Opinion No. 35-1204

October 23, 1935

BY: FRANK H. PATTON, Attorney General

TO: Honorable Frank Vesely, Commissioner of Public Lands, Santa Fe, New Mexico.

*{*84}* Your letter dated October 17th and signed by Mr. Carl B. Livingston has not been answered sooner due to the importance of the question and the amount of time which I have deemed necessary to devote to it. Your specific question is as follows:

"Under the provisions of Section 8 of the Taylor Grazing Act, may the State exchange its lands where the title is vested in the State, for other lands of the Federal Government?"

The Taylor Grazing Act confers upon the Secretary of the Interior the right to establish grazing districts in the various states and Section 8 of said Act sets forth the procedure for the exchange of lands when certain lands which are privately owned are within the exterior boundaries of such grazing district.

The section does not confer any specific authority upon the State to exchange public lands which are within the exterior boundaries of an established grazing district, but the last sentence in the section does confer upon the Secretary of the Interior the power to proceed for the exchange of lands in the same manner as that provided for the exchange of privately owned lands and to cooperate fully with the State to that end.

We may safely say, therefore, that it was contemplated by this section that public land states might possibly desire to make exchanges of land under these conditions and, therefore, power is granted to the Secretary of the Interior to proceed with his part of the exchange and in behalf of the United States.

We may say further, at this point, that so far as any power for exchange is conferred upon the State by the Taylor Grazing Act that such is not the case and we are therefore compelled to look to other provisions of law in order to ascertain what power the State has to make such exchanges.

Under Act of June 21, 1898, 30 Statutes 484, there was granted to the Territory of New Mexico for school purposes Sections 16 and 36 in each township and under the Act of June 20, 1910, 36 Statutes 557 -- 561, which is now known as Section 6 of the Enabling Act, the State was granted sections 2 and 32 in each township in the State also for the support of the common schools.

The material part of Section 6 of the Enabling Act, the latter act just mentioned, is as follows:

"That in addition to sections sixteen and thirty-six, heretofore *{*85}* granted to the territory of New Mexico, sections two and thirty-two in every township in said proposed state not otherwise appropriated at the date of the passage of this act are hereby granted to the said state for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any act of congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desertland entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the revised states are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein:"

Your attention is directed to the fact that the above quoted portion of Section 6 of the Enabling Act refers to Sections 2275 and 2276 of the revised statutes and these sections are made applicable thereto and to the selection of lands in lieu thereof to the same extent as if said sections were mentioned therein.

These sections, in order to be fully understood, must be set forth and we, therefore, quote them as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, not-withstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.' And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six

therein; but such selections *{*86}* may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

"Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land; Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

The case of California vs. Desert Waters, Oil and Irrigation Company, 243 U.S. 415, appears to be nearer in point than any other case we have been able to find and we are led to believe that the authority set forth in the ruling of the Court in that case is controlling here.

In that case the controversy was over the precise question whether when a forest reservation subsequently proclaimed included within its limits a school section surveyed before the establishment of the reservation the State could, under section 2275, Revised Statutes, herein quoted, waive its right to such section and select other lands in lieu thereof.

The court interpreted said Section 2275 and held that the first part of the section which gave the right to select lands in lieu of such as were settled upon with a view to pre-emption or homestead was clearly limited to settlements made before survey in the field and the court apparently was of the opinion that such section also, in the absence of a proviso which we will hereafter mention, only contemplated unsurveyed lands found to be mineral or included in a reservation.

However, the court went further and interpreted the proviso in the said section, which reads as follows:

"Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or

embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.

The court was of the opinion that this proviso operated to give the State a right to waive its right to lands included in a forest reservation after survey. In other words, the court felt that the State could waive its right to certain lands even after the State had acquired title to such lands.

*{*87}* Of course, it must be understood that in the interpretation of said Section 2275 we consider said section in reality as a part of the Enabling Act and it must be read in connection with said Act.

To all intents and purposes it occurs to us that the establishment of a grazing district by the Secretary of the Interior is the same as the establishment of a forest reservation or some other federal withdrawal of public lands for federal purposes and assuming this premise to be correct naturally we would arrive at the same result as that obtained in the California case above cited.

Following this line of reasoning, we are, therefore led to conclude that the State of New Mexico, even where it has acquired title to the land, may waive its right to such land, relinquish same to the Federal Government and accept other lands in lieu thereof when such lands have been included in a reservation, or, as in this case, within the exterior limits of a grazing district established by the Secretary of the Interior under the provisions of the Taylor Grazing Act.

It is our belief that this conclusion is correct unless the Constitution of the State places a limitation upon this right to waive and relinquish, but we have checked all of the constitutional provisions which, in our opinion, have any bearing upon this question at all; these provisions being as follows: Section 9 of Article XXI, Section 1 of Article XIII, Section 2 of Article XII and Section 2 of Article XIII. From a close study of these constitutional provisions, it is our belief that they do nothing more than confirm the grants made to the State under the various conditions imposed by the Enabling Act and that so far as any conveyance of power is concerned, they are negligible when compared to the state of facts here under consideration.