

**OPINION
71-15**

October 28, 1971 (OPINION)

Mr. H. L. Thorndahl

President

Bank of North Dakota

RE: Bank of North Dakota - Farm Loans - First Mortgage

This is in response to your letter of October 13, 1971, wherein you make request for an opinion of this office regarding Section 6-09-15 of the North Dakota Century Code, as the same relates to mortgage requirements for farm loans. You submit the following facts and inquiry in your letter:

"The Farmers Home Administration has instituted a new program whereby they will subordinate their first mortgage position to another lending institution that will advance funds to farm borrowers in North Dakota. As an example, if a man purchased a farm for say \$25,000 down payment and required \$100,000 of financing, the FHA would lend half this amount (\$50,000) and request another lending institution to put up the other half. If the farm were appraised for \$100,000, the Bank of North Dakota could legally (Section 6-09-15) lend to 50 percent of value or \$50,000.

"My question is: Would we be in violation of Section 6-09-15, North Dakota Century Code, if we made such a loan, which would be first in place and second in time, if the Farmers Home Administration subordinated their position to ours.

"We respectfully request your Opinion on this matter. If we can, in fact, enter into such proposals, we could greatly expand our farm real estate lending and serve many more North Dakota farmers."

The current provision of law which regulates such loans is found in Section 6-09-15 of the North Dakota Century Code, as amended, which provides in part:

" * * * It may make loans to holders of Bank of North Dakota certificates of deposit and savings accounts, up to ninety percent of the value of the certificate and savings accounts offered as security. It shall not otherwise make loans or give its credit to any individual, association or private corporation, except that it may make loans to actual farmers who are residents of this state, if such loans are secured by duly recorded first mortgages on real estate in the state of North Dakota in amounts not to exceed one-half of the value of the security and except United States insured and guaranteed loans as specifically authorized by law. * * * " (emphasis supplied)

We initially note that the foregoing regulatory law states "duly recorded first mortgages," without further specification as to the term "first." In absence of further specification it would appear that such term must be given its full import as applicable to law and as applicable as to time. We would note, however, that this office does not have a copy of the mortgage used by the Farmers Home Administration nor is this office aware of the contents of supporting security papers and instruments, if any, in connection with that particular type of farm loans. In absence of such information, it is impossible to render any legal conclusion with regard to either priority in law or priority in time.

Your letter of inquiry concedes, however, that the mechanics of this suggested type of dual financing or lending would result in a mortgage, upon which the security of the State of North Dakota rests, which would not be first in time. We can further visualize situations whereby such a mortgage as suggested in your letter would possibly result in a mortgage to the State of North Dakota which would not be first in law, partially dependent upon the type and contents of subordination agreement used. We would note that this office has not examined nor is it otherwise aware of the contents of the proposed subordination agreement which is contemplated by your letter of inquiry.

Some of the problems which this type of program and financing seem to face result from the various laws of this state regarding priority of mortgages.

The type of program and financing suggested in your letter gives rise to certain questions relating to the priority of mortgages, particularly in view of the restrictive clause in Section 6-09-15 as heretofore quoted. We note the provisions of Section 35-03-10 of the North Dakota Century Code, which would appear to apply in the instance of the example given in your letter, which provides as follows:

"MORTGAGE FOR PURCHASE OF REAL PROPERTY PRIOR TO ALL LIENS. - A mortgage given for the purchase price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws."

In such a situation, it would appear that if a parcel of land were purchased at the time the original loan was secured, a question would arise as to whether such a mortgage would have priority over a subsequent mortgage given to the state, not at the time of its conveyance, regardless of a subordination agreement.

Further, and without knowledge of the type of mortgage used by the federal agency, questions relating to whether a particular mortgage is an absolute conveyance may arise, in which instance it may become necessary to determine whether a particular instrument is a deed or a mortgage. Elements of possession, powers of sale and impairment of security all become related questions which may have bearing upon the legal effect of a particular mortgage and priority of mortgages in event of default.

In view of the foregoing questions it would appear that the Legislature, in enacting Section 6-09-15, felt that mortgages given as security for loans from the State of North Dakota, should be first in time and first in law. We cannot expand the terms used in the statute, the obvious intent of the law as it remains unqualified without further specification than the singular term, "first."

Accordingly, we are of the opinion that a loan granted under the provisions of Section 6-09-15 of the North Dakota Century Code, as amended, requires as its security a "duly recorded first mortgage on real estate," together with other requirements, and that such mortgage must be first in time and first in law or place. We are of the opinion that the proposed subordination of rights under a mortgage which is first in time would not satisfy the requirements of the statute.

Since the questions which you have submitted for opinion necessarily involve questions of fact as well as law, however, we would tend to approach the issue from the standpoint assuming that various clauses, agreements and particular components exist in the subordination agreement and the subordinated mortgage which would effect the subsequent priority of the state's mortgage. As we have stated, we have not examined the documents in question.

We would further note that this issue appears to be somewhat academic from the standpoint that the main issue as well as related issues of priority may be easily circumvented by utilization of mechanics of financing related to second mortgages. It would appear that if the Farmers Home Administration is willing, as it purports, in favor of the state, whereby the result is a security in the state with first priority, the same could easily be accomplished by the Farmers Home Administration releasing their mortgage, taking second mortgage behind the date and recordation of the state's mortgage. This method would appear to erase all tangible questions relating to priority of mortgages and the state would then have a mortgage which would be truly "first in time" and "first in law," which would clearly be within the contemplated intent of the statute in question, and the Farmers Home Administration would have a second mortgage such as apparently they are willing to hold as their security. It would not appear that such method would be cumbersome or difficult beyond that which is currently suggested. It would appear that the satisfaction of the original mortgage to Farmers Home Administration, mortgage to the state, and new mortgage to Farmers Home Administration could all be sent to the office of Register of Deeds to be recorded in that same chronological order, thereby establishing the desired result.

In this respect we would urge that the possibilities of utilization of such procedures be considered.

We trust that the foregoing will adequately set forth our opinion on the subject of your inquiry and the specific questions therein submitted for our determination.

HELGI JOHANNESON

Attorney General