Opinion No. 59-195

November 24, 1959

BY: OPINION OF HILTON A. DICKSON, JR., Attorney General

TO: Mr. Murray Morgan Commissioner of Public Lands State Capitol Building Santa Fe, New Mexico

QUESTION

QUESTION

Does Attorney General's Opinion No. 59-151, insofar as it conflicts with Attorney General's Opinions No. 5781 and 5781-A, operate to overrule these earlier opinions?

CONCLUSION

Yes.

OPINION

*{*299}* **ANALYSIS**

The earlier opinions cite as authority for the holding therein the case of **United States v. Swope,** 16 Fed. 2d 215 and **State ex rel. Shepard v. Mechem,** 56 N.M. 762, 250 P. 2d 897. It is interesting to note that the cases of **Burgete v. Del Curto,** 49 N.M. 292, 163 P. 2d 259, and **State v. District Court of Fourth Judicial District,** 51 N.M. 297, 183 P. 2d 607, were omitted as authority although these cases, more clearly than any others, spell out the position and authority of the Commissioner of Public Lands.

In **Burguete v. Del Curto,** supra, the Court said:

"It's well settled in New Mexico that under the Enabling Act, our Constitution and the statutes based thereupon, the Commissioner of Public Lands has complete dominion, which is to say complete control, over state lands. State ex rel. Otto v. Field, 31 N.M. 120, 154, 241 P. 1041; Dasburg *{*300}* v. Atchison, T. & S. F. Ry. Co., 45 N.M. 184, 191, 113 P. 2d 569, 573. **This 'dominion' is, of course, subject to the restrictions imposed by the Enabling Act, the Constitution, and the statutes, and the manner of its exercise is subject to review by the courts."** (Emphasis Supplied).

Justice Brice, concurring specially, stated:

"We have stated in more than one case that the Commissioner of Public Lands has 'absolute dominion' over this state's lands. We qualified this in Ellison v. Ellison, 48 N.M. 80, 146 P. 2d 173, by stating 'subject to an appeal' of course to the State Supreme

Court. **But this dangerous doctrine should be clarified.** The Commissioner **has absolute dominion over the public lands only in the sense that he is the only one who is authorized to sell or lease such lands.** The fact is the law sells the land, and the Commissioner has only such affirmative authority as is given to him under the Constitution and the laws of this state as limited by the Enabling Act." (Emphasis Supplied)

The opinion continues and draws comparisons of the language of Article XIII, Section 2, of the New Mexico Constitution with almost identical provisions in the Constitutions of both Idaho and Colorado. The opinion quotes from **Balderston v. Brady,** 17 Idaho 567, 107 P. 493, 494 as follows:

"Now, there can be no question or doubt but that the 'direction, control and disposition of the public lands of the state' is vested in the State Board of Land Commissioners. It is equally clear and certain that this power must be exercised **'under such regulations as may be prescribed by law'.** Both of the foregoing sections of the Constitution contain the same provision as to this **limitation of power."** * * * (Emphasis by the Court).

Again, the Court quotes from **Walpole v. State Board of Land Commissioners,** 62 Colo. 554, 163 P. 848, 850 as follows:

"While the Board is a creature of the Constitution it can dispose of state lands **only under such regulations as may be prescribed by law;** and it has and can have no powers or functions other than those bestowed upon it by **legislative enactment."** * * * (Emphasis by the Court).

After quoting from the above cases, Justice Brice observes on page 302:

"The statements made in some of our opinions that the Commissioner has 'absolute dominion' over the state's lands is wholly erroneous; and may mislead the public and the Commissioner regarding his authority.

Subject to limitations stated in the Enabling Act and the state Constitution, the state has the same power over its lands as that of any other land owner."

In the case of **State v. District Court of Fourth Judicial District,** supra, the opinion of the Court upon a Motion for Rehearing, states in part as follows:

"It is to be regretted that the Commissioner of Public Lands was referred to in the Burguet opinion a number of times, when the reference should have been made to the state. The Commissioner of Public Lands is merely an agent of the state with such powers, and only such, as have been conferred upon him by the Constitution and laws of this state as limited by the Enabling Act." * * *

"The fact is the Commissioner of Public Lands has only *{*301}* such authority as has been granted to him by the Constitution and state laws, as limited by the Enabling Act."

The opinion on rehearing, written by Chief Justice Brice, who was a member of the New Mexico Constitutional Convention, quotes § 2, Article XIII, of the New Mexico Constitution, which is the grant of authority to the Commissioner. This section reads as follows:

"Sec. 2. 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."** (Emphasis by the Court).

In a later case of **Zinn v. Hampson,** 61 N.M. 407, the Supreme Court said:

"In selling lands belonging to the State and issuing patents therefor, the Commissioner of Public Lands is merely an agent of the State and has those powers given by law. State ex rel. Del Curto v. District Court of Fourth Judicial District, 51 N.M. 297, 183 P. 2d 607."

In addition to the comparisons made by the Court in the two above cited cases, it is interesting to note that the Oklahoma Constitution provides as follows:

"Art. 6, § 32. COMMISSIONERS OF THE LAND OFFICE -- AUTHORITY. The Governor, Secretary of State, State Auditor, Superintendent of Public Instruction and the President of the Board of Agriculture, shall constitute the Commissioners of the Land Office, who shall have charge of the sale, rental, disposal, and managing of the school lands and of other public lands of the State, and of the funds and proceeds derived therefrom, **under rules and regulations prescribed by the Legislature."** (Emphasis Supplied).

The Oklahoma Supreme Court construed the underlined language in the case of **State ex rel. Commissioners of Land Office v. Bright,** 261 P. 2d 875, saying:

"Section 32, Article VI, of the Oklahoma Constitution, creates the Commissioners of the Land Office and grants to them **full power** over the sale, rental, disposal and management of school lands of the state, under rules and regulations prescribed by the legislature. * * * The **Commissioners of the Land Office can only sell land or any interest therein by complying with the rules and regulations prescribed by the legislature."** (Emphasis Supplied).

The Enabling Act became a part of the Constitution of New Mexico by virtue of this State's compact with the United States. **Lake Arthur Drainage District v. Field,** 27 N.M. 183, 199 P. 112.

Under Section 10 of the Enabling Act, it is expressly declared that the State of New Mexico shall be the trustee for the land and for the natural products and money proceeds therefrom. The Land Commissioner is the agent for the State to carry out the terms of this trust in certain instances only. For instance, the Land Commissioner is not

the State's agent for the purpose of investing the money proceeds derived from the land. This obligation, under the terms of the trust set up by the Enabling Act is now, by statute, placed in the hands of an investment council. Formerly, this obligation was on the State Treasurer, with the approval of the Governor and the Secretary of State. Neither the Land Commissioner nor the Investment Council derive their authority to carry but their respective duties under the trust from the Enabling Act. Their authority is *{*302}* derived from either the Constitution or from statutory law. In view of the wording of the section setting out the powers and duties of the Land Commissioner and expressly making them subject to such regulations as may be provided by law, the only test a statute must meet which has for its purpose, directly or indirectly, the carrying out of the obligations of the State's trust is that it not conflict with the Enabling Act or other acts of Congress. Particularly is this true where the regulation by the Legislature does not directly effect the Commissioner's authority to direct, control, care or dispose of the public lands.

The **Swope** case, supra, did not involve the question of whether the Commissioner of Public Lands had the power to expend trust monies for administrative costs. The Commissioner was operating under Section 5183, Code of 1915. The question presented in the **Swope** case was **whether or not the State had the authority to pass such legislation under the Enabling Act.**

"The plaintiff's claim is that the lands were granted by the United States to the state of New Mexico for designated uses, and that the state cannot legally use any portion of the lands or their proceeds for the purpose of paying any expense of the administration of the trust." **United States v. Swope,** supra.

We have read and noted the case of **State ex rel. Shepard v. Mechem,** 56 N.M. 762, 250 P. 2d 897. This case is not in point on the problem before us.

We now come to a case relied on for the proposition that the State's Personnel Act cannot apply to the State Land Office. This case is **Hernandez v. Frohmiller,** 68 Ariz. 242. The State of Arizona had passed a Civil Service Act of an all embracing character. The right to hire and fire was controlled along with the power to classify and adjust pay scales. Tenure was regulated, etc. The Supreme Court of Arizona held that the Civil Service Act referred to above was unconstitutional as applied to the Board of Regents since it infringed upon their general supervision of the schools which was the authority granted them under the constitution and which authority was made subject to regulations under the law.

First, it can be said that the cases are distinguishable because the Personnel Act of 1959 is not a Civil Service Act and is quite dissimilar from the one involved in the Arizona case. Our Act does not purport to control the hiring and firing of employees, nor does it attempt to arrange tenure.

Secondly, while the Arizona case might be argued as precedent in a case where our own Supreme Court had not spoken, it cannot be given any weight now in light of the

clear pronouncements already laid down by our Supreme Court on the subject. We have already made our law on the subject.

Thirdly, it appears from the case of **Board of Regents v. Frohmiller,** 69 Ariz. 60, that the Arizona Court felt it had gone too far in the **Hernandez** case and was already beginning to forsee the difficulty which would follow as a result of the language used in that case. It stated in the case of **Board of Regents v. Frohmiller,** supra:

"It would seem that the desire of the Board of Regents to be an autonomous body, freed of all shackles, was given impetus by our recent decision in Hernandez v. Frohmiller, 1949, 68 Ariz. 242, 204 P. 2d. 854, 860. * * * The Board argues that legislation permitting the auditor to question claims arising out of its contractual authority is contrary to constitutional provisions vesting in the Board the general conduct and supervision of the University and State College citing Arizona Constitution, *{*303}* Article 11, Sections 1, 2, 3, 4, and 5. **We do not believe it is or was intended that this grant of power carried with it the power, authority, or privilege to spend the state's monies at will and with no review** * * * **The fact that the University is incorporated does not make it any the less an arm, branch or agency of the state for educational purposes, and affects in nor particular the power of the legislature over it."**

It appears then, that Arizona, like New Mexico, in some of its earlier cases dealing with the Commissioner of Public Lands, has used language which it now regrets. New Mexico has changed its views and has settled down to the holding in **State ex rel. Del Curto v. Fourth Judicial District,** supra. Arizona is just embarking on the rocky road of limiting or overruling the **Hernandez** case.

The Personnel Act of 1959 applies to all State executive agencies. The State Land Office is an executive State agency and comes under the Act.

Insofar as this opinion and Opinion No. 59-151 conflicts with earlier Opinions No. 5781 and 5781-A, those opinions are hereby expressly overruled.

By: B. J. Bagget

Assistant Attorney General