

## Opinion No. 44-4435

January 8, 1944

**BY:** EDWARD P. CHASE, Attorney General

**TO:** Mr. H. R. Rodgers, Commissioner of Public Lands, Santa Fe, New Mexico.  
Attention: Mr. George A. Graham, Attorney

We are in receipt of your letter of January 4, 1944, in which you state that the Land Commission has under its jurisdiction three lots containing coal, upon one of which a lease has been given, together with an easement to drive a tunnel through a portion of one of the other lots, which is not under lease. You also state that application has been made for a coal lease upon the lots not heretofore leased, which you designate as Lots 1 and 3, by any individual other than the owner of the lease on the lot you designate as Lot 2.

In view of these facts, you ask our opinion on the following:

- "1. May the Commissioner, under paragraph 2 (a) of the lease, arbitrarily grant an easement through the tunnel built by another through lands under a valid lease?
2. May the Commissioner be forced by Court action to grant such ingress and egress after a lease has been issued to the upper Lot 1?
3. Should such easement through such tunnel be granted, would any liability attach to the Commissioner for damages to the lessee of Lot 2?
4. Does the Commissioner of Public Lands have the right to refuse to issue a coal lease upon lands where coal is believed to be embedded?"

In answer to your first question, your attention is directed to the following provision of the coal mining lease:

"2: -- The lessor hereby expressly reserves:

(a) The right to permit for joint or several use, such easements or right-of way including easements in tunnels, upon, through or in the land leased as may be necessary or appropriate to the working of the leased lands for minerals other than coal or other adjoining lands containing mineral deposits, and for the treatment and shipment of the products thereof by or under authority of the State of New Mexico, its lessee or permittee."

It is seen from this provision that the Commissioner expressly reserves the right to permit for joint or several use, such easements or right-of-way including easements in tunnels, through or in the land leased as may be necessary or appropriate to the

working of other adjoining lands containing mineral deposits. Thus, the Land Commissioner, having retained an easement to use tunnels on leased land, may grant such easement in connection with a proper lease of adjoining land containing a mineral deposits, such as coal.

In view of the foregoing, it is my opinion that the answer to your first question is "Yes." I would not, however, term such action arbitrary, but merely the exercise of the rights reserved in the lease.

In answer to your second question, I note that no lease has ever been heretofore granted on Lot 1, so that there could not, at this time, be any easements or servitudes now existing in connection with Lot 1. Your attention is directed to the portion of the granting clause of the lease, which is as follows:

"Together with rights-of-way, easements, servitudes, rights and privileges of all and every kind and nature incident to or convenient for the economical operation of said land for mining coal \* \* \*."

As I have pointed out above, since coal has not been mined on the above mentioned lot, there could be no easement incident to the coal on this lot. As to whether or not some easement might exist which is convenient to the mining of coal on this lot would be a question of fact depending on the particular facts and circumstances involved in this matter.

It is therefore my opinion that unless some easement convenient for the economical operation of said mine for mining coal be granted by the lease itself, that the lessee would have no right to force the Commission to grant ingress and egress after a lease had been issued on this land.

In answer to your third question, your attention is directed to the fact that the Commissioner of Public Lands is a State Officer of the State of New Mexico, and, as such, cannot be sued without the consent of the State through its Legislature.

In answer to your fourth question, your attention is directed to Section 8-1002 of the N.M. 1941 Compilation, which provides in part as follows:

"\* \* \* on or before the expiration of such permit, the Commissioner **may** grant the applicant the right to develop and extract coal."

In view of the use of the word "may" it is my opinion that it is discretionary with the Commissioner whether or not he grant an applicant a coal lease.

Trusting that the foregoing sufficiently answers your inquiries, I am

By ROBERT W. WARD,

Assistant Attorney General