Opinion No. 23-3657

January 10, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Justiniano Baca, State Land Commissioner, Santa Fe, New Mexico.

Lease of Saline Lands by State Land Commissioner Can Be Made Only After Advertisement and Public Sale.

Case of Neel V. Barker, 27 **N.M.** 605 **Does Not Apply to Lease of Saline Lands.**

OPINION

*{*1}* This question arises on application No. 23390 in the office of the Commissioner of Public Lands, for a lease of 618 acres of state land in western Socorro County, which are saline lands. A form of proposed lease on such application has been submitted to this office, and inquiry is made whether or not such lease may be executed by the Commissioner without appraisement, advertisement and sale at public auction to the highest bidder.

It has been many times decided that saline lands are mineral lands, and my first impression was that the proposed lease of saline lands could be made on the same basis as leases of lands for oil exploration, which the Supreme Court of this state, in the case of Neel vs. Barker, 27 N. Mex. 605, decided could be made for a term of five years, without appraisement, advertisement and sale at public auction. The decision in that case was based on the proposition that the Enabling Act, which contains the regulations and restrictions under which state lands are to be disposed, does not apply to mineral lands. The court said that the Enabling Act indicates that only agricultural lands and contracts, leases, sales and conveyances thereof were contemplated by Congress and that the provisions of the Enabling Act with reference to sale and leasing of lands do not embrace nor include a lease for mineral purposes, and that the state is not controlled nor restricted by said Act in regard to leasing state lands for mineral purposes. The court's reason for this conclusion was based upon the proposition that no grant of mineral land to the state was ever contemplated by Congress, but that Congress had specifically reserved mineral lands in making its various grants to the territory and to the state. As a general proposition this is true, but Congress made one exception to its policy by the act of June 21, 1898 granting saline lands to the territory of New Mexico, and the lands mentioned in the proposed lease are lands which were selected and approved in 1902 under this specific grant of saline lands. Since these lands were acquired under an intentional and exceptional grant of mineral lands, and since such grant is mentioned and confirmed in the Enabling Act, as will hereafter more *{*2}* fully appear, I do not think that the opinion of our Supreme Court is applicable to these saline lands.

Assuming then that the decision reached in Neel vs. Barker, supra, has no application, it becomes necessary to examine carefully the status of these saline lands which are covered by the proposed lease.

The grant of saline lands to the territory of New Mexico, under which the 618 acres in question were acquired, is contained in Section 3 of the Act of Congress of June 21, 1898, which grants all saline lands in the territory for the use of the University of New Mexico. The Act contains few restrictions or regulations on the disposition of such saline lands, but merely provided that the territory might dispose of the same under such regulations as might be prescribed by the legislature, and that the lands might be leased for a term not exceeding five years, providing that all leases shall terminate on admission of the territory as a state. Section 7 of the Act recites that it is intended only as a partial grant of lands to which the territory should be entitled upon its admission and reserves the question as to total amount of lands to be granted, until the admission of New Mexico as a state. Subsequently, in 1912, the state legislature attempted to enact Sections 5218 and 5219 of the code of 1915 authorizing the Land Commissioner to execute leases for the extraction of salt from saline lands at a royalty of not less than 10 cents a ton.

Section 10 of the Enabling Act provides that the land granted by it, together with those which had theretofore been granted to the territory, were expressly transferred and confirmed to the state to be held by the state in trust to be disposed of only in the manner therein provided, and that the natural products of the said land should be subject to the same trusts as the lands producing the same. It further provided that the disposition of the lands, or anything of value derived therefrom, contrary to its provisions, should be deemed a breach of trust. The same section further provides that no sale, or contract for the sale, of any timber or other natural product of such lands should be made except after appraisement, advertisement and public auction. There is a proviso in this section that the state may lease lands for a term of 5 years without advertisement.

The question which naturally arises first is whether Congress could, by the Enabling Act, impose any additional restrictions on the disposal of land and natural products which had theretofore been granted without such restrictions. It has frequently been held in the case of grants of land to the states by Congress for educational purposes, that title vests in the state on the selection of the lands and approval by the Secretary of Interior and that although the title thus acquired is impressed with a trust, yet Congress has no power to act further, or to impose any restrictions on the disposal of the lands not contained in the original grant, or to burden the trust in any additional particular. In other words, the first question which arises is whether the restrictions contained in section 10 of the Enabling Act are applicable to lands granted by Congress many years theretofore. I think that this question may be answered in the affirmative. I think it appears quite clearly, from the Act of June 21, 1898, that Congress was making a mere temporary arrangement for the territory of New Mexico and making a sort of advance partial payment of lands that would be granted on the admission of New Mexico as a state. I think it appears quite *{*3}* clearly that the regulations therein contained governing

the disposal of saline lands are only intended to apply temporarily, until the territory became a state, and that it was the intention of Congress that on the final confirmation of the lands mentioned in this act and on the final grant of additional lands to the State of New Mexico on its admission, new and permanent conditions and restrictions would be imposed. To my mind, the Enabling Act itself confirms this view.

In Section 7 of the Enabling Act, the original grant of saline lands by the act of June 21, 1898, is repealed except to the extent of such approved selections of such saline lands as had been theretofore made. Continuing, the Enabling Act in Section 10 declares that all lands thereby granted, including those that had theretofore been granted to the territory, are expressly transferred and confirmed to the state, subject to the conditions as to disposal which have already been mentioned. Still further, in Section 12, the Enabling Act specifically provides that all grants theretofore made to the territory are ratified and confirmed to the state, subject to the provisions of said act. It seems clear that the conditions contained in the Enabling Act attached, not only to the lands therein granted, but the lands which had been granted to the territory and which were confirmed by the Enabling Act. Moreover, the state, by its Constitution in Sections 9 and 10 of Article 21 accepted the provisions of the Enabling Act concerning the lands both granted and confirmed by it in every respect and particular as in said Enabling Act provided.

From all these considerations I am forced to the conclusion that the disposition of these saline lands is subject to the conditions of the Enabling Act.

Said Section 10 of the Enabling Act, as has been mentioned, declares that no sale, or contract, for the sale, of any timber or other natural products of the lands shall be made except after appraisement, advertisement and public auction. The proposed lease, which I have examined carefully, is a lease in name only, but is in fact a contract for the sale of salt from state lands, to be paid for on a tonnage basis. The instrument authorizes the removal of salt and prescribes the price to be paid for each ton removed. While it is true that the instrument gives possession of the acreage described, yet such possession is for the purpose of removing the salt, and I think the instrument is essentially a contract for the sale of the natural products of the land described. The courts of this country have many times construed so-called leases disposing of coal, building stone and the like, to be in fact contracts of sale, and I think there can be no reasonable doubt that the instrument submitted is essentially a contract for the sale of salt from state lands, and not such a lease as is contemplated by the provision in Section 10.

From all the foregoing it is my opinion that the disposition of salt from these saline lands of the state must be made in conformity with the provisions of the Enabling Act regarding appraisement, advertisement and public auction.

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