N.D.A.G. Letter to Yokim (Jan. 24, 1991)

January 24, 1991

The Honorable Jim Yockim
Senator, District 1
Senate Chambers
State Capitol Building
Bismarck, ND 58505

Dear Senator Yockim:

Thank you for your letter of November 14, 1990, in which you asked whether land quitclaimed to a county for a highway right-of-way in 1933 also conveyed the minerals underlying the highway right-of-way.

In 1933 a county's authority to acquire real property for a public purpose was regulated by two statutory provisions. Under the Complied Laws of 1913, section 8203, which was amended by 1931 N.D. Sess. Laws ch. 143, a county was authorized to acquire real property through the exercise of the power of eminent domain. This statutory provision did not provide for any other method for a county to acquire real property. The nature of the title to the real property acquired under C.L. 1913 section 8203 was limited by the language of C.L. 1913 section 8204. Section 8204 did not permit a county to acquire a fee title to a highway right-of-way, and instead limited the county's interest in such property to an easement.

The N.D. Supreme Court, in Lalim v. Williams County, 105 N.W.2d 339 (N.D. 1960), had the opportunity to consider an issue that is similar to the one you posed.

In that case, Lalim's predecessor in title conveyed, in the form of a warranty deed, certain strips of land to Williams County for use as highway right-of-way. Lalim contended that the deed did not convey a fee interest to Williams County and therefore the county did not own the minerals underlying the highway right-of-way.

The court held that generally the right acquired by the public (county) in land for highway purposes is an easement, rather than a fee title. It also held that section 32-1503, N.D.R.C., 1943, which is the codification of C.L. 1913, section 8204, did not permit the taking of more than an easement for highway purposes. Because the county could not condemn a greater interest than an easement, the purchased interest could be no greater than an easement.

This office has also addressed a similar question. 86 N.D. Op. Att'y Gen. 6. The opinion issued held that the North Dakota State Highway Department did not acquire ownership of the minerals underlying a highway right-of-way, even though the statute providing for the acquisition of the right-of-way permitted the taking of an estate greater than an easement.

The rationale expressed in the opinion would have a greater application to the present question because the acquisition statute, C.L. 1913 section 8205, only permitted the taking of an easement for highway right-of-way. Additionally, the opinion recognizes the legislative mandate that any property interest in a highway right-of-way greater than an easement, is reconveyed by North Dakota Century Code section 32-15-03.2.

I therefore conclude that the county does not own the minerals underlying a highway right-of-way acquired in 1933 by a quitclaim deed.

Sincerely,

Nicholas J. Spaeth
Attorney General

jfl