legislature to direct that School Trust Lands be sold "under favorable conditions". The opinion responded in the negative, stating that management and control of Nebraska's School Trust Lands, "including the responsibility for deciding whether or not such lands should be sold," is vested exclusively in the Board of Educational Lands and Funds.

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Both of these opinions heavily relied upon the case Belker v. Board of Educational Lands and Funds, 184 Neb. 620, 171 N.W.2d 156 (1969) aff'd on rehearing, 185 Neb. 270, 175 N.W.2d 63 (1970). Belker was a case brought against the State seeking to enjoin the enforcement of two state statutes (Neb.Rev.Stat. §§72-257 and 72-258 (Rev.Supp. 1967)) as void and unconstitutional. Both statutes directed the Board of Educational Lands and Funds to sell at public auction all lands now owned or hereafter acquired by the State for educational purposes at the expiration of the present leases. In reviewing the constitutionality of the statute, four of the judges were of the opinion that the statute was unconstitutional as challenged. Three of the judges were of the opinion that it was constitutional. Pursuant to art. V, §2 of the Constitution of Nebraska, no legislative statutes shall be held unconstitutional except by a concurrence of five judges. Thus, although the majority of the court found the act unconstitutional, the requisite number of five judges reaching such a finding was not met. Therefore, the decision of the court was that the statutes were constitutional.

The court's decision in Belker expressly states:

> The central issue in this case, and the only real issue, is whether the Legislature is authorized to direct the sale of all school lands. It is our opinion that the constitutional provision which vests the general management of all school lands and funds and the Board of Educational Lands and Funds 'under the direction of the Legislature' authorized the Legislature to direct the sale of school lands.

Any portion of Opinion 83027 which may be construed to stand for the proposition that the Legislature cannot constitutionally direct the sale of public school lands is incorrect. Therefore, it is within the authority of the Legislature to direct the sale of public school lands under such conditions as the Legislature shall provide. It must be noted, however, the general management of the lands is vested in the Board of Educational Lands and Funds. As noted in Attorney General Opinion #83020, the Legislature may not assume direct control over educational lands. The power of the Legislature to direct the sale of educational lands is not without limits. In directing the sale of trust property, the Legislature may not require the sale in a manner which would cause the Board to violate the fiduciary duties which bind the management of educational lands by the Board. Article VII, §8 of the Constitution of the State of Nebraska states that,

> All funds belonging to the State for educational purposes, the interest and income whereof only are to be

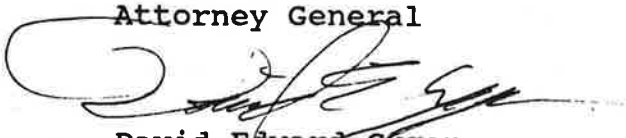
> used, shall be deemed trust funds . . . notwithstanding any other provision in the Constitution, such funds shall be invested as the Legislature may by statute provide.

Consequently, the State as trustee of the 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. Probst v. Board of Educational Lands and Funds, 156 Neb. 226, 55 N.W.2d 653 (1952); See also State ex rel. Ebke v. Board of Educational Lands and Funds, 159 Neb. 79, 65 N.W.2d 392 (1954), and Banks v. State, 181 Neb. 106, 147 N.W.2d 132 (1966).

While LB 223 may be constitutional to the extent that it permits the Legislature to direct the sales of school lands, section 1 of LB 223 is violative of the fiduciary duty placed upon the Board by Article VII, §6 of the Nebraska Constitution. Section 1 of LB 223 directs that the Board of Educational Lands and Funds shall enter into "contracts for the sale" of all Educational Lands over which the Board has general management and control upon the expiration of any leases existing on the effective date of this act. Art. VII, §6 of the Nebraska Constitution provides that no lands now owned or hereafter acquired by the State for educational purposes shall be sold except at public auction under such conditions as the Legislature shall provide. Therefore, sales of these lands by contract as provided by §1 of LB 223 is unconstitutional. The specific procedures for the sale of trust lands already being in the statutes, we cannot give an opinion concerning whether they meet constitutional fiduciary requirements.

Sincerely yours,

DON STENBERG
Attorney General



David Edward Cygan
Deputy Attorney General

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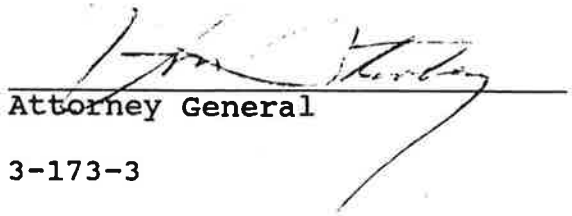

Attorney General

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