Opinion No. 69-67

June 19, 1969

BY: OPINION OF JAMES A. MALONEY, Attorney General Justin Reid, Assistant Attorney General

TO: Alex J. Armijo, Commissioner of Public Lands, P.O. Box 1148, Santa Fe, New Mexico

QUESTIONS

FACTS

Rancher "A" holds a five year term grazing lease embracing state owned lands. This lease has three years of the five year term yet to run and will expire on October 1, 1971. Rancher "A's" neighbor, Rancher "B" holds an identical grazing lease on the adjacent land except that his lease has four years yet to run expiring on October 1, 1972.

Rancher "B" has entered into a contract to sell his entire ranching unit including both state and patented lands together with improvements thereon to Rancher "A". As part of the assignment procedure "B" has filed a relinquishment of his lease to the state in favor of Rancher "A". Rancher "A" has now requested that he be permitted to relinquish his lease to the Commissioner and have the Commissioner issue him a new five year lease commencing as of October 1, 1968 and expiring October 1, 1973. The new lease would embrace all of the land in both original leases and would be at the same rental rate.

Rancher "A" gives as his reason for wanting this combined five year lease that it would be more convenient for bookkeeping purposes and would be less trouble for the Land Office to administer and, further, that he proposes to mortgage the entire ranch unit to the bank as security for a loan which would be used in part to pay off the present small balance on his existing loan and to pay Rancher "B" for his patented land, his state lease, and the ranch improvements. Part of the funds would also be used to realign fences and to establish new stock waterings. The bank has advised that it will not make the loan unless the Commissioner will agree to the issuance of the five year lease.

Rancher "A" is willing to sign an affidavit to the effect that to his best knowledge no third person is interested in leasing or purchasing the land from the state, and a search of the Land Office records does not reveal that a third party has made inquiry concerning leasing or purchasing the land.

In other somewhat similar cases holders of agriculture leases often request that they be allowed to relinquish their state leases, which for instance may have one, two, or three years to run, and that they be issued new five year leases in order to be able to put the state land together with their other private land into a Soil Bank Program. In this connection the Government does not permit a farm unit to be put into the program

unless the leases are at least five years duration, the reason being that time is needed to insure that a grass cover will be established.

QUESTIONS

1. Would it be legal for the Land Office to accept relinquishments and issue new five year leases upon application of the former lessee such as Rancher "A" in the foregoing example?

2. If your answer to question No. 1 is yes, would the absence of all of the reasons given by Rancher "A" in requesting issuance of a new five year term lease, or any combination thereof, alter your opinion as to the legality of such an issuance?

CONCLUSIONS

1. No, see analysis;

2. Not necessary to answer.

OPINION

*{*99}* Your letter requesting our opinion on the following matter has been given careful study in this office and this is the primary reason why our reply has been delayed. We will quote the clearly presented facts and questions as submitted in your request for opinion.

*{*100}* **ANALYSIS**

This request calls on us to review and state an opinion on the legality of a long standing practice of several commissioners of public lands in the issuance of grazing and agricultural leases on state lands. We realize the basic question presented is of substantial importance both to the Land Office and to ranching and farming interests in New Mexico. As far as we have determined, the question has not been directly asked or answered either in an opinion of this office or in a decision of our appellate courts.

For some years it has been the policy, as we understand, under procedures established by the land commissioner for a showing by the lessee of necessity and of no adverse or competitive interest, for leaseholders or grazing and agricultural leases to be accommodated in their need, for varying business reasons, to consolidate their holdings *{*101}* of leased lands in the manner stated above. What occurs in practice, we understand, is that a relinquishment of existing leases and an application for a new consolidated lease are filed and processed essentially in one transaction.

Our answer requires an analysis of the sources and extent of the authority of the commissioner of public lands.

The commissioner is an officer and agent of the state and its people and his authority derives from the law. **State ex rel Del Curto,** 51 N.M. 297 at 306, 183 P.2d 607 (1962). Our Supreme Court has further said in the case of **Sproles v. McDonald,** 70 N.M. 168 at 171, 372 P.2d 122 (1962).

He has complete dominion and control over all state lands. State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027. In his handling of the state lands he is subject to the restrictions set up in the Enabling Act, our state Constitution, and in statutes enacted pursuant thereto. Dasburg v. Atchison, A.T.&S.F. Ry. Co., 45 N.M. 184, 113 P.2d 569.

The Enabling Act provides, in the pertinent part of Section 10, as to all lands granted and confirmed by the United States to the state on its creation:

* * * *

Said lands shall not be sold or leased, in whole or in part, except to the highest bidder at a public auction

* * * *

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.

* * * *

Every sale, lease, conveyance, or 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 the Constitution or laws of the said state to the contrary notwithstanding.

Our state constitution provides for consent to the terms and conditions upon which these lands were granted. Article XXI, Section 9. It further provides in Article XIII, Sections 1 and 2 for disposition and control of these and other public lands, as follows:

All lands belonging to the territory of New Mexico, and all lands granted, transferred or confirmed to the state by congress, and all lands hereafter acquired, are declared to be public lands of the state to be held or disposed of as may be provided by law for the purpose for which they have been or may be granted, donated or otherwise acquired;

* * * *

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 legislature has provided by statute for the issuance of grazing and agricultural leases on state lands for a term "not exceeding five (5) years." § 7-8-31, N.M.S.A., 1953 Compilation.

The leaseholder, both grazing and agricultural, is given the right, with the consent of the commissioner, to relinquish the lease during its term and to have it cancelled. § 7-8-38, supra.

The holder of a grazing lease is given a preferential "right" to renew it subject to "notice" and the *{*102}* opportunity for competitive bids. § 7-8-51, supra.

Under his rule making powers (§ 7-8-46, supra) the commissioner has provided for a similar preference "right" for holders of agricultural leases. (Rule No. 6) These rules, when authorized by law and not contrary to it, have the effect of law. **State ex rel. McElroy v. Vesely,** supra.

We call attention to the quoted word "right" above to indicate some doubt as to the nature of this right in view of what is said in **State ex rel. McElroy v. Vesely,** 40 N.M. 19, 52 P.2d 1090 (1935); **Lusk v. First Nat'l Bank,** 46 N.M. 445 at 448, 130 P.2d 1032 (1942); and **Ellison v. Ellison,** 48 N.M. 80, 146 P.2d 173 (1944). It is sufficient to say it is not an absolute right.

The "notice" which is given is not one sent out by the Land Office, such as an advertisement for bids. It is, rather, simply contained in the records of the Land Office showing that a five-year lease has been granted and, in the normal course, will expire under its terms at the end of that time. Those who may wish to apply and bid for a lease on lands covered by an expiring lease are thus necessarily deprived of this "notice" in the case of a consolidation by relinquishment and reissuance.

While it is clear that the commissioner has a great deal of discretionary authority in managing the public lands of the state [State ex rel. Otto v. Field, supra; State ex rel. McElroy v. Vesely, supra; Burgete v. Del Curto, 40 N.M. 292, 163 P. 2d 257 (1945)], his discretion is limited by express provisions in the law and, it is equally clear, no rights in public lands may be given or acquired contrary to law by circumvention, indirection, or otherwise, no matter how valid or well-intentioned the underlying reason may be. **Dasburg v. A.T. & S.F. Ry. Co.,** supra.

It is our opinion that the consolidation procedure outlined above goes beyond limitations on the commissioner's discretion when the net result is a lease for more than five years without an opportunity for competitive bidding or adverse applications as provided by law. It does not and cannot matter in this case that the administrative interpretation and practice has been one of long standing. Neither the Enabling Act nor the plain terms of implementing legislation can be amended in this way.

In cases where the reissuance did not result in an extension beyond the anniversary date of the lease relinquished (for example, a lease having three years to run

exchanged for one for two years) or where leases relinquished and reissued unlawfully have since been further reissued under the preference procedures provided by law and regulation, we see no difficulty. Consolidations which have been accomplished in these ways are, in the first instance, within the authority of the commissioner and, in the second, have been cured of any defect by subsequent compliance with law.

We have written this opinion for general application. There is one area where we conceive it may not apply. In the case of agricultural leases on public lands not covered by the Enabling Act (i.e., otherwise acquired by the state) it is possible that the commissioner's procedures concerning consolidation may validly apply. We leave that for a future determination, should that be necessary or desirable.

With this qualification, the answer to your first question is no and it becomes unnecessary to answer the second.