

Opinion No. 49-5186

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BY: JOE L. MARTINEZ, Attorney General

TO: George A. Graham Attorney for State Land Office State Land Office Santa Fe, New Mexico

{*5} We are in receipt of your letter of December 28th in which you request an opinion as to the relative rights of a lessee and a purchaser at a public sale.

As we understand the situation, a grazing lease was entered into with a lessee for a period of five years, expiring October 1, 1952. The lessee, on August 4, 1948, filed an application to purchase the land. In compliance with the state laws, the necessary publication of the sale was had and a sale was held on November 30, 1948, at which time a third party out-bid the lessee. On December 13, 1948, a formal contract was entered into between the new purchaser and the Commissioner of Public Lands. The contract of sale provided among other things that "It is further understood and agreed that possession of lands herein contracted for and held under existing lease at the date hereof shall not be given the purchaser until October 1st following date hereof."

The question then is -- Does the new purchaser have the right of occupancy on October 1, 1949, or on the expiration of the lease?

In your letter you cite Section 8-834, New Mexico Statutes Annotated, which provides, in effect, that no lease of state land shall be cancelled without the written consent of the lessee except for fraud, collusion, mutual mistake or default of the lessee, and the right to cancel or forfeit such lease without cause, based on any agreement or consent contained in such lease is hereby waived. All sales of state lands embraced within such lease shall be made subject to all the terms and provisions thereof, except the right of the lessee to renewal at the end of the term.

It is not believed that Section 8-834 is applicable. It prohibits only unilateral action by the state. There is no question that if the lessee had not filed the application to sell, his right to continue in possession until the expiration of the lease was absolute.

The Commissioner of Public Lands has promulgated certain rules and regulations among which is the provision "Lands which are held under a grazing or agricultural lease will not ordinarily be offered for sale, except during the year next preceding the date of expiration of the lease, or with the express written consent of the lessee. In exceptional cases lands under lease may be sold without the consent of the lessee but possession cannot be given the purchaser until the expiration of the existing lease."

It is the opinion of this office that the application to purchase filed by the lessee was not only a written consent to the sale of the land but was an insistence on such a sale. The

lessee should not be heard to complain that he was outbid at the sale; further, it would appear from a reading of the rules and regulations of the Commissioner, rights of the lessee under the terms of the lease were irrevocable only if the land were sold without his consent.

To allow a person, who has a lease of some duration to request a sale, the effect of which if he {*6} were the successful bidder would be to merge his tenancy for years with a fee to the property, to insist on the validity of his lease after a sale to a higher bidder would be unfair and inequitable. It would place the lessee in a superior position to any competitive bidder. If his bid were successful, he would be entitled to this fee immediately. If he were unsuccessful, he would have the right to continue his tenancy under the terms of the lease.

His application to purchase was, in our opinion, a written consent to the sale and he is estopped by his own action to complain of the results. The purchaser is entitled to possession as of October 1, 1949.