Opinion No. 88-35

May 23, 1988

OPINION OF: HAL STRATTON, Attorney General

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TO: William R. Humphries, Commissioner of Public Lands, Post Office Box 1148, Santa Fe, New Mexico 87504

QUESTIONS

May the Commissioner of Public Lands exchange state trust lands for lands of equal value whether held in private ownership or by other state agencies, local governing bodies, trust land beneficiary institutions and federal agencies, other than the Department of the Interior?

CONCLUSIONS

No.

ANALYSIS

To determine whether the Commissioner of Public Lands (Commissioner) has authority to make the exchanges set forth in the inquiry, we must consider relevant provisions of the New Mexico Constitution, the Enabling Act, and applicable statutes. On June 20, 1910, Congress passed the Enabling Act, which allowed and regulated New Mexico's and Arizona's admission into the union. Act of June 20, 1910, 36 Stat. 557. Pursuant to the Enabling Act, the federal government transferred approximately thirteen million acres of land to New Mexico to be held in trust for certain specific purposes. 15 Nat'l. Resources J. 581, 583 (1975). The people of New Mexico consented to the terms and conditions of Congress' grant of the trust lands. See N.M. Const., article XXI, § 9. Thus, the Enabling Act became part of New Mexico's fundamental law as if it had been incorporated directly into the New Mexico Constitution. **State ex rel. Interstate Stream Comm'n. v. Reynolds,** 71 N.M. 389, 397, 378 P.2d 622, 627 (1963). Section 2 of the Enabling Act requires the federal government's and the state's mutual consent to change the compact.

Twenty-three states, including the original thirteen states, do not have enabling acts. Another twenty-three states have enabling acts that give full power and authority to the states' legislatures to determine the manner of trust land disposal. Because of repeated abuses and fraud in disposal of trust lands that occurred in these states, Congress imposed stricter conditions for disposal of trust lands in New Mexico's and Arizona's enabling act. **Gladden Farms, Inc. v. State,** 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981); **Murphy v. State,** 65 Ariz. 338, 351, 181 P.2d 336, 344 (1947). Senator

Beveridge of Indiana, Chairman of the Congressional Committee on Territories in 1910, recommended rejecting the House bill proposed as the enabling act for Arizona and New Mexico, as it contained no safeguards for the disposal of trust lands. He supported the Senate bill, because it "provides that the land shall be sold and leased only after appraisement and advertisement. We have thrown conditions around land grants in the several states heretofore ... but not so thorough and complete as this...." 45 Cong. Rec. 8227 (1910).

Section 10 of the Enabling Act controls the manner in which New Mexico can dispose of trust lands. In pertinent part, it states:

It is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the land producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than that for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust; provided, however, that the state of New Mexico, through proper legislation, may provide for the payment, out of the income from the lands herein granted, which land may be included in a drainage district, of such assessments as have been duly and regularly established against any such lands in properly organized drainage districts under the general drainage laws of said state.

No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. 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; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner and after the notice by publication thus provided for sales and leases of the lands themselves: provided, that nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

Every sale, lease, conveyance of contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the constitution or laws of the said state to the contrary notwithstanding.

It shall be the duty of the attorney general of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

(Emphasis added). For a sale or lease of trust lands to be valid, Section 10 thus requires that the lands be sold or leased to the highest bidder at a public auction after notice of such auction is published at least once a week for ten successive weeks in a newspaper of general circulation. Any sale, lease, conveyance or contract pertaining to the trust lands that does not conform substantially with its provisions is null and void.

Article XIII, section 2 of the New Mexico Constitution provides: "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 case law in New Mexico consistently has characterized the Commissioner as having substantial discretionary authority in managing the state's public lands. **Burguete v. Del Curto,** 49 N.M. 292, 295, 163 P.2d 257, 259 (1945); **State ex rel. Otto v. Field,** 31 N.M. 120, 143, 241 P. 1027, 1041 (1925). However, the Commissioner is subject to the restrictions of the Enabling Act, the New Mexico Constitution, and the statutes enacted pursuant thereto. **Application of Dasburg,** 45 N.M. 184, 191, 113 P.2d 569, 573 (1941). Therefore, express restrictions in these laws limit the Commissioner's discretion. He may not grant any rights to public lands contrary to law by circumvention, indirection or otherwise, regardless of motive or validity of any underlying justification. Id. The Supreme Court also has stated that the Commissioner is an agent for the state and has only those powers given by the constitution and laws of the state as limited by the Enabling Act. **State ex rel. Del Curto v. District Court of the Fourth Judicial Dist.,** 51 N.M. 297, 306, 183 P.2d 607, 613 (1947).

The dispositive question is whether the Commissioner has authority to exchange property under the Enabling Act. The Enabling Act does not use the word "exchange." Therefore, we must determine whether the drafters intended the word "sale" in the Enabling Act to encompass an "exchange."

The New Mexico Supreme Court has defined "sale" as the passing of the title to and possession of, property for money that the buyer pays or promises to pay. **Raton Wholesale Liquor Co. v. Besre,** 49 N.M. 121, 125, 158 P.2d 295, 297 (1945). Courts in other jurisdictions on many occasions have distinguished an "exchange" from a "sale" of real property. The Texas Court of Civil Appeals decided that an "exchange" occurred if one party passed property to another and received property in return without any agreed upon value to the property. **Griswold v. Tucker,** 216 S.W.2d 276, 278 (Tex. Civ. App. 1948). In an earlier case, the court determined that an exchange of land differs from a sale in that the parties place no fixed money price or value on either of the exchanged properties. **Liberto v. Sanders,** 248 S.W. 120, 121 (Tex. Civ. App. 1922). See also **Hawn v. Malone,** 188 Iowa 439, 443, 176 N.W. 393, 395 (Iowa 1920) (the test for distinguishing between a sale or an exchange of real property is a sale contains a fixed price); **Herring Motor Co. v. Aetna Trust & Savings Co.,** 87 Ind. 83, 89, 154 N.E. 29, 31 (Ct. App. 1926) (the transaction is an "exchange" where the parties transfer two properties and do not set a price for either parcel). In a federal tax case, the District of Columbia Circuit Court of Appeals concluded that a transaction is an exchange if the parties set no price for the property. If they do, it is a "sale." **Gruver v. Commissioner,** 142 F.2d 363, 366 (D.C. Cir. 1944).

Under the terms of the Enabling Act, the Commissioner must appraise trust land prior to any disposition. The required appraisal sets a monetary value for the trust land to be conveyed. Consequently, any disposition of trust lands will be for an agreed upon value and will result in a "sale" rather than an "exchange." Because of the mandatory appraisal, it is not possible for the Commissioner to engage in "exchanges" of trust land for other land. The conveyances by the Commissioner will be "sales," and moreover must comply with the Enabling Act's requirements, including appraisal, advertisement and public auction with sale to the highest bidder.[1]

Furthermore, Section 19-7-9 NMSA 1978 restricts the manner of payment that the Commissioner can accept for the sale of property:

Any state lands offered for sale by the commissioner of public lands shall be sold at the commissioner's discretion for cash or upon payment of one-tenth of the purchase price in cash and payment of the balance in thirty equal annual installments with interest on the principal balance at a rate to be set by the commissioner in the notice of auction pertaining to the particular sale in advance....

This section requires the sale of property for cash or cash and installment payments with interest. It does not permit the acceptance of real property or other non-monetary, in-kind consideration.

This prohibition against exchanges of land is equally applicable to exchanges with another state agency. In 1981, the Supreme Court of Arizona considered a sale of trust land to a state agency in **Gladden Farms, Inc. v. State,** 129 Ariz. 516, 633 P.2d 325. In that case, the state land department sold state trust land to a state agency at the appraised value without advertisement, auction or bid. The petitioners, two private

corporations, were willing to bid more than the appraised value for the land at a public auction.[2]

The respondents argued that **Arizona Highway Dept. v. Lassen,** 385 U.S. 458 (1967), had created an exception to the Enabling Act's requirements, allowing state agencies to acquire trust lands for public purposes without advertisement, auction and sale to the highest and best bidder. The respondents relied on the following language from Lassen:

The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands. We see no need to read the Act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation.

385 U.S. at 464. The Arizona Supreme Court refused to read Lassen so broadly:

The United States Supreme Court held that for highway purposes, the state could obtain an easement or right of way without auction and sale. That is as far as the court went and no further. No cases have been cited to us and we have found none which hold that, as to the transfer of an interest in fee, the requirement of advertisement, auction and sale to the "highest and best bidder" is waived when the sale is to a state agency. As noted above, one of the purposes of the specific language in the Enabling Act was to assure that the trust lands generated the appropriate if not maximum revenue for the support of the common schools. The fact that the sale is to another state agency does not necessarily provide the protection to the trust lands that Congress intended. For example, an appraisal could be fairly made and the price received for public sale might still be higher than the appraised value. 129 Ariz. at 520, 633 P.2d at 329.

The reasoning in Gladden Farms is persuasive. Because Arizona shares a parallel Enabling Act with New Mexico,[3] its courts' decisions interpreting its Enabling Act should be given deference. The requirement of strict compliance with the Enabling Act's advertisement and auction provisions is additional authority that the Enabling Act prohibits an "exchange" of trust lands to a state agency without an appraisal. We therefore conclude that the Commissioner of Public Lands may not exchange state trust lands for lands of equal value held by private persons, local governing bodies, trust land beneficiary institutions, state agencies or federal agencies other than the Interior Department.[4]

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 New Mexico's Section 10 and Arizona's Section 28 originally were identical. The Arizona section has been amended to add the following: "The state of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: Provided, that such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder." No such amendment has been appended to New Mexico's Section 10.

n2 The court distinguished cases in Arizona and New Mexico that held that states could grant easements over trust lands for highways. **Grosetta v. Choate,** 51 Ariz. 248, 75 P.2d 1031 (1931); **State v. Walker,** 61 N.M. 374, 301 P.2d 317 (1956). It should be noted that even though the courts in Arizona and New Mexico agreed that easements over trust lands could be granted for highways, the New Mexico court in Walker insisted that the highway commission pay the fair appraisal value for the easements while the Arizona court required no such payment. The court in Gladden Farms distinguished the conveyance of an easement from the conveyance of a fee, emphasizing that the Enabling Act's restrictions did not apply to the conveyance of easements or rights of way for highways. The Arizona court cited **Arizona Highway Dept. v. Lassen,** 385 U.S. 458 (1967), where the United States Supreme Court rejected the argument that the restrictions in the Enabling Act applied where less than a fee interest was obtained: "The trust will be protected, and its purpose entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program." 385 U.S. at 465.

n3 Sections 1 through 18 of the Enabling Act apply to New Mexico; sections 19 through 35 apply to Arizona.

n4 New Mexico has exchanged state lands for land owned by the federal government through the Secretary of Interior pursuant to article XXI, section 11 of the New Mexico Constitution and Section 19-2-12 NMSA 1978. We express no opinion on the legality of these exchanges.