Linda Willard

DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
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#89030

NO.
STATE OF NEBRASKA
OFFICIAL
APR 7 1989
DEPT. OF JUSTICE

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

DATE: April 5, 1989

SUBJECT: Constitutionality of distributing a portion of the income from school trust lands to certain school districts in the form of in lieu of tax payments

REQUESTED BY: Senator Merton L. Dierks
Nebraska State Legislature

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

Your letter of March 31, 1989, inquires as to whether the Legislature may establish an appropriate level of in lieu of tax payments to be made to the public schools in counties wherein tax exempt school trust land is located and provide that (1) an appropriate portion of those in lieu of tax payments be distributed to the school districts in which such land is located (for example, a percentage equal to such school district's share of the total tax levy which would be made on such land if it were taxable); (2) the remainder of such in lieu of tax payments be distributed to all school districts in the county on an appropriate basis; and (3) all school trust income in excess of those in lieu of tax payments be distributed to all school districts in the state on an appropriate basis.

Section 7 of the Act of Congress 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 in part that:

> "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."

L. Jay Bartel, Elaine A. Catlin, Delores N. Coe-Barbee, Dale A. Comer, David Edward Cygan, Lynne R. Fritz, Denise E. Frost, Yvonne E. Gates, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Donald E. Hyde, Kimberly A. Klein, Charles E. Lowe, Lisa D. Martin-Price, Steven J. Moeller, Harold I. Mosher, Fredrick F. Neid, Bernard L. Packett, Marie C. Pawol, Kenneth W. Payne, Douglas J. Peterson, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Terri M. Weeks, Melanie J. Whittamore, Linda L. Willard

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

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. Schmit, 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 require that income from Nebraska's school trust lands "be exclusively used for the support and maintenance of the common schools in each school district in the state as the Legislature shall provide."

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.

In lieu of tax payments, of course, are not taxes, but are merely one form of distributing school trust income to the various school districts of the state. An appropriate level of such in lieu of tax payments to the public schools in geographic areas containing tax exempt school trust land is lawful precisely because it removes a special detriment (or disadvantage) which those areas would otherwise suffer, as compared to other identical areas containing no school trust land. Its purpose is to place all of Nebraska's school districts on an "equal footing" with one another so that those containing school trust land neither suffer special detriments, nor receive special benefits, due solely to that fact. The discretion vested in the Legislature pursuant to Section 9 of Article VII includes, among other things, its discretion to establish the appropriate level of such in lieu of tax payments and provide for the distribution of those in lieu of tax payments in such manner as will, in the best judgment of the Legislature, meet its obligations to all beneficiaries of the school trust, including those school districts in areas which include, and others in areas which do not include, tax exempt school trust land.

The system you propose, although different from the present method of distributing in lieu of tax payments, would, in our

opinion, be entirely lawful. Since these in lieu of tax distributions would be made exclusively to school districts, this system (like the present method) would not contravene the prohibition against diverting school trust income to non-trust uses which was discussed at length in our Opinion No. 89016 which became official on March 20, 1989. Similarly, it also would not have the defects addressed in our Opinion No. 89022 dated March 24, 1989, wherein we found unlawful a plan which would have (1) ended such in lieu of tax payments entirely, thus imposing special detriments on those school districts in areas of the state containing tax exempt school trust land to the benefit of others in different areas containing no such land, and (2) replaced these in lieu of tax distributions with a different scheme conferring special benefits on some school districts to the detriment of others.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General

Harold Mosher
Assistant Attorney General

20-61-2

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

APPROVED BY:

Robert M. Spire
Attorney General