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June 26, 1979

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ARIZONA ATTORNEY GENERAL

Mr. Louis C. Duncan
Manager, Contract Audit Section
State Land Department
1624 West Adams
Phoenix, AZ 85007

Re: I79-166 (R79-089)

Dear Mr. Duncan:

In your letter dated March 15, 1979, you requested an opinion concerning the Arizona Supreme Court decision in Farmers Investment Co. v. Pima Mining Co., 111 Ariz. 56, 523 P.2d 487 (1974), as it relates to the proper disposition of cactus and protected native plants located on State trust lands. Your inquiry was limited to those dispositions which are incidental for some purpose other than sale of natural products of the land such as a grant of right of way.

It is our opinion that dispositions by the State Land Department of natural products of the land other than by sale are not subject to the public auction and notice requirements contained in Article 10, § 3 of the Arizona Constitution, although no disposition of any kind can be made for a consideration less than the value so ascertained. Ariz. Const., Art. 10, § 4.¹

1. Initially, it should be noted that, by the Act of June 20, 1910, Ch. 310, 367 Stat. 557, Congress passed enabling legislation which authorized the Territory of Arizona to form a state government. Certain federal lands were granted to Arizona to be held in trust for the support of common schools and other specified purposes. Section 28 of the Arizona Enabling Act provided unprecedented restrictions governing disposition of granted lands and natural products of the land. The relevant provisions of Section 28 of the Act are as follows:

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such

Footnote 1 continued:

particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

* * *

All lands, leaseholds, timber and other products of land, before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . .

* * *

. . . nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after notice by publication provided for sales and lease of the lands themselves.

* * *

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural product thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provisions of the Constitution or laws of the said State to the contrary notwithstanding.

Article 10 of the Arizona Constitution restates the requirements and limitations imposed upon the state as to the management of the federal granted lands in accordance with the provisions of the Enabling Act. See also A.R.S. § 37-481 et seq.

The interpretation and pragmatic application of the Enabling Act has been cumbersome and awkward since its inception. The cause of this dilemma is found in the express restrictions in Section 28 regarding management of the trust assets. A lengthy historical analysis is inappropriate for this opinion; however, the recognition of congressional concern with poor administration and unwise dissipation of the lands must be acknowledged. See Murphy v. State, 65 Ariz. 338, 181 P.2d 336 (1947), for an excellent discussion of the historical events leading to the unprecedented restrictions in Arizona's Enabling Act.

In Farmers Investment Co., supra, the court held that products of the land must be disposed of pursuant to notice and public sale when those products are the true objects being bargained for by the prospective grantee, pursuant to Ariz. Const. Art. 10, § 3. In that case, the real purpose of a lease was for the sale of groundwater, notwithstanding the fact that the land was the stated object of the parties' agreement. Therefore, the court held that the lease was violative of the Arizona Constitution and Enabling Act because the State Land Department failed to comply with the requirements of notice and public auction. That decision does not mandate notice and public sale where the contemplated disposition of natural products of the land is incidental to the real purpose or consideration of the agreement.

On the basis of the foregoing discussion, it may be permissible in some situations to charge a right of way applicant the appraised value of the products of the land which are incidentally disposed of pursuant to the grant of right of way without the necessity of holding a public sale with notice.² The decision to hold a public sale should be made whenever it is determined to be in the best interests of the trust. The State Land Department as trustee has a continuing duty to protect the interests of the trust. This duty may mandate a public sale even though it is not required as a matter of law. See Ellison v. Schuster, 35 Ariz. 457, 281 P. 38 (1929).

The state does not have the right to grant any interest in trust lands which incidentally encompasses the right to dispose of natural products without minimum consideration for the products equal to their true value. The Arizona Constitution and Enabling Act expressly require that true value be given to the state trust pursuant to any disposal of products of the land. Ariz. Const., Art. 10, § 4. Therefore, it would be permissible for the State Land Department to impose damages for destruction of products of the land that occur pursuant to use by a lessee or permittee of a right of way in an amount not less than true value.

2. A mandatory public sale requirement would be especially burdensome in the situation where the costs of sale exceed the appraised value of the products. Such a sale would result in a loss to the trust which would undermine the intention of Congress in procuring the true value proceeds from any disposition. See Lassen v. Arizona, 385 U.S. 458, 87 S.Ct. 584 (1967).

Mr. Louis C. Duncan
June 26, 1979
Page 4

Assuming that an incidental disposition of products of the land is made necessary by the use to which the land will be put, an issue arises as to the proper party to appraise and sell the products of the land. This inquiry relates to the right of the State Land Department to delegate its obligations imposed by statute in accordance with the Enabling Act.

It is our opinion that the obligations of appraisal and public sale cannot be delegated by the State Land Department to a lessee or any third party. A delegation of the State Land Department's duties would eliminate the control necessary to insure reimbursement of true value to the trust. The trustee must be directly responsible for the management and preservation of the trust assets.³ Delegation of these obligations would improperly shift the responsibility contrary to the terms of the Ariz. Const., Art. 10, § 1, and A.R.S. § 37-481.⁴ A delegation of this authority would result in a breach of trust violative of the Enabling Act.

Sincerely,



BOB CORBIN
Attorney General

BC/mm

3. The State Land Department as trustee of state lands has a duty to "exercise that care and diligence which an ordinarily prudent man would exercise in the management of his own affairs." Ellison v. Schuster, 35 Ariz. 457, 469, 281 P. 38, 43 (1929).

4. A.R.S. § 37-481 provides:

The state land department shall conserve, sell or otherwise administer the timber products, stone, gravel and other products and property upon lands belonging to the state under rules and regulations not in conflict with the enabling act and the constitution, and conforming as nearly as possible to the rules and regulations of the forest service of the United States department of agriculture.