

## Opinion No. 16-1712

January 12, 1916

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Honorable Robert P. Ervien, Commissioner of Public Lands, Santa Fe, New Mexico.

**Authority of State Land Commissioner to sell timber land.**

### OPINION

{\*283} From my conversation with you today I understand that you desire from me some official expression of opinion as to your power under the provisions of the act of Congress commonly known as the "Enabling Act," and under the state land act, to sell timber land the same as you would sell any other land.

From an examination of the statutes I do not see how there can be any reasonable doubt of your authority to make such sales, and I do not understand that you yourself entertain any such doubt, but that some vague expression of fear on the part of intending purchasers of such lands, that they might be interfered with by the federal government, prompts your desire to have this letter from me.

For the matter now under consideration the only material things {\*284} to be found in the Enabling Act are in Section 10 of that act, and the following quotations include all that can be of any importance:

"Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature time, and place of the transaction to be had, with a full description of the lands to be offered, and published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural produce of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; 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.

"All lands, leaseholds, timber, and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum

price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid."

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"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the sale thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

"It shall be the duty of the Attorney General of the United States to prosecute in the name of the United States and its courts such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom."

I am entirely unable to discover in the language quoted anything which can be held to be a limitation upon your power to sell timber lands which is not equally applicable to all of the donated state lands. It is true that there is a clause which prohibits the sale of timber or other natural product of the lands except in the same manner provided for sales of the lands themselves. There can be no doubt that this prohibition was inserted on account of the fact that prior to the passage of the Enabling Act the Territory of New {\*285} Mexico had undertaken to sell timber apart from the land, and suits were brought by the Attorney General of the United States to vacate and set aside those contracts of sale mainly upon the ground that the trees were a part of the real estate and ought not to be sold in any manner different from the land itself. Congress evidently intended to prevent a repetition of any such sales of timber free from the limitations upon the sale of the land itself, and, therefore, this prohibition was inserted as to the sale of timber or other natural products of the land. There is nothing, however, to indicate that timber must be sold separately from the land, but only an indication that it might be so sold.

Coming now to the consideration of our state law, I believe that the only provision on this subject is to be found in Section 65 of Chapter 82 of the Laws of 1912, which re-appears as Section 5243 in the new codification. That section is 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.

"All sales of timber shall be on the stumpage basis. No down, large growth and matured timber, except such as is fit only for fire wood, shall be sold at less than one dollar and fifty cents per one thousand feet, board measure."

It will be seen that this statute is in harmony with the provision in Section 10 of the Enabling Act, and was probably drawn with that in view. It merely authorizes the Commissioner to sell certain kinds of timber in the same manner as is provided for sales of lands, with an additional provision that the sale of timber shall not be construed as a sale of the land, and with some limitations as to the size of the timber which can be sold, and a minimum price per thousand feet, board measure. These restrictions and limitations are applicable to sales of timber, if any are made separate and apart from the land, but there is nothing to indicate that the land itself may not be sold with the timber on it.

As stated in substance at the beginning of this letter, I can discover nothing in either Congressional or state legislation which classifies timber lands as such, or imposes any restrictions or limitations upon its sale which are different from the sale of any other state lands.