Opinion No. 55-6111

February 21, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. E. S. Walker, Commissioner of Public Lands, State Land Office, Santa Fe, New Mexico. Attention: Legal Department

Your request for an opinion dated February 8, 1955, has been received. The problem presented arises out of the following situation. In 1917 the State of New Mexico, through the Commissioner of Public Lands, sold at public auction the following described lands:

"All of sections 2, 4, 6, 8, 10, 12, 14, 18, 20, 22, 24, 26, 28, 30, 32, and 34, Township 9, Range 11 W."

The purchaser assigned his interest to William C. Reid, and on January 11, 1918, a contract for the purchase of public lands was entered into between William C. Reid and the State of New Mexico. This contract did not mention timber then standing upon the lands. However, in the notice of the original sale the timber was mentioned. On January 2, 1920 the State issued its Patent No. 190 to William C. Reid. This was a separate conveyance of the timber on the above lands. The contract for purchase of the land was cancelled subsequently, January 18, 1928, because payments were not kept up.

An heir of William C. Reid is now claiming the timber upon the land contending that William C. Reid had a perpetual interest in said timber by virtue of Patent No. 190. Your inquiry is whether or not this heir has an interest in the timber on said lands at the present time.

The determination of this question requires construction of Patent No. 190 made by the State of New Mexico to William C. Reid on January 2, 1920 in connection with laws in existence at that time. Laws 1912, Chapter 82, Section 65 was in effect and read as follows:

"The Commissioner may sell the down, large growth and matured timber on any State lands in the manner and after the notice provided by law governing sales of State lands. The sale of any such timber shall not be construed as a sale of the land on which the same is situate. No growing or matured timber less than twelve inches in diameter inside of bark, three feet from the butt, shall be sold; provided, that timber not less than nine inches in diameter, inside of bark, three feet from the butt, may be sold for railroad ties, mine props or fence posts."

Viewing the situation in a light most favorable to claimant we must assume, as Patent No. 190 recites, that the sale of the lands and the sale of the timber thereon were two separate transactions. The sale of the timber thus would be governed by the above provisions of State law in existence at that time.

The only possible construction that the above statute permits is that the Commissioner, if he were selling the timber alone, could sell only timber larger than specified sizes. Thus at any one time there would be only so many trees on a particular tract which could be the subject of sale. The balance could not be sold. As to those trees smaller than the prescribed saleable sizes their sale must await the time that they grew into the specified sizes.

Viewed thus, and it is impossible to hold otherwise, William C. Reid did not acquire an interest in the timber in perpetuity. At the time of the sale he acquired an interest in 600,000 B.M. of timber on that land, and it was timber the size of which was prescribed by statute. The balance of the timber belonged to the owner of the land. It happens that in this case William C. Reid was also purchasing the land from the State under contract. He thus may have had an interest in that timber which could not have passed to him by virtue of Patent No. 190, but this interest was cancelled out when the purchase contract on the lands was cancelled for non-payment.

Even were we to disregard the statute and other circumstances above, it still must be held that Patent No. 190 did not convey an interest in the timber in perpetuity. The general rule being, that, unless in a conveyance of timber the intention is clearly manifested that a perpetual interest is being created, the vendee receives a limited interest. Hay vs. Chehalis Mill Company, 172 Wash. 102. That intention cannot be ascertained from Patent No. 190. For example, one of the recitals states that one of the reasons for the grant is to give the purchaser time in which to cut and remove the timber. Further the purchaser is given "such time within which to cut and remove the timber as to him may seem meet and proper." This indicates, that, although the purchaser was to have a large measure of discretion as to when he should cut, he must nevertheless cut and remove. The fact that the discretion is left with the purchaser as to when he should remove does not indicate of itself a grant in perpetuity. Jones vs. Gibson, 118 W. Va. 66; Livingston vs. Drew Lumber Company, 82 Fla. 508.

Thus if an interest was acquired in a certain amount of timber the next question is whether or not that interest is still alive today.

Generally, if the conveyance states no time for removal of the timber, it must be removed within a "reasonable" time. Hay vs. Chehalis Mill Company, supra; 54 C. J.S., Section 19 (2) (a). It is our opinion that under no circumstances could thirty-five (35) years be construed as less than a reasonable time for having removed whatever timber William C. Reid, or his successors in interest, owned.

It is, therefore, the opinion of this office that William C. Reid or his successors in interest have no present interest in any of the timber upon the above described lands.

Trusting that this fully answers your inquiry satisfactorily, I am

By: Santiago E. Campos

Assistant Attorney General