

## **Opinion No. 65-20**

February 4, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

**TO:** Representative Alfonso F. Vigil, New Mexico House of Representatives, State Capitol Building, Santa Fe, New Mexico

### **QUESTION**

#### QUESTION

Is House Bill No. 27, set out below, constitutional?

"7-8-9.1 [NEW MATERIAL] PREFERENCE OF LESSEES. -- In the event state land is sold to a person, other than the holder of an existing lease, of the surface rights to the land sold, the lessee shall be given preference and, if he is otherwise qualified to purchase, and he matches or exceeds the bid and offer of the purchaser within ten days of the sale, the lessee shall be substituted for the purchaser and shall be granted the land sold."

#### CONCLUSION

See analysis.

### **OPINION**

#### {\*34} ANALYSIS

Article XXI, Section 9 of the Constitution of New Mexico provides as follows:

"This state and its people consent to all and singular the provisions of the said Act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said Act granted or confirmed to this State, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided."

The section quoted has reference to the Enabling Act for New Mexico passed by the United States Congress. Among the terms and conditions imposed by the Enabling Act on lands granted or confirmed therein to New Mexico are these found in Section 10 of that Act:

". . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the

lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; . . ."

House Bill No. 27, if enacted, would certainly have application to the lands granted or confirmed in the Enabling Act. The language quoted just above is clear and unambiguous. The land must go to the highest and best bidder at a public auction. House Bill No. 27 sets out a procedure totally incompatible with the prohibition contained in the Enabling Act. In *{\*35} Matthews v. Linn*, 78 S.D. 203, 99 N.W. 2d 885 (1959), the Supreme Court of South Dakota considered a question much like the one presented here. That case dealt with a certain South Dakota statute to implement the sale of education and school lands. The South Dakota Constitution, Article VIII, Section 5, contained this provision:

"No land shall be sold for less than the appraised value, and in no case for less than ten dollars (\$ 10.00) per acre . . . No land shall be sold until appraised and advertised and offered for sale at public auction after sixty (60) days advertisement of the same. . . . No land can be sold except at public sale."

The legislation provided that the lands would be sold at public auction to the highest bidder but it also contained the following two paragraphs:

"A lessee, or assignee, of such land, or a lessee, or an assignee holding an expiring lease at the time of sale, shall have the right to purchase such land for the amount of the highest bid made as provided by statute, upon giving notice of his election to exercise his right at the conclusion of the sale, and having bid at least once on such land at said sale, of the particular tract being offered, and making the payment required by law provided, however, nothing herein contained shall prevent the high bidder from raising his own bid."

"Fifteen days before the date of sale of any land, the commissioner of School and Public Lands shall give notice by registered mail, addressed to the record lessee at his record address, of the day, hour, and place of the sale."

The court began its remarks by pointing out that every presumption favors the validity of legislation and that it should be held unconstitutional only when it infringed organic restrictions so plainly and palpably as to admit of no reasonable doubt. The court then made this quote from 11 Am. Jur., Constitutional Law, Sec. 99, p. 733:

"Where the language used in a statute is plain, the court cannot read words into it that are not found therein either expressly or by fair implication, even to save its constitutionality, because this would be legislation, and not construction."

The court then gave this excellent definition of a public sale:

". . . a sale in which the public, upon proper notice, is invited to participate and given full opportunity to bid upon a competitive basis for property placed on sale, which is sold to the highest bidder."

The court then concluded that the sale contemplated by the statute quoted above was not an auction in competition with the public. Contemplated instead was a sale after the auction and hence did not comply with the requirements of the South Dakota Constitution.

The reasoning and conclusion reached in **Matthews v. Linn**, supra, would apply equally as well to House Bill No. 27. The language of Section 10 of the Enabling Act which calls for a public auction and extended advertisement of the sale seems clearly to contemplate a public sale as defined in **Matthews v. Linn**, supra. House Bill No. 27 contemplates a sale after the public auction has taken place. This is not permissible under the language of the Enabling Act. Therefore, without voicing an opinion as to any other state lands, it is our conclusion that House Bill No. 27 is unconstitutional because it would involve these lands granted and confirmed by the Enabling Act and it violates that portion of the Enabling {36} Act quoted above which was specifically adopted as part of the Constitution of New Mexico by Article XXI, Section 9.