LETTER OPINION
93-L-62

February 26, 1993

Honorable Alvin A. Jaeger
Secretary of State
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Secretary of State Jaeger:

Thank you for your February 5, 1993, letter requesting my advice on four issues presented to you by several North Dakota citizens (citizens).

ISSUE 1: Whether the requirement that foreign corporations register with the Secretary of State applies to all foreign corporations, including federal agencies and federal instrumentalities.

It is a long-standing policy of this office not to issue opinions on matters which are pending before a court. It would be particularly inappropriate for me to issue an opinion because we are currently representing your office in litigation brought by Virgil Rott concerning this issue. (Enclosed please find a copy of the district court decision in this case.)

ISSUE 2. Whether North Dakota law permits foreclosure of a homestead.

Article XI, Section 22 of the North Dakota Constitution provides:

> The right of the debtor to enjoy the comforts and necessaries of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law; and a reasonable amount of personal

property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law.

N.D. Const. art. XI, ? 22.

The citizens question whether this constitutional provision prohibits the forced sale of a homestead in all cases. The North Dakota Supreme Court addressed this issue with regard to a farmer who continued to stay on his homestead after foreclosure on the land in Federal Land Bank of St. Paul v. Gefroh, 418 N.W.2d 602 (N.D. 1988). The court stated "North Dakota Constitution Article XI, ? 22 does not preclude a 'wholesome law' like NDCC 47-18-04 permitting the enforcement of a mortgage on a homestead." Id. at 605. N.D.C.C. ? 47-18-04 provides in part:

A homestead is subject to execution or forced sale in satisfaction of judgments obtained in the following cases:

. . .

2. On debts secured by mortgage on the premises executed and acknowledged by both husband and wife, or an unmarried claimant.

3. On debts created for the purchase thereof and for all taxes accruing and levied thereon.

N.D.C.C. ? 47-18-04(2), (3).

To reach its conclusion that a mortgagor could foreclose upon the homestead of a debtor, the court reviewed the legislative history of N.D.C.C. ? 47-18-04, noting it was enacted only two years after the North Dakota Constitution was adopted. The court also considered the fact that the practice of permitting the forced sale of mortgaged homesteads had been allowed for nearly a century. The court recognized the practical effect upon home ownership if lending

institutions could not collateralize the loans they made to purchase homes. Essentially, the ability of an individual to borrow money to purchase a home would "become an impossibility." Gefroh at 605. The court held that N.D.C.C. ? 47-18-04 which allows a forced sale of a homestead does not violate the North Dakota Constitution. A statute cannot be held unconstitutional unless at least four of the five supreme court justices declare it unconstitutional. N.D. Const. art. VI, ? 4. The constitutionality of N.D.C.C. ? 47-18-04 has been challenged through the court system and upheld by the North Dakota Supreme Court.

CONCLUSION: A homestead may be foreclosed upon under N.D.C.C. ? 47-18-04.

ISSUE 3: Whether federal courts have jurisdiction over North Dakota citizens.

I will not set out Sections 1, 2, and 3 of Article XIII of the North Dakota Constitution to which the citizens refer because of their length. However, I do enclose a copy for your reference.

The question raised is answered simply by reference to the federal Constitution which is the supreme law of the land. Both state statutes and state constitutions are subordinate to the United States Constitution. U.S. Const. art. 6. Article 3, Section 2 of the United States Constitution provides in pertinent part:

> The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

U.S. Const. art 3, ? 2. (Emphasis supplied.) Pursuant to this provision of the Constitution,

Congress has enacted federal legislation which allows cases to be brought in federal courts against North Dakota citizens (or citizens of any other state). These statutes are found in title 28 of the United States Code.

Section 1331 of that title provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. ? 1331 (1986).

Section 1332 of that title provides in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --
>
> (1) citizens of different States;
>
> . . .
>
> (c) For the purposes of this section and section 1441 of this title --
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C.A. ? 1332 (Supp. 1992).

Which of these two federal statutes confers jurisdiction in the federal district court depends upon the facts in the particular situation. For example, under section 1331 an action could be brought in a federal district court to recover monies loaned to a North Dakota citizen by the Farmers Home Administration pursuant to a federal statute because the cause of action arose under the laws of the United States. Likewise, under section 1332 an out-of-state corporation could bring an action against a North Dakota citizen if the amount of the dispute exceeds $50,000. (Such an action could have been brought in federal court before November 19, 1988, if the amount in question exceeded $10,000.) Therefore, an action may be brought against a North Dakota citizen in federal court if the case involves a question of federal law or if the parties are from two different states and the amount in dispute exceeds $50,000 (or $10,000 if before November 19, 1988).

CONCLUSION: Federal courts have jurisdiction over North Dakota citizens in cases which involve federal law, or in cases which involve persons or corporations from different states who are litigating an amount of more than $50,000 (or $10,000 if brought before November 19, 1988).

ISSUE 4: Whether the central indexing system is unlawful or discriminatory.

The fourth issue raised by the citizens concerns the central indexing system established by the Fifty-Second Legislative Assembly in 1991. The central indexing system also includes the central notice system for farm products established in 1985 which has been certified by the federal government. The statutes creating these systems are found in N.D.C.C. ch. 41-09. The citizens' contention is that provision of this service somehow is "unlawful and discriminatory." The citizens' document refers to Article IV, Section 43, clause 31 of the North Dakota Constitution. Although that provision was repealed effective December 1, 1986, it formerly provided:

> The legislative assembly shall not pass local or special laws in any of [the] following enumerated cases, that is to say:
>
> . . .
>
> 31. Authorizing the creation, extension or impairing of liens.

N.D. Const. art. IV, ? 43, cl. 31. (Repealed at the general election held on November 6, 1984. 1983 N.D. Sess. Laws ch. 730, ? 2, 1985 N.D. Sess. Laws ch. 707, ?2.) The language approved by the voters to replace the language addressing local or special laws now simply provides: "Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted." N.D. Const. art. IV, ? 13. The former constitutional provision specifically addressed local or special laws which would create, extend or impair liens. Neither the former nor the present language prohibits the enactment of general laws which would allow the creation, extension, or impairment of liens. However, it should be noted that the central indexing system does not create, extend, or impair liens. The liens are all created and governed by agreements between the debtor and lienholder or secured party or by other statutes which grant a lien under specific circumstances.

The North Dakota Supreme Court has defined the words "local" and "special" with regard to the former

language in the North Dakota Constitution. "[A] 'special law' is one which relates only to a particular person or things of a class, as distinguished from a 'general law,' which applies to all things or persons of a class [citations omitted], and a 'local law' is one which applies to a specific locality or spot, as distinguished from a law which operates generally throughout the entire state [citations omitted]." State v. First State Bank of Jud, 202 N.W. 391, 399 (N.D. 1925). These definitions apply equally to those words as they are used in the present constitutional provision found in Article IV, Section 13.

The central indexing system and the central notice system apply equally to all debtors and secured parties or lienholders who are similarly situated and the systems have statewide application. When the Legislature created the central indexing system and the central notice system it did not violate the prohibition against local or special laws found in Article IV, Section 13 of the North Dakota Constitution.

CONCLUSION: The central indexing system is not a special or local law and does not violate provisions of the North Dakota Constitution.

I have enclosed copies of all statutes and cases not cited in full for your information. I trust this answers your questions.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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Enclosure