Opinion No. 34-785

July 12, 1934

BY: E. K. NEUMANN, Attorney General

TO: Honorable Frank Vesely, Commissioner of Public Lands, Santa Fe, New Mexico.

*{*141}* Your letter of February 9, 1934 states that, in your opinion, Section 36, Township 21 South, Range 24 East, in the Carlsbad Cavern National Parks, still belongs to the state for the benefit of the public schools of the state. You ask that this office investigate the matter from a legal standpoint and outline a program which would be adequate for an equitable reimbursement for this section of land.

You state in said letter, also, that you have taken the matter up with Secretary Ickes and that no settlement can be had along the lines you suggested. In talking with you since the letter mentioned was written, I believe that now you desire legal steps taken to recover said section, upon the grounds that legal title has always been in the state and that same was never conveyed to the United States.

Your letter has remained unanswered for so long because of the magnitude of the subject matter, although I have spent many hours in study thereon.

At the outset, I may say that if legal title never vested in the United States, after the original grant, of course, of said Section to this state, an increase of consideration at this or any other time paid by the United States would not cure the latter's title thereto.

Under the Act of June 21, 1898, 30 Statutes 484, there was granted to the then Territory of New Mexico for school purposes Sections 16 and 36 in each township in said Territory. Under the New Mexico Enabling Act of June 20, 1910, 36 Statutes 557-561, the state was granted Sections 2 and 32 of every township in the state, also for the support of the common schools.

The material part of the latter Act is as follows, and also relates to Sections 16 and 36 theretofore granted as well as to Sections 2 and 32 granted therein:

"That in addition to sections sixteen and thirty-six, heretofore granted to the Territory of New Mexico, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of the common schools; and where sections two, sixteen, thirty-two and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereof with a view to pre-emption or homestead, or improvement thereof with a view to desertland entry has been made heretofore or hereafter, and before survey thereof in

the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein."

In Section 9 of Article 21 of our Constitution we find the following:

"This state and its people consent to all and singular the provisions of the said Act of Congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said Act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations *{*142}* were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said Act provided."

Section 1 of Article XIII of said Constitution is as follows:

"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, are declared to be public lands of the state to be held or disposed of as may be provided by law for the purposes for which they have been or may be granted, donated or otherwise acquired; provided, that such of school sections two, thirty-two, sixteen and thirty-six as are not contiguous to other state lands shall not be sold within the period of ten years next after the admission of New Mexico as a state for less than ten dollars per acre."

Section 2 of Article XII of the State Constitution is as follows:

"The permanent school fund of the state shall consist of the proceeds of sales of sections two, sixteen, thirty-two and thirty-six in each township of the state, or the lands selected in lieu thereof; the proceeds of sales of all lands that have been or may hereafter be granted to the state not otherwise appropriated by the terms and conditions of the grant; such portion of the proceeds of sales of lands of the United States within the state as has been or may be granted by congress; also all other grants, gifts and devises made to the state, the purpose of which is not otherwise specified."

Section 10 of the Enabling Act (Act of June 20, 1910) specifies the conditions of the grant made to the state.

That title to said Section 36, within the Carlsbad Caverns National Park, did vest in the State of New Mexico there can be no doubt. The question being: Did the United States acquire good title thereto from the state, after the state had originally acquired title to the land in question?

The Legislature of this state, by Chapter 31, Laws of 1925, authorized the Commissioner of Public Lands to convey said Section 36 to the Secretary of the Interior for National Monument purposes, for the consideration of another section of land in lieu thereof. Said Chapter, deleting Section 2 thereof, which is the emergency clause, is as follows:

"Section 1. That the Commissioner of Public Lands of the State of New Mexico, in lieu of a section of Government Domain selected by the State, be, and he is hereby authorized and directed to execute and deliver to the Secretary of the Interior of the United States a proper conveyance conveying that certain section of state land more particularly described as Section 36 of Township 24 South Range 24 East N.M.P.M., situate, lying and being in the County of Eddy, State of New Mexico, the same being a school section belonging to the state and in which is situated the Carlsbad Cavern said section of land herein described to be held and used by the United States as a National Monument."

Standing alone, the above provision might be insufficient to pass title to the land in question. A Federal Statute, however, Sections 2275 and 2276, Revised Statutes of the United States, as amended must be considered in this matter. Said sections are, as follows:

"Sec. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said *{*143}* State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral lands or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty - six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

"Sec. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to-wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land; Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships."

In view of said federal act, we must determine if our Enabling Act and Constitution permit state officers to make the lieu selections after title is completely vested in the state. Where title has vested, it may be admitted, the Federal Government cannot, by either an Act of Congress or Executive Order, divest the state's title to any of its land. The Act in question, however, permits the state to exercise an option. The Federal *{*144}* Courts have so construed the Act, and further have held that, where such lieu selection has been made, the state has relinquished its title to the land originally granted, even where title to school lands had become vested but later are within the exterior boundaries of some reservation made under an Act of Congress.

The most universally quoted case is that of California vs. Desert Waters, Oil and Irrigation Co., 243 U.S. 415, where the Supreme Court reversed the Supreme Court of California. The Court said, in part:

"The land in question is a sixteenth section, passing to the State by virtue of the federal grant for school purposes. Act of 1853, 10 Stat. 244; Act of 1866, 14 Stat. 218. Afterward, a national reservation, known as the Mono Forest Reserve, was established by proclamation of the President. This reservation included this section 16 within its boundaries.

"It was shown at the trial that the lands in question were withdrawn from sale by the State by an act of the legislature, and it was contended they could only be used as bases for lieu selections. The survey or general of the State offered the lands as bases for such selections, except forty acres, for which the State had sold an indemnity certificate entitling the purchaser to surrender that land, and apply for unappropriated public land in lieu thereof. All the remainder had been offered for lieu selections which are pending in the General Land Office.

"The Supreme Court of California held that the title to the lands was completely vested in the State, and subject to condemnation at the instance of the Water Company." * * *

"The federal statutes involved are Sections 2275 and 2276 of the Revised Statutes of the United States, as amended in 1891, 26 Stat. 796, 797. They are found in the margin.

"As we have already stated, the State has elected to surrender this section 16 to the United States, asking compensation in other lands for the same under the provisions contained in the sections of the federal statutes just referred to. It is the contention of the State that because of such action the lands in question in equity belong to the United States, and that consequently they could not be condemned for the uses of the Water Company.

"The controversy reduces itself to the precise question whether when a forest reservation, subsequently proclaimed, includes within its limits a school section surveyed before the establishment of the reservation, the State may under Section 2275, Revised Statutes of the United States, as amended in 1891, waive its right to such section and select other lands in lieu thereof.

"The first part of the section, giving the right to select lands in lieu of such as were settled upon with a view to pre-emption or homestead, is clearly limited to settlements made before survey of lands in the field, and under the following provision, giving the right of selection to the State where the lands are mineral or are included in an Indian, military or other reservation or are otherwise disposed of by the United States, it well may be that, in the absence of the proviso, the right of selection would be confined to instances where the lands were unsurveyed where found to be mineral or included in a reservation, and this because if the lands were unreserved and not known to be mineral when surveyed the title would then vest in the State (Sherman v. Buick, 93 U.S. 209; Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634; United States v. Morrison, 240 U.S. 192, 204, 207), and because lieu selections are usually, although not always permitted where the right to the place lands is cut off before the time for the title to become vested. But the proviso, which was not originally in *{*145}* the statute, is an important part of it and, according to a familiar rule, must be given some effect. It reads:

"'Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.' This language, while not as clear as it might be, operates, as we interpret it, to give to the State a right to waive its right to such lands where, as in this case, the same are included in a forest reservation after survey, that is, after the title vests in the State. Unless this proviso refers to lands, the title to which has passed to the State it adds nothing to the statute and performs no office whatever. This construction preserves the integrity of forest reservations, and permits the State to acquire other lands not surrounded by large tracts in such reservations which are withdrawn from settlement."

The situation in the California case cited is practically parallel to the present case. Here, Section 36 passed to the State of New Mexico and after passing, was included in the

Carlsbad Cavern National Monument by Proclamation of the President (No. 1679) dated October 25, 1923 (43 Stat. 1929). Later, on February 2, 1925, the State of New Mexico applied to select an equal area of other lands in lieu thereof, filing Santa Fe Selection List No. 048508, in lieu of NW 1/4 and S 1/2 of the Section, and Roswell List No. 052929 (Las Cruces 029503), in lieu of the NE 1/4 of the Section. Clear List No. 177 embraced the selections and was approved September 19, 1925 and certified to the state on September 23, 1925. Chapter 31, Laws of 1925, approved and authorized such action, however effective such approval and authorization might be.

It would be unnecessary to proceed further to hold that the United States has legal and valid title to said land (for we can utterly disregard the 1925 Act of our legislature and, in my opinion, hold that title passed without question and with all due legal formalities and requirements) except for the question of the legal right of the state to convey or attempt to convey a legal title when the provisions of our Constitution and Enabling Act are considered. This question is of some moment when we consider the holding of the Supreme Court of Idaho in Newton vs. Land Commissioners et al, 219 P. 1053, and the holding of the Supreme Court of Washington in Thompson vs. Savidge, 188 P. 397.

In the former case, the Court holds that under Section 5 of the Idaho Admission Bill, which provides that "all lands therein granted for educational purposes shall be disposed of only at public sale," and Section 8, Article 9 of the Constitution, which provides that "no school lands shall be sold for less than ten dollars per acre," are mandatory and prohibitive, and the state board of land commissioners is without authority to effect an exchange of state school lands after the same have been surveyed for other lands with the Government of the United States. It therefore granted a writ of prohibition against the board's contemplated exchange.

In commenting on the decision of the Supreme Court of the United States in the California case cited above, the Idaho Court said:

"Clearly the foregoing opinion does not go further than to hold that Sections 2275 and 2276, Rev. State. U.S., confer upon a state the right to receive indemnity lands for school sections 16 and 36 to which it has a complete and indefeasible title, upon its surrender of such lands to the government, and that its reinvestment of title in the government operates to waive its rights as to such land and take title to the indemnity lands. But as we understand the decision, the Federal Supreme Court expressly disavows any purpose to decide for the state when and under what circumstances it has authority under its constitution *{*146}* and laws to surrender such school lands, which is the question before us for determination."

I feel that the California case goes much further than is conceded by the Idaho Court. Even under the reasoning of the Idaho Court, it is my opinion, that the Supreme Court of the United States would, under the authority of the California case cited, hold that title to Section 36 now vests in the United States, because the state **has made** its lieu selections, under Sections 2275 and 2276, Rev. Stat. U.S., and in conformity with Chapter 31, Laws of 1925 (N.M.) and has relinquished title to said land, which

relinquishment was accepted by the United States in good faith, pursuant to an established federal policy and, on the strength thereof, considerable money was spent thereon. My opinion is founded in the face of the Idaho decision, for in that case, as in the Washington case, the Court stopped the **proposed relinquishment** and with the admission, for the sake of argument at this point, that our Supreme Court might have stopped the proposed transaction in our case in 1925.

We must, however, go further and I cannot admit that even under our Enabling Act and Constitution the transaction, as proposed in 1925, would have been stopped by our Courts.

The heretofore quoted part of our Enabling Act makes the provisions of said Sections 2275 and 2276, Rev. Stat. U.S., a part of the Act, and allow this state full privilege to accept its provisions without restriction. In other words, this state is permitted exchange of school lands for other lands in each and every instance as permitted under the provisions of said Sections 2275 and 2276. The specific procedure for such exchange or selection is provided for in Section 11 of the Enabling Act. The restrictions contained in Section 10 of the Enabling Act, relating to disposal of the lands granted the state, are subject to the possibility of lieu selections or exchanges as are granted under Section 6 of the Act. All of said sections must be read together for the true meaning of any one section. The Constitution does nothing except confirm the grants made the state and under the conditions imposed by the Enabling Act.

Note the language in Section 2 of Article XII of the Constitution:

"The permanent school fund of the state shall consist of the proceeds of sales of Sections two, sixteen, thirty-two and thirty-six in each township of the state, or lands selected in lieu thereof * * *."

See also Sections 1 and 2 of Article XIII, and Section 9 of Article XXI.

In the case of Payne vs. New Mexico, 65 L. Ed. 680, the Supreme Court of the United States, speaking through Justice Van Deventer, states:

"Congress granted to New Mexico for the support of common schools designated sections of land in each township, subject to specified exceptions, with a provision enabling and entitling the state to select other lands in lieu of those excepted, and with a further provision whereby, in the event any of the designated sections, after passing under the grant, should be included within a public reservation, the state was to be entitled to waive its right to them and select instead other land of equal acreage."

We must therefore conclude that title to said Section 36 was legally relinquished or waived by this state to the United States and that title thereto now is legally and regularly in the United States.

Evidently the state thought the exchange, to use a general term, well worth considering, and since that time the government has spent huge sums of money for development of said lands, upon the strength of its title thereto. This, in my opinion, would of itself, in the face of the federal statute cited and quoted herein, preclude recovery of the land by the state, for as the Supreme Court of the United States said in the California case supra:

"In the brief presented by leave of Court on behalf of the United States it is set forth that *{*147}* the rule laid down in State of California, 28 L. D. 57, is still adhered to by the Land Department; that selections aggregating many thousands of acres have been made in reliance upon it and that no doubt large expenditures of money have been made in good faith upon the selected lands. It is therefore urged that such consideration has become a rule of property. In this situation we should be slow to disturb a ruling of the Department of the Government to which is committed the administration of public lands. McMichael vs. Murphy, 197 U.S. 304.

Furthermore, the reasoning upon which the departmental interpretation is founded commends itself to our judgment as best calculated to carry out the purposes intended to be accomplished by the statute in question."