Opinion No. 53-5831

October 28, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Hon. Edward M. Hartman State Comptroller State Comptroller Santa Fe, New Mexico

*{*242}* Your letter of October 9, 1953, requests the opinion of this office as to whether the State Highway Commission has authority to list its old district yard in Albuquerque with real estate agents for sale, and in event of sale to pay a commission of 5% to the agent making the sale.

Sec. 6-228 N.M.S.A., 1941 provides:

"Sale of property by state departments -- Approval of state comptroller. -- Any state department is hereby empowered to sell or otherwise dispose of real *{*243}* or personal property belonging to such state department, subject to the approval of the state comptroller. The state comptroller shall have the power to credit any payment received from the sale of any such real or personal property to whatever fund of such state department as he deems appropriate. (Laws 1943, ch. 128, Sec. 1, p. 307.)"

This statute would appear to be authority for the sale, subject to your approval, nor need the property be sold for any appraised figure, as long as you approve. We see no reason why you should not seek a fair appraisal of the property to guide you in your discretion in the matter, however.

Before acceptance of this statute as authority for the sale, we have considered other statutes and the Constitution. Although 6-708 N.M.S.A., 1941 authorizes the State Purchasing Agent to sell surplus and unneeded supplies or property in his hands owned by the state or any department thereof, the statute does not specifically mention real estate. Apparently the Highway Commission first attempted to have the Purchasing Agent sell this property, but receiving no satisfactory bid after advertising is now attempting to proceed with the sale under Sec. 6-228 above quoted.

In Attorney General's Opinion 4367, dated August 17, 1943, it was determined that where property was not in the hands of the State Purchasing Agent it might be sold pursuant to Sec. 6-228. Attorney General's Opinion 4560, dated August 11, 1944, states that surplus property can be placed in the hands of the Purchasing Agent for sale, but that unless it is so placed he has no authority over it. If the land in question is no longer listed with the State Purchasing Agent, we believe the Purchasing Agent statute 6-701-6-713 would not now prevent its sale under 6-228, which clearly applies to **real** and personal property, while 6-701 et seq. leaves doubt as to whether it contemplates sales of real estate. We see no conflict between the two acts.

If the property can be sold pursuant to this act, we see no reason why a commission of 5% could not be paid to an agent making the sale. This is customary in such cases. It involves a personal service contract which is exempt from the provisions of Purchasing Agent Act (6-703 N.M.S.A., 1941). Of course, such an agent or agents must be duly licensed pursuant to Sec. 51-3211 N.M.S.A., 1941.

The most difficult question arising, however, is whether Art. 13 of the Constitution, which gives the Commissioner of Public Lands power of disposition of all public lands, and Sec. 8-101 N.M.S.A., 1941, creating the land office and giving the Commissioner jurisdiction over state lands, conflicts with Sec. 6-228.

Since your request for this opinion the Highway Commission has asked our opinion as to whether it could lease this property if no offer for sale is forthcoming, and since both questions rest upon the determination of the effect of the Constitutional and statutory powers of the Land Commissioner, we will consider both questions here.

Art. 13 of the Constitution dealing with public lands gives us our first concern. It reads as follows:

"Sec. 1. (Disposition of state lands.) -- All lands belonging to the Territory of New Mexico, and all lands granted, transferred or confirmed to the state by Congress, and all lands hereafter *{*244}* acquired, are declared to be public lands of the state to be held or disposed of as may be provided by law for the purposes for which they have been or may be granted, donated or otherwise acquired; provided, that such of school sections two, thirty-two, sixteen and thirty-six as are not contiguous to other state lands shall not be sold within the period of ten years next after the admission of New Mexico as a state for less than ten dollars per acre.

Sec. 2. (Duties of land commissioner.) -- The Commissioner of public lands shall select, locate, classify, and have the direction, control care and disposition of all public lands, under the provisions of the acts of Congress relating thereto and such regulations as may be provided by law."

The first state legislature in implementing this Constitutional provision provided for the creation and organization of the Land Office by Ch. 82, Laws of 1912, and Sec. 1 thereof appears as follows:

"Section 1. That a State Land Office is hereby created, the executive officer of which shall be the Commissioner of Public Lands, hereinafter called the Commissioner, who shall have jurisdiction over all lands now owned or hereafter acquired by the State, except as may be otherwise specifically provided by law, and shall have the management, care, custody, control and disposition thereof in accordance with the provisions of this Act and the law or laws under which such lands have been or may be acquired."

Read alone, and without reference to the historical background and other provisions of Chapter 82, it would appear from the above quotations that the Commissioner of Public Lands would have direct control over all lands acquired by the state unless there are other constitutional provisions or laws specifically providing to the contrary.

Although a determination of exactly what lands are included within the term public lands as provided by the Constitution has not been made by our Supreme Court, the Supreme Court of Arizona has had the question before it. In Murphy v. State (Ariz. 1947) 181 P2 336, the State Treasurer had acquired by mortgage foreclosure certain lands which it had traded to Murphy. The transaction was alleged to be void because in violation of the Enabling Act, the Constitution and the statutes thereunder which required that public lands be held in trust. The Constitution there stated:

"All lands expressly transferred and confirmed to the state by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the Territory of Arizona, **and all lands otherwise acquired by the state * * *"**

The Arizona Court discussed the history of the Enabling Act for the admission into the Union of New Mexico and Arizona and the Constitutional provisions. There being no New Mexico cases on this point, this holding of our sister state is very persuasive. The Arizona Court held:

"The phrase 'and all lands otherwise acquired by the state' appearing in Secs. 1 and 9 of Article 10 of the Constitution are not all inclusive. These words 'and all lands otherwise acquired by the state' refer to lands otherwise *{*245}* acquired by the state for the uses and benefits of the trust which was set up to create permanent funds for the support and maintenance of the institutions referred to in the Enabling Act. It is a matter of common knowledge that, since admission into the Union, the state has acquired much property for governmental purposes and for proprietary uses. The state has acquired many sites throughout the state for highway maintenance yards; also additional lands for fish hatcheries, hospitals, fair grounds, the university, colleges, etc."

The Supreme Court of Florida has also similarly construed the term in State v. Holland (Fla. 1942) 10 So. 2nd 577 where in construing a constitutional provision which required "25% of the sales of public lands which are now or may hereafter be owned by the state" to be applied to school purposes the court held:

"The words 'public lands' * * * have reference to open areas of land the title to which is based upon sovereign grants from the United States to Florida, as designed for general public purposes such as education, internal improvements, drainage and reclamation * * * *"

It is our opinion that Sec. 2, Art. 13 of our Constitution limits the control of the Commissioner of Public Lands to their disposition "under provisions of the acts of Congress relating thereto and such regulations as may be provided by law". The

provision is of the act of Congress relating only to those lands New Mexico has received in trust from the federal government for institutional purposes. What regulations, therefore, have been otherwise provided by law? Did Sec. 1, Ch. 82, Laws of 1912 extend the jurisdiction of the Commissioner of Public Lands over additional state lands than those intended by the Constitution?

When Sec. 1, Ch. 82, Laws of 1912 was placed in the Code of 1915 as Sec. 5178, its wording was changed and since that time and as Sec. 8-101 N.M.S.A., 1941, the section reads as follows:

"8-101. Creation of state land office -- Commissioner of public lands designated executive officer -- Powers. -- A state land office is hereby created, the executive officer of which shall be the Commissioner of Public lands, herein-after called the Commissioner, who shall have jurisdiction over all lands **owned in this chapter by the state,** except as may be otherwise specifically provided by law, and shall have the management, care, custody, control and disposition thereof in accordance with provisions of this chapter and the law or laws under which such lands have been or may be acquired."

The law was changed by the adoption of the Code of 1915 in that the Commissioner was given jurisdiction over lands "owned in this chapter by the state" instead of "jurisdiction over all lands now owned or hereafter acquired by the state". Lands in this chapter would be those lands referred to in Ch. 102, New Mexico Statutes Annotated, Codification of 1915. A reading of that chapter is not particularly helpful until Sec. 5256 is encountered which sets forth the institutions and funds into which all proceeds of the sale of lands by the Commissioner are to be deposited. These funds all relate to the beneficiary institutions of federal donations and none of them would be appropriate for the deposit of money accruing from non-institutional *{*246}* lands. This, together with the fact that no reference is made throughout the chapter in any specific instance in language which could apply to non-institutional lands, leads us to conclude that at least after the adoption of the 1915 Code the legislature intended to limit the jurisdiction of the Commissioner of Public Lands to those lands acquired by act of Congress for institutional purposes as does the Constitution.

The question may well arise as to whether the Code of 1915 did amend Sec. 1, Ch. 82 of the Laws of 1912. This question was considered by the Supreme Court in ex parte Bustillos, 26 NM 450 where Justice Parker in speaking for the Court at Pg. 463 states:

"* * * There is the general enacting clause at the beginning of the act, and, under all rules of construction and interpretation, every section from the first to the last is to be held to be enacted by the act. It will be immaterial as to the source of the matter included in the act, whether coming from old statutes, decisions of the court, or whether the matter be entirely new. 11 C. J. p. 940; Code, Sec. 1; Lewis v. Dunne 134 Cal. 291, 66 Pac. 478, 55 L.R.A. 833, 86 Am. St. Rep. 257; Central Ga. R. Co. v. State, 104 Ga. 831, 31 S. E. 531, 42 L.R.A. 518. In speaking of the codification of the laws of Georgia, the court said:

'its general object is to embody as nearly as practicable all the law of a state, from whatever source derived. When properly adopted by the law-making power of a state, it has the same effect as one general act of the Legislature containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law; it is the law itself.'

This case has been cited and followed by the Supreme Court in Hobbs v. Morrison Supply Co., 41 N.M. 644 and in Application of Dasberg, 45 N.M. 184, where the Court said:

"The codification of 1915 was enacted with the purpose of harmonizing conflicting sections and the entire Code was enacted as statutory law by the 1915 section. See Code 1915 Pg. 1665 N.M. Stat. Ann. Com. 1929 Sec. 138-101. Every section from the first to the last is held to be enacted by the act. It is immaterial as to the source of the material included in the act, whether coming from the old statutes, decisions of the court, or whether the matter be entirely new."

Although there is dicta in the case of Wells v. Dice 33 N.M. 647 to the contrary and this dicta was followed in State v. District Court of 9th Judicial District, Curry County, 44 N.M. 16, we have reviewed the authority cited by Justice Parker in ex parte Bustillos, supra, and believe that his reasoning based on these authorities is the correct rule in New Mexico.

We, therefore, conclude that neither by the Constitution nor by statute has the Commissioner of Public Lands been given power to sell lands held by the Highway Commission and acquired for its purposes. We must next consider whether he has authority to lease the land.

On February 19, 1953, this office rendered Opinion No. 5684 to Mr. George L. Warder, President of the New Mexico Industrial School. There *{*247}* Sec. 8-1101, N.M.S.A., 1941 was discussed. It reads as follows:

"Issuance of leases authorized -- Lands subject -- Carbon dioxide leases exempted. -- The commissioner of public lands hereinafter referred to as the "commissioner" is hereby authorized to execute and issue in the name of the state of New Mexico, as lessor, leases for the exploration, development and production of oil and natural gas, from any lands belonging to the state of New Mexico, or held in trust by the state under grants from the United States of America, and including lands which have been or may hereafter be sold by the state with reservations of minerals in the land, such leases to be issued upon such terms and conditions as the commissioner may deem to be for the best interests of the state, and not inconsistent with the provisions of chapter 125 of the Session Laws of 1929 (Secs. 8-1101, 8-1103, 8-1105 -- 8-118), and amendments thereto; Provided that this act (Secs. 8-1101, 8-1102) shall be effective only as to such leases issued subsequent to the effective date of this act (Sec. 8-1101, 8-1102); and, Provided, further, that nothing in this act (Secs. 8-1101, 8-1102) shall affect or disturb valid existing rights as to any carbon dioxide lease heretofore issued under the

provisions of chapter 177, of the New Mexico Session Laws of 1937 (repealed). (Laws 1929, ch. 125, Sec. 1, p. 281; C.S. 1929, Sec. 132-401; Laws 1931, ch. 18, Sec. 1, p. 29; 1941, ch. 137, Sec. 2, p. 236.)"

This opinion did say that this statute gives the exclusive right to the land commissioner to execute **all** leases on any lands owned by the State of New Mexico. This is perhaps misleading and was intended to mean all leases for the exploration, development and production of oil and natural gas, as the statute plainly reads, and as was the type of lease upon which our opinion was sought.

The leasing of lands for oil and gas purposes is a specialized field and the legislature did well in centralizing this function in one official. Chapter 125, Session Laws of 1929 referred to, deals only with this type of lease, and the Land Office has the facilities and specialists for this work. Should the Highway Commission contemplate leasing its property for this purpose, it must turn it over to the Land Commissioner who alone could execute the lease.

We know of no statute which would prohibit the Highway Commission from leasing the surface rights and the buildings, nor is there any statute specifically giving them such right. Although generally administrative boards and commissions have no implied powers above those absolutely necessary to carry out those powers expressly granted them, it has been held that an administrative commission created by the Constitution is not limited to those powers expressly granted by the Constitution, but that it may exercise all powers which may be necessary or essential in connection with the performance of its duties. 73 C.J.S., Page 374 citing Garvey v. Trew (Ariz.) 170 P2 845 cert. denied 329, U.S. 784.

In Opinion No. 5555 dated June 27, 1952, my predecessor found that the broad general powers conferred upon the Highway Commission by the Constitution and the statutes, authorized it to purchase real estate for its Maintenance Division. If it becomes necessary and expedient to *{*248}* sell the property, the legislature has provided the means in Sec. 6-228 above set forth. We believe the same statute would be their authority for leasing the land and buildings except for oil and gas purposes. There is no statute specifically giving the Commissioner of Lands authority to lease surface rights and buildings owned by State Departments, and no reason we know of why he should. On the other hand, there is as much reason for the State Comptroller to approve the leasing as the sale of departmental property.

Sec. 6-228 empowers the department to "sell or otherwise dispose of real or personal property" subject to the comptroller's approval. This would include leasing the land. In Green v. City of Rock Hill (S.C. 1927) 147 S.E. 346 the legislature had authorized the city "to sell, convey and dispose of" its waterworks. The court held:

"That a grant of power to sell necessarily carries with it a grant of power to transfer an interest less than an absolute one would seem to be self evident. 43 C.J. 1342 Waskey v. Chambers

We conclude, therefore, that the Highway Commission may sell or lease its old district yard upon such terms as are for the best interest of the state, and as the Commission may determine, and you approve, and that it could pay such reasonable real estate commissions as are necessary to bring about such a sale or lease.

By: Special Assistant