Opinion No. 23-3728

August 31, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Hon. Justiniano Baca, State Land Commissioner, Santa Fe, N. M.

A Lease of Timber Lands by the Territorial Land Commissioner Passed Title to the Standing Timber on the Execution of the Lease, Which Title, However, Was Subject to Defeasance as to the Timber not Removed During the Term of the Lease.

The Land Commissioner Could Lawfully Extend the Time in Which to Remove the Timber for a Consideration.

On Expiration of the Lease the Standing Timber not Removed by the Lessee Would Ordinarily Revert to the State, but Where the Lessee has also Purchased the Land Itself, Before the Expiration of the Lease, the State has no Title Remaining in the Timber. The Subsequent Sale of the Land Itself Gave the Lessee the Right to the Timber Remaining Uncut at the Expiration of the Original Lease Which the Lessee Would Not Have Otherwise.

Where A Suit Was Brought 16 **Years Ago Attacking a Territorial Lease as Fraudulent and Finally Dismissed** 10 **Years Ago this Office Will Not Investigate the Probabilities of Fraud at this Late Day Nor go Back of the Decree of Dismissal.**

OPINION

*{*80}* The facts on which this inquiry arises are as follows:

On November 7th and December 5th, 1904, the Territory of New Mexico, by its Governor Miguel Otero, and its Land Commissioner A. A. Keen, executed to the American Lumber Company, two contracts for the sale of timber growing on certain lands selected by the Territory, for the benefit of the University of New Mexico. The granting clause of both contracts is as follows:

"That the said party of the first part, the said Territory, hereby agrees to sell and does hereby grant, bargain and sell to the party of the second part, the said company, all the timber standing and growing on the land hereinafter particularly described, over eight inches in diameter, measured three feet from the ground, at and for the price of $ 2.50 per acre to be paid for as the said timber is cut from the lands. All of said timber, however, to be paid for on or before the expiration of five years from the date of this contract, whether removed or not."

The contracts contained various other provisions relating to payment, bond, etc.

Thereafter, in August 1907, the United States, through special assistance to the Attorney General, brought suit in the District Court of the Second Judicial District to cancel said contracts on the ground of fraud, and an injunction was issued in connection with the suit restraining the company from cutting timber under the contracts. The suit was still pending in 1909 and the company was still under injunction and, as the original five-year period was about to expire, Commissioner of Public Lands of the Territory of New Mexico, on November 2, 1909, entered into a stipulation with the company to extend the time within which the company might cut its timber, in case the injunction was dissolved, for a period equal to the time that the injunction had been in force. This was the status of affairs when New Mexico became a state. The suit was still pending and the injunction was still in force. After statehood, the State of New Mexico was substituted as plaintiff for the United States in the suit, and the same was removed to the Federal Court. In March 1913, Frank W. Clancy, Attorney General of New Mexico, appeared for the State, in the case in the Federal Court and filed a statement that he would not prosecute the case, giving his reasons therefor. Acting upon the statement of Mr. Clancy, United States District Judge William H. Pope, made an order on March 12, 1913 dismissing the suit and discharging the defendant. This, of course, dissolved the injunction which had been in force five years, five months and twelve days. However, on June 19, 1913, Robert P. Ervien, Commissioner of Public Lands, entered into a supplemental contract which will be hereafter referred to as the "extension contract." By this contract the company agreed to pay $ 3.00 per acre *{*81}* instead of $ 2.50, and agreed not to cut trees less than twelve inches in diameter and agreed to pay an additional fifty cents per acre for such acreage as was cut prior to the issuing of the injunction in the year 1907. There were a number of other provisions which are not important. In return, the state agreed that:

"The two contracts which are dated respectively Nov. 7 and Dec. 5, 1904, and which, under the former stipulation, will have about two years to run, are to be extended for a period of ten years from June 1, 1913 subject to the modifications herein set forth, and all timber not cut or removed on or before June 1, 1923 shall remain the property of the state."

This extension, under which the company and its successors, The McKinley Land & Lumber Company, have since been operating, expired on June 1, 1923.

In March 1922, former Land Commissioner Nels Field, on advice of the former Attorney General, notified the company that the extension was invalid because it had been made after statehood, without advertisement and sale, and on an acreage basis instead of stumpage basis. He refused to accept a payment tendered by the company for timber cut, but nothing more was done.

On the 15th of this month I completed an opinion based on the foregoing facts, but on the day the opinion was completed, but before the transmittal thereof, I discovered that, in addition to these timber sales contracts, the bulk of the land on which the timber stood was sold to the McKinley Land & Lumber Company on August 16, 1918 by the state, acting through its Land Commissioner Fritz Muller. This sale appears to have

been made according to the regular and ordinary procedure, at a price of about $ 3.00 per acre. The discovery of this sale caused me to revise my former opinion. The bulk of the land on which the timber was located is included in this sale, although there are a few scattering tracts mentioned in the original timber contracts which are omitted. I assume the company claims the timber by virtue of both the timber contracts and the purchase of the land itself.

Such was the situation when the present Land Commissioner took office.

The McKinley Land & Lumber Company, through G. E. Breece, its President and E. W. Dobson, its Attorney, has recently made tender of two checks of $ 6,667.20 and $ 53,630.94 respectively, the former in payment of timber cut up to June 1, 1923, when the extension expired, and the latter in payment of timber on the acreage which remains uncut. Advice is asked of this office whether either of these checks should be accepted and what action, generally, should be taken by the Land Commissioner in the premises.

I have spent much time in considering this matter because it is one of great importance. Since the matter has been pending I have received many suggestions as to what my opinion should be but, unfortunately, most of this advice has not been legal in character. There have also appeared several newspaper comments on this matter which have not been helpful to me in arriving at a satisfactory opinion. It has been pointed out to me that the price of $ 3.00 per acre is a most inadequate price for the timber received by the company, and that if the contract has been made on a stumpage basis at a fair price, an immensely greater return would have come *{*82}* to the Territory and the State for the benefit of the University, during all these years. It has been stated that the company has received lumber of a value of $ 150,000.00 in excess of the contract price. On the other hand, Frank W. Clancy, on January 6, 1908, when President of the Board of Regents of the University of New Mexico, made an affidavit indicating that the Board of Regents of the University was satisfied with the contracts as originally made. The summary of his affidavit was as follows:

"In brief I can say that we thought at the time the contract was a good one for the University and we expressed our satisfaction with it to the Commissioner of Public Lands. I do not find, however, that there was any formal or written record made of this and I believe that none was asked by the Commissioner. That there was anything morally wrong about the making of the contract, I am sure was never suspected by anyone connected with the University. It may be that we should have obtained a larger price, but at that time it did not appear so to us."

However, it is probably true that anyone who now weighs the matter carefully with the benefit of observation during this long lapse of time might conclude that the contracts were improvidently made. It has also been pointed out to me that the former Land Commissioner held the extension contract invalid in March 1922 after it has been in effect about nine years. Nothing came of this gesture because no suit was instituted for accounting, or cancellation, or trespass, of ejectment, and refusal of the company's tendered payments was the only action taken. Consequently, the company stood on

what it conceived to be its rights and continued to cut timber. It has also been asserted that the opinion of the former Attorney General disposed of the matter, but I find that this opinion is an exceedingly brief letter which apparently does not take into consideration all of the facts. The present Land Commissioner, therefore, finds himself in a position where he must take the responsibility of safeguarding the rights of the state in a situation which has been allowed to continue for many years. I have stated these matters primarily for the purpose of showing the importance of this matter and the grave responsibility under which the Land Commissioner and this office rest. I shall now proceed to answer this inquiry by stating my opinion based on purely legal considerations and nothing else.

This opinion will first discuss the validity of the timber contracts and then the effect of the sale of the land to the company.

The lands from which the timber was sold were granted by Congress to the Territory of New Mexico in 1898 for the use and benefit of the University of New Mexico. This grant by Congress was made without any conditions regulating or limiting the disposal of the lands by the Territory. The contracts made for the sale of this timber by the territorial officials in 1904 appear to be regular on their faces and do not, in their terms, violate any law of the Territory, or of the United States. I know nothing concerning the merits of the charge of fraud which was made by the Government in 1907, but since the suit which was brought to cancel the contracts was abandoned, and the complaint dismissed by the United States District Court, I think there is no good reason for considering the possibilities of fraud at this late day. At any rate, I do not propose to go back of the decree of dismissal.

*{*83}* I think it can be safely said that the original contracts made by the Territory were valid contracts. Neither will anybody deny the lawfulness of the first stipulation for an extension made by the Territorial Commissioner in 1909, when the company was under injunction and the five year term about to expire. As I understand, the claim of invalidity is directed solely to the extension of the two contracts made after statehood by Robert P. Ervien, as Commissioner of Public Lands and I think the matter will be determined largely upon the question whether the extension contract was in fact an extension or a new contract.

As has been mentioned before, the lands from which this timber was sold were granted by Congress to the Territory without any conditions attached regarding the disposal of the land or their products by the Territory and hence, it was lawful for the Territory to dispose of the lands or their products without advertisement or sale and upon an acreage basis. But, when New Mexico became a state, Congress, in the Enabling Act, imposed certain conditions upon the disposal of lands and the products thereof which had theretofore been granted to the Territory as well as on lands granted in the Enabling Act itself. These restrictions are familiar ones and include the requirement that products of the land shall be sold on advertisement and sale. It has been questioned by some courts whether Congress could attach any subsequent conditions to lands which had already been granted; but since New Mexico. in its Constitution, solemnly agreed to

the conditions imposed by Congress, I think the restrictions should be held to apply to lands granted to the Territory before statehood, as well as to the lands granted by the Enabling Act itself. But, of course, such restrictions could not possibly apply to lands or products which had already been disposed of by the Territory to private individuals. In 1912 the Legislature of New Mexico added another restriction to the disposal of timber by providing that all contracts of sale should be made on a stumpage basis.

The extension contract was made in 1913, after the Enabling Act, and after the passage of the stumpage basis law, and at a time when the original contracts had about two years to run under the first stipulations. It is claimed that since the extension contract was made in 1913, it was in violation of the requirement for advertisement and sale imposed by the Enabling Act, and of the requirement for a stumpage basis contained in the laws of 1912. It is obvious that no original sale of timber could be made after 1912 without meeting these requirements. But the question to be determined here is whether the extension was an original sale or whether it was in fact a modification of the existing valid contracts which the Commissioner had power to make.

I think the original contracts between the Territory and the Company are to be construed according to the familiar rules of law which are applied to contracts for the sale of timber generally. The undoubted weight of authority is that a sale of standing timber passes title to the timber, which title is subject to defeasance as to the timber not within the time limit.

"The weight of authority is apparently to the effect that while a contract for the sale of standing timber passes title to the standing timber, such title is subject to defeasance as to the timber not removed in the time limit." -- 17 Ruling Case Law, 1085.

*{*84}* I have examined carefully the original contracts and find that the same are undoubtedly contracts for the sale of timber which passed a defeasible title in the standing timber to the company. The question next arises whether the Commissioner could lawfully extend the time in which to remove the timber. Again applying familiar principles of the law applicable to contracts of this sort generally, it will be found that an extension of time can be had ordinarily, by the mere mutual agreement of the parties.

"The rule that the vendee of timber forfeits his right therein at the end of the time for removal may be modified by circumstances, by an agreement of extension either in writing or by parole, or by the acts of the vendor." -- 17 R. C. L. 1090.

An extension of time can certainly be had for a valuable consideration. The terms and regulations of sales of products from Territorial or State land rest largely in the discretion of the Commissioner who acts on behalf of the public, and unless the Commissioner is restrained by some positive prohibition of law, I can see no reason why he could not grant an extension, in his discretion, for a consideration in the same manner that an individual vendor might do. I think that the Commissioner of Public Lands could lawfully grant the extension of 1913 if the same were in fact an extension of an existing contract and not a new and original sale. In other words, the restrictions

contained in the Enabling Act and in the law of 1912 applied only to sales thereafter made and could not possibly apply to sales previously made or to rights previously vested. It therefore becomes essential to determine whether the extension of 1913 was, in fact, an extension of a consummated sale or whether it was a new and original sale.

So far as the form of the extension is concerned, it clearly purports to be an actual extension of the original contracts and not a new contract. I imagine it was carefully and advisedly drawn by the parties with the very point under discussion in view. At any rate, so far as the wording of the extension is concerned, it is clearly an extension of the old contract and not a new contract. The extension contains specific provisions reciting that it is supplemental to the original contract; that the original contracts are to remain in force and effect except as changed, and the provision above quoted to the effect that the original contracts are extended for a period of ten years from January 1, 1913. There would seem to be no reasonable doubt that in form, at least, the instrument is an extension of the original contracts and not a new contract. The extension modified the original contract in the matter of price, by requiring an additional fifty cent per acre payment. However, the mere form of the contract is not in itself sufficient to dispose of the point under discussion. I think it should be determined whether the instrument, irrespective of its form and phraseology, is actually an extension or a new contract and I am forced to the conclusion that the instrument is really an extension of the original contracts, in fact as well as in form. I am forced to this conclusion because the subject matter was unchanged -- the extension referred to the identical timber which had previously been sold under the original contracts. The title to the standing timber passed to the company in 1904 subject only to defeasance as to that part which the company failed to cut within the time limit. In other words, the sale was completed in 1904 and the extension was merely a modification *{*85}* enlarging the time limit which the Commissioner had lawful right to grant. The extension contract was not a sale of any new or additional timber, because the company already had a defeasible title in all the timber mentioned. The extension merely gave the company an opportunity to cut more of the timber which was covered in the original contracts and a chance to avoid a defeasance of title to a portion of the timber it had purchased. For these reasons I think the extension was an extension in fact and not a new contract, and hence not invalidated by the provisions of the Enabling Act and the 1912 law. It seems to me that the passage of the Enabling Act and of the 1912 stumpage basis law could not affect a consummated sale or prohibit an extension of the same which would otherwise be lawful.

It next becomes very necessary to consider the effect of the sale of the land to the company in 1918 and whether this sale gives the company any right to the timber remaining uncut after June 1, 1923. The extension contract provided that the timber remaining uncut after June 1, 1923 should be the property of the State. It is likewise a general rule of law applying to sales of timber, that the title to timber which remains uncut after the time limit has expired becomes the property of the vendor. Therefore, if the law is applied solely to the timber contracts, I think there would be no doubt that the timber which remains uncut could not be claimed by the company as a matter of right, but that the Commissioner could legally assert that it belonged to the state and decline

to accept the company's tendered payment for it. Consequently, it must be determined whether the purchase of the land by the company changes this situation and gives the company a right to the uncut timber which it would not have under the timber contract alone.

The contract for the sale of the land is in the usual printed form and contains no reservation of timber. I assume that the sale was made in contemplation of the existing timber contracts with the intention of receiving from the company $ 3.00 per acre for the land itself and $ 3.00 per acre for the timber, or $ 6.00 per acre in all. The company in making its tender of $ 53,630.94 for the timber still remaining on the land evidently takes the position that although the purchase of the land itself gives it the absolute right to everything on the land, yet payment should be made for the remaining timber at the contract price.

I have studied the effect of this sale carefully in an effort to discover any reason why the ordinary rules of law should not apply and I can find none. The courts of the country have been unanimous in holding that where a land owner sells timber with a time limit for cutting and then sells the land itself, the timber remaining uncut after the limit has expired belongs to the grantee of the land and it would seem quite obvious that where both the timber and the land itself are sold to the same person, all the estate there is vests in the grantee, and nothing remains in the grantor. Some typical authorities to this effect are Hornthal v. Howcott, 154 N. Car 288; Jenkins v. Lumber Company, 154 N. Car. 355; Neilson v. McNeil, 143 Pac. 1119. In the case of Brown v. Minden Lumber Company, 86 Sou. 727, the Supreme Court of Louisiana held that an owner having sold standing timber under a contract requiring removal within a specific period, by subsequent conveyance of the land by deed divested himself of all interest in the property including *{*86}* both land and timber. In this case the land contract and the land itself were subsequently transferred to the same person.

It seems quite clear to my mind that the state in conveying the land before the expiration of the time for the removal of the timber divested itself of all reversionary right in the timber on the land. I have searched diligently to find whether there is any escape from this conclusion -- whether there is any theory on which the state can assert any claim to the timber which remains on the land, but I can evolve no convincing argument to such effect.

For the sake of clarity, I summarize my opinion as follows:

The timber sale and extension thereof was valid. The subsequent sale of the land itself gives the company a right to the timber remaining uncut at the expiration of the original contracts which the company would not have otherwise.

I, therefore, advise the Commissioner of Public Lands to accept both checks tendered by the company reserving, however, the right to make a thorough check for the purpose of determining the accuracy of the amount tendered.

It will be noted from the statement of facts in the beginning of this opinion that a few tracts included in the original timber sales were omitted from the purchase made by the company in 1918 and, as to these tracts, I think it is quite clear that any timber remaining uncut is the property of the state. This will be another matter which the Commissioner should check up.

Since there is a great public interest in this matter, I would suggest that the commissioner give notice of his intention to accept the payments tendered by the company and allow a reasonable time before actually so doing so that any interested person who differs with this opinion may have an opportunity to enjoin the Commissioner in Court.