

Opinion No. 3762, 3762-0A

Original Opinion dated March 21, 1924; Modification dated March 28, 1924

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Hon. Justiniano Baca, Commissioner of Public Lands, Santa Fe, New Mexico.

The Commissioner of Public Lands may Grant Assignments of a Portion of a Purchase Contract, Providing He Safeguards the Right of the State in the Transaction.

OPINION

{*135} This inquiry arises upon the following facts:

In many instances, purchasers of state land under the installment contract plan, authorized by the laws of New Mexico, have assigned a portion of their holdings and filed the assignment with the Commissioner of Public Lands. The Commissioner of Public Lands has accepted these assignments and acknowledged their validity to the extent of recognizing the right of the assignee to the possession of the portion of the land covered by the assignment. The Commissioner has taken the position that he cannot lawfully do more than this, and that he cannot consider the assigned portion of the land segregated from the original contract. The Commissioner has been of the opinion that he had no legal right to modify the original contract, in any way, by reason of such assignment, but that he must consider the original contract in force, looking to the original purchaser for its performance, and grant no patent to any part of it, but only a patent to the whole of the land covered by the purchase contract when the entire purchase price is paid. The purchasers, on the other hand, are insisting that there is nothing in the law to prevent the Commissioner of Public Lands from dealing with these assignments in the manner they desire. They ask that an assignment should be considered a segregation, or rather a transfer of the portion of the land assigned which the Commissioner should recognize as such. They feel that the Commissioner should deal with the assignee directly, relieving the original purchaser from responsibility for that portion of the land which is assigned, and that the Commissioner should issue patent directly to the assignee, when he has {*136} paid out the price applicable to the portion he has acquired, by assignment from the original purchaser.

The Commissioner of Public Lands states that he is willing and anxious to adopt any lawful policy which will be mutually fair to the purchaser and to the state.

There are many practical and historical conditions which enter into the question. It is agreed by all parties that a difficult situation has arisen by reason of the great depression in the cattle industry of New Mexico. The Commissioner of Public Lands points out that cattle men, in the past, have contracted for the purchase of vast areas of

state lands for grazing purposes, and for the purpose of insuring control of ranges. The cattle men, in the past, have not been particular as to the character of land they have contracted to purchase, but have selected rocky land, desert land and virtually worthless land along with good grazing land. In other words, the cattle men have purchased quantity rather than quality and, as a consequence, now have on their hands large areas of worthless lands which are useless to them by reason of the fact that many of them have virtually gone out of the cattle business. Many of the cattle men have invested huge amounts in purchase contracts for these large bodies of state lands, and now desire to salvage what they can by assigning to settlers various tracts which are thought to be adaptable to agricultural purposes. The Commissioner of Public Lands fears that this plan of the cattle men will work serious prejudice to the state because it is natural that the cattle men will assign the choicest part of the lands, at more or less advanced prices, and default on the remainder of the purchase contract which would cover the worthless lands, thus throwing back on the state the worthless lands which could not be again disposed of by the state.

The cattle men, on the other hand, point out that in many sections, particularly the eastern sections of the state, the cattle industry will never be conducted again on a large scale, as in the past, and that it is hopeless to expect these purchasers of vast quantities of state land to carry the lands for grazing purposes, and pay out their contracts. The cattle men insist that the reasonable thing to do is to encourage settlement by being permitted to assign such portions of these lands as are suitable for agriculture to new settlers who will come into the state. It is predicted that these settlers will develop agriculture on the state lands which would otherwise have to remain idle as grazing lands, with no livestock to range on them.

The unhappy situation has been brought about, as the Commissioner of Public Lands points out, largely by the circumstance that, in the past, purchasers of state lands have been permitted to designate the land which the state has selected from the public domain, in accordance with the congressional grants of land to New Mexico; the purchasers of state lands have naturally had the state select lands which were most convenient for their personal purposes without regard to its value. As a consequence the state finds itself the owner of many acres of valueless land which it has selected at the request of individuals.

The Commissioner of Public Lands realizes that the present situation cannot now be changed, and he is willing to pursue whatever policy will be best for both the state and the holders of purchase contracts, providing such policy is lawful.

{*137} As I see the problem, the solution must be determined on this question: Has the Commissioner of Public Lands the legal authority to withdraw assigned lands from a subsisting purchase contract and treat the assignee as an original purchaser, by releasing the original purchaser from responsibility for the assigned portion.

I do not find anything in the enabling act which affects this question. The enabling act prescribes the conditions for which the lands granted to the State shall be used, and

also requires that disposition of these lands shall be made after appraisal, advertisement and public sale. After the sale has been made in compliance with these requirements, the enabling act does not pretend to apply to the further administration of the lands.

The right of the Commissioner to pursue the policy requested, depends then upon the Constitution and laws of New Mexico. The statute governing the sale of state lands is Section 5236 of the Codification of 1915; this section has been amended by Chapter 52 of the Laws of 1917; by Chapter 89 of the Laws of 1919 and by Chapter 7 of the Laws of 1921. Neither in this section nor its amendments can be found anything which throws much light on the question involved here. These statutes merely provide for the amount and number of installments. The Commissioner, of course, issues no deed until the purchase price is paid. The security for such deferred payments is, of course, the land itself because no legal title passes and no deed is issued by the Commissioner until all of the installments have been paid. On non-performance of the contract, the Commissioner is authorized to cancel the contract and forfeit the money paid in under the provisions of sections 5238 and 5199 of the Code of 1915, as amended by Chapter 8 of the Laws of 1921.

The only statutory provision on the subject of assignments, which I have been able to find, is section 5196 of the Code of 1915, as amended by Chapter 73 of the Laws of 1915. This brief section is as follows:

"With the consent of the Commissioner, any lessee may assign all his right, title and interest in his lease, or relinquish the same to the state, whereupon his lease shall be cancelled. Any assignment or relinquishment without the written consent of the Commissioner shall be null and void."

It will be observed that this section applies only to leases and not to purchase contracts, and that it mentions only an assignment of all the interest in the lease, and not a portion. I do not believe that this section has any bearing on assignments of purchase contracts. Under the provisions of Chapter 174 of the laws of 1921, the Commissioner of Public Lands is authorized to prescribe rules and regulations for the conduct of the business of his office.

The terms and regulations of sales of state lands rest largely in the discretion of the Commissioner who acts on behalf of the public, and unless the Commissioner is restricted by some positive prohibition of law I can see no reason why he could not permit an assignment of a portion of a purchase contract in the same manner that an individual vendor might do. If this is the case, it seems to me that the Commissioner would have the legal right to pursue such a policy, and make such a regulation as has been requested, unless the familiar constitutional provision in Section {~~138~~} 32 of Article 4 forbids. This constitutional provision reads as follows:

"No obligation or liability of any person, association or corporation, held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged,

transferred, remitted, released, postponed, or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court."

In two other opinions of this office, numbered 3705 and 3730, addressed to the Commissioner of Public Lands this provision has been discussed and construed. In these opinions I said that the prohibition contained in this section was not addressed exclusively to legislative statutes, but covered rules and regulations made by the Commissioner under legislative authority, as well as actual enactments of the legislature. I also said in these opinions that this constitutional provision prevented the Commissioner from making any reduction in rentals on existing leases because such reductions would be a remission and diminishment of an obligation and liability owing to the state.

It seems necessary now to again construe this section to ascertain whether or not it prohibits the Land Commissioner from recognizing the assignment and segregation and transfer of a portion of the purchase contract.

I am unable to see any escape from the plain wording of this constitutional provision. The plan which is requested would, in my opinion, be clearly a transfer, exchange and diminishment of an obligation owing to the state, and I do not believe the Commissioner of Public Lands could lawfully adopt the policy desired. It seems to me that the Commissioner can do nothing more than stand on the terms of the contract as made, and insist upon its performance as an entirety. I cannot bring myself to believe that the Commissioner may release the purchaser from any part of the contract and transfer it to anyone. I think this is particularly true because it is a certainty, in most cases, that the purchaser will default on the part which he does not assign, and the state will actually lose the remaining purchase price due on the bulk of the land.

I would suggest that the Commissioner of Public Lands and this office cooperate in expediting the test suit for the determination of this question by the courts.

In my original opinion No. 3762, I said that I was unable to find any authority in law for the assignment of purchase contracts of state land. I find that I was mistaken in this statement and my attention has been called to Sec. 5239, Code 1915 which specifically authorizes assignments by the purchaser with the consent of the Commissioner. This statutory authorization together with the broad powers given the Commissioner by the Constitution to regulate the terms of the sale of state lands and the provision written in the form of sales contracts used in the land office which also provides for assignments with the consent of the Commissioner{*139} would seem to dispose of the idea that a mere assignment of a sales contract constitutes a violation of the prohibitions of Sec. 32, Art. 4 of the Constitution, and my former opinion must be modified accordingly.

Since an assignment of a purchase contract is lawful with the consent of the Commissioner, it would seem that no hard and fast rule can be promulgated, but that each case in which an assignment is requested must be judged upon its own merit and

it will be the duty of the Commissioner, in the exercise of his discretion, to safe-guard the rights of the state and to see that no surrender of any right is suffered by the state. In other words, the Commissioner will have to use his discretion in every case to see that there is no violation of the constitutional prohibitions against the diminishing or surrendering of the obligation to the state. It cannot be said that every assignment **ipso facto** constitutes a violation of the constitutional provision because as is explained above, assignments of purchase contracts are legally permissible. I think that in every case where an assignment of a purchase contract is requested the burden rests upon the Commissioner to see that the proposed arrangement does not prejudice the state, and in assuming this burden, the Commissioner will have to take into consideration all the facts and circumstances of the particular case. For instance, if a purchaser proposes to assign a portion of his contract covering lands of the same character which he retains and does not seek to assign merely the valuable lands and retain the worthless lands for the purpose of defaulting, or does not seek to isolate the valuable lands by what is commonly known as checkerboarding, then I think the Commissioner could properly hold that the assignment would not work any harm to the state nor be a violation of said Sec. 32, Art. 4. I am further impelled to this view by a consideration of the following authorities:

Delta County v. Blackburn, 100 Tex. 151; Wagner v. Wise County, 43 S. W. 836; Louisville Telephone Company v. Louisville, 113 S. W. 855; Young v. DeBois, 113 N. Y. (Supplement) 456.

It will doubtless be proper for the Commissioner, in the exercise of his discretion, to require the purchaser desiring an assignment to pay the expenses of the Land Office for making an actual examination of the land so that the Commissioner can intelligently determine whether or not the assignment should be approved by him.

A careful investigation of the situation has convinced me that it is quite impossible for anyone to maintain a test suit for the reason that the discretion of the Commissioner figures so largely in the question involved that a definite issue could not be presented.