

Opinion No. 17-2062

October 20, 1917

BY: MILTON J. HELMICK, Assistant Attorney General

TO: Dr. A. L. Dillon, 102 1/2 South Main St., Clovis, New Mexico.

Purchaser of State Lands Allowed no Deduction for Acreage Occupied by Railroad Right-of-Way.

OPINION

We are in receipt of your recent favor wherein you state that you have purchased from the State of New Mexico, the East half of Section 16, Township 2, North, Range 36 East. You state that your purchase price is \$ 17.50 per acre and that you have received a contract from the State at such figure on 320 acres. You also state that the Santa Fe Railroad has a right of way through the half section, amounting to 12 acres, but that you have been charged \$ 17.50 per acre for the entire 320 acres without any deduction on acreage occupied by the railway. You desire to know if you are required to pay the said price for the entire 320 acres.

Every Section 16 of public lands in the State was granted and confirmed to the Territory of New Mexico, by the Congressional Act of June 21, 1898, which may be found in Volume 30 of the Statutes at Large, at page 484. The land which you have purchased, therefore, became state land in 1898, and the title thereto vested in the Territory of New Mexico at that time. Several years afterward, the Eastern Railway of New Mexico, of which the present Santa Fe Road is the successor, took a right of way through the said Section 16 under the terms of the Territorial Statute, which is now Section 4700 of Compilation of 1915. A map of such right of way was duly filed with the State Secretary on April 24, 1903.

From the foregoing facts it seems apparent that the railroad right of way through the land you have purchased was derived exclusively from the State, and the nature of the interest of the railroad company in and to such right of way is to be determined by Section 4700.

There is a Federal Statute granting rights of way to railroads over the public domain of the United States, which is very similar to the Statutes of New Mexico, providing for the granting of rights of way to railroads over state lands. These latter statutes are Sections 4700, above cited, 4701, 4702 and 4703. Owing to the great similarity between the provisions of the Federal and State Statutes, it seems to us that a construction or interpretation of the Federal Statutes would be equally enlightening as to the provisions of the State Statutes. In discussing the nature of the interest acquired by railroads in and to rights of way, under the provisions of the Federal Statutes, former Secretary of the Interior Hitchcock wrote:

"The Act of March 3, 1875, is not in the nature of a grant of lands, but is a base or qualified fee giving possession and right of use of the land for the purposes contemplated by the law. A reversionary interest remaining in the United States to be conveyed by deed to the person to whom the land may be patented, whose rights will be subject to those of the grantee of the right of way."

In another opinion from the Interior Department, it was stated that this act, --

"is not in the nature of a grant of land; it does not convey an estate in fee, either as a right of way, or the grounds selected for depot purposes. It is the right of use only, the title still remaining in the United States."

It has been held that this Federal Act seems to require that the purchaser of lands over which a right of way is claimed, or on which depot grounds are selected, shall pay for the entire legal sub-division; and that he takes title to the whole thereof, subject to such right of way. The rules of the Interior Department also require that the settler shall pay for the whole sub-division, and that his patent is issued therefor. *Oregon Short Line v. Btalker*, 94 Pac. 56.

The case which you state, involving a purchase from the State of lands which there is a road rail right of way acquired under the State statutes, seems to us to be analogous to the situation above discussed under the Federal Laws. In our opinion the railroad in obtaining a right of way over said Section 16, obtained from the State not a fee simple title, nor a mere easement, but a base or qualified fee. The entire estate in the right of way is granted to the railroad company, limited and qualified in that the land shall be used for the specific purpose of operating a railroad. The title continues in the railroad company absolutely as long as such purpose is fulfilled, but the title will revert if the land ceases to be used for the purpose specified. The reversionary title, therefore, in the right of way access said Section 16, remains in the State of New Mexico, and such reversionary title is conveyed to you on your purchase from the State.

It is therefore our opinion that you obtained from the State a title which covers the entire 320 acres, although a portion of such title is merely reversionary. The State sells you title in each and every acre at a stated price per acre. We therefore believe that you stand in the same position as the settler on public lands of the United States, and that you are required to pay for the whole sub-division.