Opinion No. 37-1832

December 6, 1937

BY: FRANK H. PATTON, Attorney General,

TO: Mr. Carl B. Livingston, Attorney State Land Office Santa Fe, New Mexico

*{*198}* This opinion is in response to your written request dated December 1 relating to the title of the State in lands granted to the State for school purposes by the Ferguson Act and Enabling Act.

In substance, you make two inquiries as follows:

1. Is the title to School Sections 2, 16, 32 and 36 embraced within national forests established since the date of the Enabling Act, June 20, 1910, or since the date of statehood, February 6, 1912, lost by the state?

2. What effect would the creation or establishment of new national forests, or the extension of boundaries of other national forests, after the date of the Enabling Act, have upon the State's title to Sections 2, 16, 32 and 36 acquired under either the Ferguson Act or the Enabling Act?

Under the "Ferguson Act", Act of June 21, 1898, (30 Stat., 484), Sections 16 and 36 were granted to the Territory of New Mexico. It has been held by the Secretary of the Interior that this was a grant in praesenti. 29 L. D. 364. See also an *{*199}* opinion from this office numbered 533 and dated October 22, 1932.

By the act of June 20, 1910, "the Enabling Act," an additional grant of Sections 2 and 32 was made to the State upon the condition that the State would lose title to Sections 16 and 36 included within national forests then existing and proclaimed. See Attorney General's Opinion No. 533, supra.

The terms and conditions of the grants provided for in the Enabling Act were accepted by Sections 9 and 10, Article XXI of the New Mexico Constitution, as contemplated by Sub-section ninth of Section 2 of the Enabling Act, and the new state came into being pursuant thereto, upon the proclamation of the President of the United States under date of February 6, 1912.

The Supreme Court of New Mexico, in the case of Dallas, et. al., vs. Swigart, et. al., 24 N.M. 1, held that Sections 6 and 11 of the Enabling Act operated as a present grant to the State of school sections, subject to identification by survey, whereupon title vested in the State **as of the date of the Enabling Act.**

However, the term "survey in the field" as used in the Enabling Act has been interpreted by the Secretary of the Interior and the United states Court of Appeals of the District of

Columbia as meaning "a completed survey finally approved by the Secretary of the Interior." See 52 L. D. 679, 681; and U. S. ex rel. State of New Mexico vs. Ickes, Secretary of Interior, 72 F. (2d) 71, certiorari denied, 293 U.S. 596, 79 L. ed 689.

As between the State of New Mexico and the United States any apparent discrepancies between the holdings in Dallas vs. Swigart, supra, and U. S. vs. Ickes, supra, will have to be resolved in favor of the holdings of the United States courts because the United States Government on Federal questions is not bound by the interpretation made by State courts. State of California vs. Irrigation Co., 61 L. ed. 821, 243 U.S. 415.

However, I do believe that both the New Mexico Supreme Court and the Federal courts are in accord; that upon "proper and sufficient" identification by survey, title does pass to the State **as of the date of the Enabling Act.** Dallas vs. Swigart, supra; U. S. vs. Ickes, supra; Wyoming vs. U. S., 65 L. Ed. 742, 255 U.S. 489.

The Federal courts have held that the language of the Enabling Act, "are hereby granted to the said state for the support of common schools", creates a grant in praesenti and title to the school land within the conditions of the Act immediately became vested in the State, provided, however, that the land in question was **sufficiently identified by survey at the date of the grant.** U. S. vs. Ickes, supra.

This being so, one conclusion may be arrived at forthwith, namely, that on Sections 2, 16, 32, and 36, on which there has been a completed survey finally approved by the Secretary of the Interior at the date of enactment of the Enabling Act, title to such sections vested immediately in the State as of the date of such enactment, and the creation of any national forests or extension of boundaries of pre-existing national forests after the date of the Enabling Act would not, in and of itself, take away the title which had prior thereto vested in the State.

The remaining question may be stated as follows:

What effect would the creation of national forests or extension of boundaries of pre-existing national forests, subsequent to the date of the Enabling Act, have upon the State's title to Sections 2, 16, 32 and 36, on which there had not been a "completed survey finally approved by the Secretary of the Interior" *{*200}* at the date of the Enabling Act?

The pertinent sections of the Enabling Act on this point are found in Section 6 thereof, from which we quote in part as follows:

"* * * *; **and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, * * *, have been * * * reserved, or otherwise appropriated or reserved by or under the authority of any act of congress, * * * *, and before the 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 states (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:"

It appears, therefore, that the Federal Government has by express reservation retained the right to "reserve or otherwise appropriate" any such sections of land "before the survey thereof in the field", which survey has, as already stated supra, been defined as a "completed survey finally approved by the Secretary of the interior".

This being so, title to such unsurveyed sections did not pass to the State as of the date of the Enabling Act, and until such sections were completely surveyed and finally approved by the Secretary of the Interior, such lands could be withdrawn and set apart and reserved as national forests by the Federal Government or its proper agents, and the State would then have to resort to the provisions of Sections 2275 and 2276 of the Revised Statutes, or other subsequent enactments pertaining thereto, allowing the State certain indemnities or lieu land in such cases.

Very much in point is the case of U. S. vs. Morrison, 60 L. ed. 599, 240 U.S. 192, where the Supreme Court of the United States held that under the Enabling Act of Oregon **unsurveyed** lands granted to the State by said Act could be withdrawn by the Federal Government and reserved to establish forest reservations.

See also the case of State of Utah vs. Work, 6 F. (2d) 675, where the Court of Appeals of the District of Columbia, in dealing with land granted to the State of Utah for school purposes, said:

"Nor would title attach in the state, though terms of **present grant** are used in the school land grant, as against any disposition thereof made by the United States, until the survey of the lands had been approved."

The court further said:

"At a time prior to survey, when the lands were still public lands of the United States, they were, under a valid order of the President, designated as oil lands and placed within a petroleum reserve. This removed them from the operation of the school land grant until such time as the order of withdrawal should be revoked. That time has not arrived."

The foregoing Utah case was affirmed by the Supreme Court of the United States in State of Utah vs. Work, 273 U.S. 649, 71 L. ed. 822. See also U. S. ex rel State of New Mexico vs. Ickes, 72 F. (2d) 71, certiorari denied, 293 U.S. 296, 79 L. ed. 689; State of Wyoming vs. Lane, 62 L. ed. 377, 245 U.S. 427; and U. S. vs. State of Oregon, 79 L. ed. 1267, 295 U.S. 1.

We answer your inquiries, therefore, by stating, in our opinion, as follows:

(1) That the state's title to Sections 2, 16, 32 and 36, on which there had been on June 20, 1910, *{*201}* (the date of enactment of the Enabling Act), a completed survey finally approved by the Secretary of the Interior, was in no way lost by the mere embracement of such sections within national forests established or enlarged subsequent to such date.

(2) That as to Sections 2, 16, 32 and 36 as were unsurveyed at the date of the Enabling Act, the same may, under the reservations found in Section 6 of the Enabling Act, supra, have been withdrawn by the Federal Government for national forest purposes at any time prior to a completed survey thereof finally approved by the Secretary of the Interior, in which case the State would have to resort to the indemnifying provisions found in Section 6 of the Enabling Act and Sections 2275 and 2276 of the Revised Statutes and/or amendments thereto.

Trusting the foregoing sufficiently answers your inquiry, I am

By: FRED J. FEDERICI,

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