

LETTER OPINION
94-L-66

March 18, 1994

Honorable Donna Nalewaja
State Senator
1121 11th Street North
Fargo, ND 58102

Dear Senator Nalewaja:

Thank you for your letter asking several questions concerning ownership of plant varieties developed at the North Dakota Agricultural Experiment Station (AES).

You explain that royalties or fees received for the sale of Pioneer seed varieties and germplasm developed at the AES are paid to the NDSU Research Foundation pursuant to an agreement with the Foundation. Your questions relate to whether this arrangement is consistent with the state constitution and applicable statutes.

In order to answer your questions, it is necessary to review the legal status of the AES. The AES is established in connection with North Dakota State University (NDSU) under the control of the North Dakota State Board of Higher Education. N.D. Const. art. VIII, § 6; North Dakota Century Code (N.D.C.C.) §§ 15-12-10 and 4-05.1-02. The director of the AES is "under the direction of the president of the North Dakota state university of agriculture and applied science." N.D.C.C. § 4-05.1-03. These provisions are consistent with federal laws authorizing the land grant colleges. Section 1 of the original Hatch Act of 1887 (Act of March 2, 1887, 24 Stat. 440) stated that experiment stations were to be established "in connection with" the land grant colleges. Current federal law defines a state agricultural experiment station as a "department which shall have been established, under direction of the college or university or agricultural departments of the college or university" or "such other substantially equivalent

arrangements as any State shall determine." 7 U.S.C.A. ? 361a. Nothing in federal law pertaining to experiment stations is intended to "impair or modify the legal relation existing between any of the colleges or universities under whose direction State agricultural experiment stations have been established and the government of the States in which they are respectively located." 7 U.S.C.A. ? 361h. Therefore, the AES is a part of NDSU, governed by the State Board of Higher Education.

N.D.C.C. ch. 47-28 governs inventions or discoveries at institutions of higher learning under the control of the Board of Higher Education. Letters patent on all inventions or discoveries resulting from state-sponsored research conducted by employees of a state institution of higher learning "shall inure to and be taken out by or assigned to the respective state institution of higher learning in accordance with a general policy established by each institution of higher learning with the approval of the state board of higher education." N.D.C.C. ? 47-28-01. Ownership of the inventions or discoveries "shall be vested in each respective institution, or in an independent foundation created for the purpose of obtaining patents or inventions, receiving gifts, administering or disposing of such patents and promoting research at the respective institution by every proper means." Id. Income received for the inventions or discoveries must be shared with the inventor. N.D.C.C. ? 47-28-02.

The Board of Higher Education has adopted a policy pursuant to N.D.C.C. ch. 47-28. The Board policy governs any "patentable discovery," including those that may arise from "the development of a new and useful process, device or apparatus, article of manufacture, composition of matter (including chemical compounds, microorganisms, and the like), plant, or related improvement, or a new use for a known material or device." SBHE Policy ? 611.2. SBHE Policy ? 611.2 states that the institution shall have the right of first refusal to the title of all patentable discoveries and, subject to overriding obligations of the institution pursuant to the terms of applicable gifts, grants or contracts, the institution shall pay to the inventor a minimum of 30% of the net royalties and fees received by the institution. The remainder

Honorable Donna Nalewaja
March 18, 1994
Page 3

shall be dispersed "by negotiated agreement with allocations to the originating department, the originating college/school, and the institution." Id.
A "patent review procedure" at each institution shall establish the "negotiation and distribution mechanism" at each institution. Id.

Rights to seed varieties may be protected by the Plant Variety Protection Act, 7 U.S.C.A. ? 2321 et seq. N.D.C.C. ? 47-28-01 utilizes the term "letters patent." The term "letters patent" is generally defined as a document, open to public inspection and under seal of the government, which grants some special right, privilege, authority, monopoly, franchise, immunity, exemption or title that could not otherwise be enjoyed. See Webster's Third International Dictionary 1298 (1967). In my opinion, this term is broad enough to encompass certificates of federal seed variety protection. Therefore, the Board policy pursuant to N.D.C.C. ? 47-28-01 governs disposition of royalties and other income received by NDSU for the sale of seed varieties developed at NDSU which are protected by the Plant Variety Protection Act.

The NDSU Research Foundation fulfills the purposes of N.D.C.C. ? 47-28-01 and was organized for scientific and educational purposes and specifically, among other things, to support NDSU in its teaching and research missions. The NDSU policy governing distribution of royalties from patentable discoveries states that ownership of patent rights is generally assigned to the institution, acting through the Office of Graduate Studies and Research, and all net income received by the institution, after payment of the inventor's share, shall be devoted to the support of the NDSU research program. NDSU Policy ? 341. I understand that policies exist at NDSU, adopted by the Dean of Graduate Studies and Research, the NDSU Research Foundation and approved by the NDSU president, whereby all patentable discoveries are assigned to the NDSU Research Foundation, subject to the approval of the president. The policies provide that the institution's 70% share of royalties and other net income is distributed according to the terms of an agreement negotiated by "the originating College Dean(s), Department Chair(s), and the Dean of Graduate Studies and Research to support endeavors to enhance research." Patent Policy, Patent Review Procedures,

Honorable Donna Nalewaja
March 18, 1994
Page 4

North Dakota State University (Approved October 11, 1988).

Ownership of intellectual property, including protected seed varieties, patents, trademarks and copyrights may also be subject to restrictions stated in the terms of research grants or contracts or in agreements transferring ownership to institutions of higher learning. See N.D.C.C. § 47-28-04. In an agreement dated July 17, 1990, Pioneer Hi-Bred International, Inc., an Iowa corporation, donated and assigned to the NDSU Research Foundation its ownership interests in PVP certificates to certain hard red spring wheat varieties and hard red spring germplasm.

The agreement restricts the development of varieties and sale of seed to North America.

Your first question is whether plant varieties developed by the AES should be considered a part of the agreement with the NDSU Research Foundation. The agreement between the NDSU Research Foundation and Pioneer Hi-Bred International, Inc., governs only the varieties listed in the agreement. However, as noted above, Board of Higher Education and NDSU policies, adopted under the authority of N.D.C.C. § 47-28-01, all patentable discoveries made at NDSU, including new plant varieties developed at the AES, are assigned to the NDSU Research Foundation.

Your second question asks whether royalties/fees on plant varieties developed by AES scientists should be collected by the NDSU Research Foundation. Pursuant to policies of the Board of Higher Education and NDSU adopted under the authority of N.D.C.C. ch. 47-28, the royalties and fees received for plant varieties developed by AES scientists should be collected by the NDSU Research Foundation and, after payment of expenses and the inventor's share, distributed for the support of research at the AES or other departments at NDSU according to the terms of a negotiated agreement.

Your third question asks what agency should collect and manage the monies collected from the sale of plant varieties developed by the AES scientists. The NDSU Research Foundation is established for this purpose pursuant to applicable laws and policies. Therefore, it is the entity responsible for collecting and managing these funds.

Honorable Donna Nalewaja
March 18, 1994
Page 5

In answer to your fourth question, the NDSU Research Foundation can collect and manage all funds received from sales both within and without the country unless other arrangements or agreements consistent with NDSU policies are negotiated. As I have noted, the agreement with Pioneer Hi-Bred International, Inc., restricts sales of the varieties governed by that agreement to North America.

Your fifth question asks whether the intent of the approved constitutional amendment in 1964 was to separate the budgets of the AES and NDSU. The constitution states that the budgets and appropriation measures for the AES and the Extension Division may be separate from those of state educational institutions.

N.D. Const. art. VIII, ? 6(6)(d). In other words, the Legislature may provide for separate budgets and enact separate appropriations measures or the appropriations may be combined. The Legislature has chosen to enact separate appropriations measures and has stated that funds appropriated to the Extension Service, Northern Crops Institute and the AES shall not be commingled with funds appropriated to NDSU. See 1993 N.D. Sess. Laws ch. 26, ? 8.

Your final question asks "[d]oes the separation of appropriation (1993 ND Sess. Laws 26) imply separation of the management of all monies?". All the entities receiving an appropriation under 1993 N.D. Sess. Laws ch. 26 received authority for the expenditure of the amounts stated therein to carry out their functions under the law. Management of the AES and its centers is by the superintendent of the center and the director of the AES. The director, in turn, is under the direction of the president of NDSU. (N.D.C.C. ? 4-05.1-03.) Ultimately, the AES is subject to the supervision of the State Board of Higher Education. (N.D. Const. art. VIII, ? 6(1); N.D.C.C. ?? 15-10-01, 4-05.1-02.) The State Board of Higher Education supervises the institutions under its control according to the North Dakota Constitution and statutes, including appropriation acts and policies it is authorized by statute to adopt.

Therefore, although the research centers and main research station received separately identifiable appropriations, which must be separately accounted for, the management of the AES and its centers,

Honorable Donna Nalewaja
March 18, 1994
Page 6

including their appropriations, is still under the ultimate control of the State Board of Higher Education exercising its authority under law. A separate appropriation to an entity does not make it a separate legal entity of the state. The AES is organized as a part of NDSU. Therefore, the AES is subject to policies developed under N.D.C.C. ? 47-28-01 by the State Board of Higher Education and NDSU concerning royalties from plant varieties developed at the AES, and following those policies does not conflict with the separate appropriations contained in 1993 N.D. Sess. Laws ch. 26. It should be noted that this result could be changed by legislation amending the Board's and universities' authority under N.D.C.C. ? 47-28-01.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

rel/pg