Opinion No. 91-15

December 27, 1991

OPINION OF: TOM UDALL, Attorney General

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TO: Jim Baca, Commissioner of Public Lands, P.O. Box 1148, Santa Fe, New Mexico 87504

QUESTIONS

May the Commissioner of Public Lands exchange state trust lands for other public or private lands of equal or greater value?

CONCLUSIONS

Yes, the Commissioner of Public Lands may exchange state trust lands for other public or private lands of equal or greater value provided that the exchange transaction is in substantial conformity with the requirements of the Enabling Act. As a consequence of this conclusion, A.G. Op. No. 88-35 is hereby overruled.

BACKGROUND

In 1988, the Commissioner of Public Lands ("Commissioner") submitted this same question to the previous Attorney General who opined that such exchanges were not authorized. A.G. Op. No. 88-35. Due to the longstanding practices of the Land Office to the contrary and the significant impact of A.G. Op. No. 88-35 on the Commissioner's authority, the Commissioner has now resubmitted the question to the Attorney General's Office. We have reviewed the laws and cases concerning the Commissioner's power to dispose of public lands and conclude that A.G. Op. No. 88-35 is incorrect and must be overruled.

ANALYSIS

1. Power of the Commissioner to Exchange Public Lands

Under the New Mexico Constitution, the Commissioner of Public Lands is given the authority to dispose of the public lands of the state.

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.

N.M. Const. art. XIII, § 2. "Public lands" are declared by the New Mexico Constitution to be "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...." N.M. Const. art. XIII, § 1.

The term "acts of congress" noted in Article XIII, Section 2 of the New Mexico Constitution refers to the Enabling Act whereby in 1910 the U.S. Congress established terms for the future admission of New Mexico and Arizona into the union. Ch. 310, 36 Stat. 557 (1910). The Enabling Act includes grants of public land to the new state subject to certain terms and conditions and requires that the future state constitution include a consent to the terms and conditions of the land grant. Ch. 310, §§ 2, 10, 36 Stat. 557 (1910). The New Mexico Constitution includes a consent to the provisions of the Enabling Act concerning the terms and conditions of the land grant, N.M. Const. art. XXI, § 9, and as a result, the relevant provisions of the Enabling Act have become part of the fundamental law of New Mexico as if the provisions were directly incorporated into the state constitution. State ex rel. Interstate Stream Commission v. Reynolds, 71 N.M. 389, 378 P.2d 622 (1963). The provisions of the Enabling Act can only be amended with both an amendment to the New Mexico Constitution and the consent of the U.S. Congress. N.M. Const. art XIX, § 4, art. XXI, § 10.

The power of the Commissioner to convey public lands is controlled by Section 10 of the Enabling Act. Section 10 provides that all public lands will be held in trust and can be "disposed of in whole or in part only in a manner as herein provided..." Disposal of public lands "in any manner contrary to the provisions of this act, shall be deemed a breach of trust." Any conveyance of public lands not in substantial compliance with the Enabling Act will be null and void. Ch. 310, § 10, 36 Stat. 557 (1910).[1]

The authority of the Commissioner to "dispose" of public lands granted by the New Mexico Constitution and, with restrictions, by the Enabling Act includes the power to exchange public lands.[2] "Dispose" is a broad term commonly defined as "to transfer into new hands or to the control of someone else". Webster's Third New International Dictionary 654 (1986). An early United States Supreme Court case construing the power of a trustee to dispose of land under a will found that the term "to dispose of" is "very broad" and "would include the power to barter or exchange as well as the power to sell". Phelps v. Harris, 101 U.S. 370, 380, 381, 25 L. Ed. 855 (1879).

Further, the Enabling Act contains no prohibitions against exchanges. In fact, the Act provides specific procedures for one type of exchange. The ninth paragraph of Section 10 describes the manner in which the Commissioner may exchange public lands located within a national forest for federal land located in New Mexico. This provision creates different procedures, other than those provided elsewhere in Section 10, for this type of exchange and grants the federal government broad discretion in choosing the federal land to be conveyed to the state. The state constitution and the statutes also include provisions concerning certain exchanges of public lands with the federal government. N.M. Const. art. XXI, § 11; NMSA 1978, § 19-2-12 (Repl. Pamp. 1985).

Even if the Enabling Act had not mentioned exchanges, the New Mexico courts have a long history of approving various methods of disposal not explicitly authorized under the Enabling Act or the New Mexico Constitution. This rule of construction began in 1925 when the New Mexico Supreme Court, in a lengthy opinion, considered whether the Commissioner could reserve mineral rights in a conveyance of public lands:

Appellee also contends that, where the Constitution and statute conveying powers on the commissioner fail to specifically authorize him to reserve the minerals, he has no such power. We do not agree to that narrow construction of the powers of the commissioner. If it was intended by the Constitution makers and the Legislature to cover every contingency, they would not, at the time of giving specific directions, also repose general jurisdiction or power of control and disposition over the state lands.

State ex rel. Otto v. Field, 31 N.M. 120, 143, 241 P. 1027 (1925).

Since then, New Mexico courts have generally concluded that the Commissioner has "complete dominion" over public lands limited only by the explicit restrictions in the state constitution, the Enabling Act and the statutes. In re Dasburg, 45 N.M. 184, 113 P.2d 569 (1941), Burguete v. Del Curto, 49 N.M. 292, 163 P.2d 257 (1945), Jensen v. State Highway Commission, 97 N.M. 630, 642 P.2d 1089 (1982). In other cases where a method of disposal not specifically mentioned in the Enabling Act or the Constitution is attempted, the courts have upheld the Commissioner's powers. State ex rel. Del Curto v. District Court, 51 N.M. 297, 183 P.2d 607 (1947) (reserving mineral rights), State ex rel. State Highway Commission v. Walker, 61 N.M. 374, 301 P.2d 317 (1956) (granting right-of-way easements and removing sand and gravel for highways), Jensen v. State Highway Commission, 97 N.M. 630, 642 P.2d 1089 (1982) (leasing or selling sand and gravel).

Based on the general power to dispose of public lands granted the Commissioner in the New Mexico Constitution, on the broad construction given that power by the Courts, on the lack of any prohibition of exchanges in the Enabling Act and on the specific guidelines within the Act for one type of exchange, we conclude that the Commissioner has the power to exchange public lands for lands of equal or greater value. The restrictions or requirements placed on the power to exchange by the Enabling Act will be discussed in the next section.

Our conclusion and that set forth in A.G. Op. No. 88-35 are clearly at odds. A.G. Op. No. 88-35 only considered whether the Enabling Act literally authorized "exchanges" and failed to consider the general power of disposal granted the Commissioner by the New Mexico Constitution. Moreover, the opinion analyzed whether the term "exchange" could be considered part of the term "sale", which term is only mentioned in the Enabling Act and not in the Constitution, and failed to consider whether "exchange" was included within the term "dispose" in both the Constitution and the Enabling Act. In addition, the opinion failed to consider the broad construction repeatedly given the Commissioner's powers by the New Mexico Supreme Court and that the Court had decades ago rejected the narrow construction advanced by the opinion. Finally, A.G.

Op. No. 88-35 failed to notice that the Enabling Act does contain the term "exchange" and does approve specific procedures for one type of exchange.[3]

Restrictions On The Commissioner's Power to Exchange Public Lands

The drafters of the Enabling Act placed numerous restrictions and procedures in Section 10 to cover all conveyances. Included are requirements for an appraisal, the receipt of consideration valued at no less than the appraised value or the minimum value established by the Act, published notice, sale or lease only to the highest and best bidder at a public auction, and use of the proceeds to benefit only the trust beneficiaries. The Enabling Act mandates "substantial conformity" with the provisions of the Act. Ch. 310, § 10, 36 Stat. 557 (1910). The exchange transactions contemplated by the Commissioner are subject to these requirements.[4]

Because of the variety of conveyances covered by the Enabling Act, courts have struggled to define "substantial conformity" with the Act. New Mexico and federal courts have relaxed the strict procedural requirements for certain types of conveyances that were not susceptible to the abuses feared by the drafters of the Enabling Act. In State ex rel. State Highway Commission v. Walker, 61 N.M. 374, 301 P.2d 317 (1956), the court rejected the advertisement requirement of Section 10 when the grantee was the highway department:

[I]t could not have been in the contemplation of Congress [that] this provision should apply to right-of-way easements for state highways or for the taking of sand and gravel to be used in highway construction upon such lands.

61 N.M. at 381.

A similar case concerning the Arizona Enabling Act and conveyances of public land for state highways reached the United States Supreme Court. Lassen v. Arizona ex rel. Arizona Highway Department, 385 U.S. 458 (1967).[5] The U.S. Supreme Court reached the same conclusions as the New Mexico Supreme Court in the Walker decision. When presented with the state's failure to comply with the Enabling Act's requirements for public notice and public sale, the Court rejected the requirements:

We see no need to read the Act to impose these restrictions on transfers in which the abuses they are intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation .... were we to require Arizona to follow precisely these procedures, we would sanction an empty formality.

We conclude that it is consonant with the Act's essential purposes to exclude from the restrictions in question the transactions at issue here. The trust will be protected, and its purposes entirely satisfied, if the state is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program.

385 U.S. at 464-465.[6]

However, as to the compensation received for the conveyed public lands and the use of that compensation, the courts have narrowly construed the Enabling Act. Even when the grantee is another state agency, the courts insist that full compensation must be received for the public lands. In Walker, the New Mexico Supreme Court rejected a long standing practice (supported by several Attorney General opinions) of state agencies not paying for easements granted on, or for sand and gravel obtained from, public land. 61 N.M. at 381. In Lassen, the United States Supreme Court refused even to allow credit for the increase in value of adjacent public land resulting from the building of a state highway. Instead, the Court required the Highway Department to compensate the trust for the full appraised value of the public land taken for highways. "The purposes of Congress require that the [Enabling] Act's designated beneficiaries "derive the full benefit' of the grant." 385 U.S. at 468.

In addition, the courts require that the proceeds of the conveyances must be used for the specific purposes referenced in the Enabling Act. Lassen, 385 U.S. 458, 466. An earlier United States Supreme Court decision resulted in the voiding of a New Mexico statute that allowed three percent of the trust income to be used for publicity. Ervien v. United States, 251 U.S. 41 (1919). "The disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom of any object other than the enumerated ones should "be deemed a breach of trust"." 251 U.S. at 47.

In sum, the courts have consistently required strict compliance with certain requirements that are necessary to fulfill the trust responsibilities and to prevent abuses, but have relaxed other requirements when the trust is being satisfied, the possibility of abuse is unlikely and, therefore, strict compliance with the procedures would produce only an "empty formality." Lassen, 385 U.S. at 464. Thus, when exchanging public land, the Commissioner must strictly comply with certain requirements of the Enabling Act. Clearly, the Commissioner must appraise the land being exchanged and must determine that the land being received is of equal or greater value than the land being exchanged or than the minimum values established by the Act. The land being received and any proceeds therefrom must be applied to the trusts for which the original land was dedicated.

On the other hand, strict compliance with the Enabling Act's requirement of auction and public notice are not necessary. If the requirements of the auction prove inappropriate to the exchange transaction, to achieve substantial conformity with the Act, the Commissioner should develop a procedure that, in the words of the United States Supreme Court, "most nearly reproduces the results of the auction prescribed by the Act." Lassen, 385 U.S. at 469.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 Section 10 also specifically restricts the power of the Commissioner in two manners. First, the section prohibits certain actions including mortgaging or encumbering public lands, and the disposal of public lands for a consideration less than the appraised value of the lands. Second, the section imposes certain obligations when public lands are disposed of, including the requirement for an appraisal and for a public auction when lands are being offered for sale or leasing.

n2 The restrictions on disposal of public lands were inserted in the Enabling Act because the U.S. Senate feared that corrupt officials would sell public land to private parties at low prices. Those fears were fueled by charges of corruption in the New Mexico territory. In fact, at the time the Enabling Act was passed, several territorial officials had been indicted for fraudulent sales of public lands. R. Larson, **New Mexico's Quest for Statehood 1846-1912** 267-68 (1968).

n3 Opinion 88-35 also concluded that New Mexico should give "deference" to an Arizona case, **Gladden Farms, Inc. v. State,** 129 Ariz. 516, 633 P.2d 325 (1981) which required strict compliance with the Arizona Enabling Act's requirements for advertisement and auction in any transfer of a fee interest. The reliance on an Arizona case discussing procedural requirements is misguided when several New Mexico cases have analyzed the Commissioner's power to dispose of public lands. **Gladden** is more relevant to the following discussion of the procedural restrictions on the Commissioner's power to exchange.

n4 Compare with the Arizona Enabling Act which was amended to give the state broad authority to exchange lands under regulations prescribed by the state legislature:

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: provided, that such exchanges including public lands may be made only as authorized by Acts of Congress and regulations thereunder.

Ch. 310 § 28, 36 Stat. 557 (1910). A similar attempt to amend the New Mexico Constitution to give the Commissioner broad powers to exchange public lands without all the Enabling Act's restrictions was defeated by the voters on November 6, 1990. Therefore, the restrictions on disposal of public lands in the Enabling Act still pertain to exchanges.

n5 The Arizona and New Mexico Enabling Acts were part of the same law passed by Congress in 1910. The Enabling Acts were essentially the same and originally contained identical provisions restricting the disposal of public lands (Section 10 of the New Mexico Enabling Act and Section 28 of the Arizona Enabling Act). Since statehood, both states have amended their Enabling Acts in differing ways. However, the requirements analyzed in the **Lassen** case are essentially the same as the requirements in the New Mexico act.

n6 In **Gladden,** the Arizona court distinguishes **Lassen** and **Walker** and limits their application to conveyances of easements. No New Mexico court has addressed the easement/fee title distinction raised by **Gladden** and we see no reason that a New Mexico court would necessarily follow the **Gladden** reasoning.