Opinion No. 68-122

December 18, 1968

BY: OPINION OF BOSTON E. WITT, Attorney General

TO: Board of County Commissioners County of Eddy County Courthouse Carlsbad, New Mexico

QUESTIONS

FACTS

1. On March 19, 1964, the Commissioner of Public Lands contracted under Contract No. 5406 to sell to H. W. Potter the S 1/2, Sec. 34, T.21S., R.26E., "subject to the reservations and conditions hereinafter expressed" and "subject to valid, existing rights, easements, rights of way and reservation." None such are mentioned in the contract but it carries the typed notation on its face "SALE NO. 4406 (COMMON SCHOOL LANDS.)"

2. Notice Of Public Auction on Sale No. 4406 was published in the Carlsbad **Current Argus** prior to the sale and included the following language:

Said above described land is being sold subject to the right of the Commissioner of Public Lands of the State of New Mexico, which is expressly reserved to issue or grant an easement upon, over and across said land to the Water Shed Association for the purpose of building, constructing and maintaining Flood Control dikes, and for the installation of any other equipment necessary to the operation and maintenance of same, and covering 12 acres, more or less.

3. On January 20, 1965, the Commissioner of Public Lands granted to Hackberry Draw Watershed District Right-of-Way Permit No. RW-16136 over some 10.6 acres of this land for flood retarding structures "subject to all valid, existing rights." The grant also provides:

In crossing any right-of-way for a highway . . . [Hackberry Draw] will exercise due care so as not to interfere with said right-of-way.

. . .

and

. . . [Hackberry Draw and assigns] agree carefully to avoid destruction or injury to improvements . . . lawfully upon said premises . . . and pay the reasonable and just damages for such injury or destruction, if any, arising from construction, maintaining such flood retarding structures.

This permit was filed for record in Eddy County on February 1, 1965.

4. On June 4, 1965, H. W. Potter and wife assigned all their interest in Contract No. 5406 to Don R. Miehls.

5. At an unstated date, presumably after recording of the Hackberry Draw permit, a bladed road was constructed by Miehls across the subject lands intersecting the right-of-way described in the Hackberry Draw permit. The road was dedicated by a grant of easement from Miehls and his wife to Eddy County on December 8, 1965, recorded in the County Clerk's Office on March 23, 1966.

6. In late April or early May, 1967, Hackberry Draw constructed a ditch which crossed the road and contends that its contractor "held up cutting the road until after we were advised by Mr. Cathey that the County Commissioners now recognize the validity of the District's easement, and until one of the County road Supervisors had set up road blocks on the road on each side of the location where the cut was to be made."

1. Does Hackberry Draw have a lawful interest in the property?

2. If so, is the County's interest in the road easement superior to that of Hackberry Draw in the ditch right-of-way?

3. In any case, is Hackberry Draw responsible for reconstruction necessary to repair the road?

4. Is the County nevertheless estopped or did it waive its right to assert this responsibility?

CONCLUSIONS

1. Yes.

2. No.

3. Yes.

4. No.

OPINION

*{*198}* **ANALYSIS**

As to questions Nos. 1 and 2, it is our opinion that Hackberry Draw has a lawful right-of-way interest in the property and that Eddy County has no superior right to use the land from a title standpoint.

The authority of the Commissioner of Public Lands to grant a right-of-way easement over state land is specifically provided for by law (§ 7-8-61, N.M.S.A., 1953 Compilation). That this authority can be exercised through a reservation such as stated in the Notice of Public Auction in this case and is still adequate notice to a purchaser has long been established (**State ex rel. Otto v. Field,** 31 N.M. 120, 241 Pac. 1027)

In our view, no question arises as to the right or duty of the Commissioner of Public Lands to cancel the contract of sale on the grounds of mistake or to modify it to show the ditch right-of-way reservation (§ 7-8-8, N.M.S.A., 1953 Compilation; see also **Application of Dasburg,** 45 N.M. 184, 113 P.2d 569). Nor is there a real question of whether the advertisement, bid, and acceptance are merged, and therefore possibly lost, in the contract (see 17A CJS **Contracts** § 381, p. 452).

The reason these issues are not present is simply that the valid reservation contained in the Notice of Public Auction was incorporated into printed-form Contract No. 5406 by the typed-in reference therein to "SALE NO. 4406, COMMON SCHOOL LANDS." (17 Am. Jur. 2d **Contracts** §§ 263, 271, 288). There would seem to be no other reason for the reference and under the general rules cited in the authorities above such a reference to matters outside the contract may be used to determine the true intention of the parties.

Being so incorporated, the reservation is part of the contract, presumed to be known to all who claim under that document, and the subsequent granting of a right-of-way to Hackberry Draw was without infirmity insofar as the contract of sale is concerned.

*{*199}* From this, it is clear that the County's possessory interest in the road under the grant from Miehl is not superior to that of Hackberry Draw from a title standpoint.

Proceeding to the third question, it is our opinion that under the explicit terms of its right-of-way grant, Hackberry Draw is responsible for repairing the road.

While §§ 55-3-1, et seq., N.M.S.A., 1953 Compilation, impose on the County the duty of maintaining county roads and § 55-3-17 provides for a county bridge fund for the building of bridges across canals, drainage and irrigation ditches, these provisions do not prevent the County from relying on and asserting the lawful obligations of others to repair, or pay for the repair of, roads endangered or damaged by their actions. (See, for example, § 7-8-62 and §§ 55-6-9 and 55-6-10, N.M.S.A., 1953 Compilation).

Hackberry Draw in exercising its right to build flood retarding structures on this land was expressly required, as a condition of its grant, as follows:

In crossing any right-of-way for a highway . . . [Hackberry] will exercise due care so as not to interfere with said right-of-way.

. . .

and

. . . [Hackberry and assigns] agree carefully to avoid destruction or injury to improvements . . . lawfully upon said premises . . . and pay the reasonable and just damages for such injury or destruction, if any, arising from construction, maintaining such flood retarding structures.

This undertaking is plainly for the benefit of those having interest in improvements "lawfully upon said premises" crossed by the ditch right-of-way, including specifically an undertaking of due care not to interfere with a highway right-of-way. This, in our opinion, puts the duty of repairing or paying for the repair of the road on Hackberry Draw. (39 Am. Jur. 2d **Highways,** § 85; 25 Am. Jur. 2d **Drains** and Drainage Districts, § 35).

Does it matter that the road may have been constructed after the ditch right-of-way was made specific by grant and filed for record? We think not. Nothing in the grant so provides. Nothing in the contract of sale so provides. To say that Hackberry Draw's undertakings apply only to a road constructed before its grant makes them meaningless, a result which cannot have been intended. The language of the grant expressly imposes a duty of due care in "crossing **any** right-of-way for a highway" not to interfere therewith. (our emphasis) This clear condition speaks as of the time the crossing is made, not as of the time of grant (see § 7-8-62, supra).

Finally, on question three, it should be pointed out that if Hackberry Draw has no lawful easement in the property, then its obligation to repair the road is all the more clear (Section 55-6-10, supra).

Question four raises the issue of estoppel or waiver. The evidence submitted to us on this question is incomplete and subject to some dispute. However, viewing what we have in the light most favorable to Hackberry Draw, it is our opinion that the evidence is insufficient to establish an estoppel against or waiver by the County to assert its claim.

Recognition by the County of the "validity" of the ditch right-of-way and placing traffic barriers at the site was not such conduct as could have created an estoppel by inducing Hackberry Draw to do something it would have not have done, to its disadvantage *{*200}* (**state v. City Council of Hot Springs,** 56 N.M. 118, 241 P.2d 100).

The same conduct is not such an intentional abandonment or relinquishment of a known right as would constitute a waiver by the County. (**Chaves v. Gomez,** 77 N.M. 341, 423 P.2d 31).

It is therefore our opinion that the Hackberry Draw Watershed District is responsible for reconstruction necessary to repair this County road. And, under its enabling legislation, there is no limitation on either the authority or duty of the District to do so (Sections 45-5-19, et seq., N.M.S.A., 1953 Compilation).

By: Roy G. Hill

Deputy Attorney General