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VANLANDINGHAM - "

July 20, 1959  
Opinion No. 59-122

REQUESTED BY: Honorable Obed M. Lassen,  
State Land Commissioner

OPINION BY: WADE CHURCH, The Attorney General

QUESTIONS: 1. Can the Land Department under the terms of  
A.R.S. §37-461 sell at public auction merely  
a right-of-way and not the land?

2. In the event it is determined that the  
Land Department has the authority to sell rights-  
of-way at public auction rather than land, can  
the Land Department impose terms and conditions,  
such as the reversion of the right-of-way to the  
State when no longer used for the purpose for  
which granted; that pipelines be placed at such  
depth as not to interfere with surface use for  
grazing or agricultural etc.; when the right-  
of-way is granted after public notice and sale?

3. Does the State Land Department have the  
authority to grant rights-of-way in excess of  
a ten year period without public auction?

4. Is a pipeline for the conveyance of oil, gas,  
helium, etc., across grazing or agricultural land  
to be considered as an improvement under the defini-  
tion contained in A.R.S. §37-101?

CONCLUSIONS: Question No. 1, Yes.

Question No. 2, Yes.

Question No. 3, Yes.

Question No. 4, No.

1. An understanding of the authority of the State Land Department relative to rights-of-way requires some discussion of the authority possessed by the State of Arizona over lands acquired by it from the United States.

The Supreme Court of Arizona has discussed this authority in the case of Campbell v. Flying V. Cattle Co., 25 Ariz. 577, which was followed in State v. Drew, 83 Ariz. 91. The court said in the Campbell case that:

"The lands owned or held in trust by the State were granted by the federal government under the provisions of the Enabling Act, and the state holds them the same as any other patentee \* \* \* After title to them had vested in the state, it became exclusively the province of the state legislature to provide a method for disposing of them which would further the objects for which the

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various grants were made, and its action in this respect, unless in violation of some constitutional provision or clearly contrary to the terms of the grant, is final."

It would therefore appear that the State has authority to grant rights-of-way on such terms and conditions as it may select, unless in violation of some constitutional provision, or clearly contrary to the terms of the grant. That the authority to grant rights-of-way is not in conflict with the Enabling Act or with the State Constitution has been determined by the Supreme Court of Arizona in the cases of Grossetta v. Choate, 51 Ariz. 248, and the State of Arizona v. State Land Department, 62 Ariz. 248.

". . . There is nothing in the Enabling Act limiting the power of the Legislature to grant rights-of-way easements over the public lands for public highways." Grossetta v. Choate, supra, pg. 254."

These cases treat a right-of-way easement neither as a sale nor a lease and the conclusion to be drawn therefrom is that all facets of the granting of a right-of-way rest within the legislative discretion. The legislature has exercised that discretion in the enactment of A.R.S. §37-461, as follows, to-wit:

"§37-461. Grants of rights of way and sites for public uses

A. The state land department may grant rights of way for any purpose it deems necessary, and sites for reservoirs, dams and power or irrigation plants, or other purposes, on and over state lands, subject to terms and conditions the department imposes. The department may make rules and regulations respecting the granting and maintenance of such rights of way and sites.

B. When grant of a right-of-way or site amounts to the disposition of or conveys a perpetual right to the use of the surface of the land, it shall be disposed of after approval by the department of the application for the right of way or sites in conformity with the requirements of law, and the department may, if the best interest of the state requires, state in the notice of sale that the sale is subject to approval by the state land department, and in such case the purchaser shall not be entitled to the right-of-way or site until his purchase is confirmed."

1.2.3. The answers to questions 1, 2 and 3 must be ascertained from the expression of legislative will contained in said section.

Applying recognized rules of statutory construction, a careful examination of said section fails to disclose any wording indicating a legislative intent that any interest in land other than a right-of-way be granted, whether with or without sale and such must be so as a comprehensive coverage is otherwise contained in the "Land Code" providing for sales and leases. Nor is there any language restricting the power to impose upon a right-of-way terms and conditions, whether the grant be made with or without public auction.

Since the Land Department is expressly given the authority to make rules and regulations respecting the granting and maintenance of such rights-of-way, the Department can under proper rules and regulations grant rights-of-way (1) for any purpose it deems necessary (2) subject to such terms and conditions as are reasonable and necessary for the protection of the state's rights (3) either with or without public auction so long as when a grant amounts to the disposition of, or conveys a perpetual right to the use of the surface of the land, it shall be at public auction, and (4) for such a period of time as the department may determine, if perpetual at public auction, if not perpetual, either with or without public auction; unless said section is an improper delegation of legislative power.

Our Supreme Court has discussed this matter of delegation of legislative powers as follows:

" . . . (1,2) Under the Constitution the legislative authority of the state is vested in the legislature with the reservation that the people at the polls may enact or reject laws. It is fundamental that the legislative power thus entrusted cannot be relinquished nor delegated. Tillotson v. Frohmiller, 34 Ariz. 394, 271 P. 867; Hernandez v. Frohmiller, 68 Ariz. 242, 204 P. 2d 854; Loftus v. Russell, 69 Ariz. 245, 212 P. 2d 91. The line of demarcation between what is a legitimate granting of power for administrative regulation and an illegitimate delegation of legislative power is often quite dim. A clear guide for all situations is indeed difficult

" . . . The difficulty is to properly mark the boundary between administrative and legislative power. It may safely be said that a statute which gives unlimited regulatory power to a commission, board or agency with no prescribed restraints nor criterion nor guide to its action offends the Constitution as a delegation

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of legislative power. The board must be corralled in some reasonable degree and must not be permitted to range at large and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate. . .

". . . (3) It has been recognized that the legislature sometimes cannot practically nor feasibly prescribe all administrative details, and such duties within limits may be left to the board. It has also been recognized that sometimes the applicability of a statute may depend upon the existence or non-existence of hypothetical facts, and determination of which is not feasible for the legislature. Consequently boards have been legitimately given fact-finding powers and rule-making powers to provide the details for enforcing existing law. Haggard v. Industrial Commission, 71 Ariz. 91, 223 P. 2d 915 . . . State v. Marana Plantations, 75 Ariz. 111."

The California Supreme Court has stated the rule in this manner:

". . . The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect. . ."

A statute authorizing the commissioner of public works "to cooperate" with the federal government, counties and other governmental subdivisions "for the construction, improvement and maintenance of" certain roads is constitutional. The Supreme Court of Idaho in so deciding said:

". . . The legislature may constitutionally leave to administrative agencies the selection of the means and the time and place of the execution of the legislative purpose and to that end may prescribe suitable rules and regulations." . . . State v. Taylor, 78 P. 2d 125.

A statute granting the state property and buildings commission power "to purchase, lease or rent real estate as the commission may find to be necessary for use by the state. . . to sell and convey any real estate owned by the state. . . found by the commission not to be

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needed" is constitutional. Preston v. Clements, 232 SW 2d 85.

A statute granting a board power to "regulate all conditions of employment in the state service" is unconstitutional. Hernandez v. Frohmiller, 58 Ariz. 242.

A statute granting the unemployment commission authority over employees with the requirement "positions shall be filled by persons selected and appointed on a non-partisan merit basis" was constitutional and the commission could by rule establish a very elaborate system of testing. Taylor v. McSwain, 54 Ariz. 295.

After due consideration of the statute and authorities we are of the opinion that the statute is not an unconstitutional delegation of legislative power and that rules and regulations properly promulgated by the Land Department governing the granting of rights-of-way are valid,

The Enabling Act, Section 28 provides:

". . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction.

". . . Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substances may be produced therefrom in paying quantities, . . ."

The Constitution and statutes adopt the provisions of the Enabling Act.

The Enabling Act, Constitution and statutes not referring to rights-of-way and the Supreme Court in the cases of Grossetta v. Choate, supra, and State of Arizona v. State Land Department, supra, having treated a right-of-way easement neither as a sale nor a lease, the only applicable

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statutory provision is that contained in A.R.S. §37-461, heretofore quoted, requiring public auction when the grant amounts to the disposition of or conveys a perpetual right to the use of the surface of the land.

We therefore conclude that the answers to questions 1, 2 and 3 are yes.

Throughout the statutes applicable to the Land Department, reference is made to improvements without specifying what should be considered improvements. However, in A.R.S. §37-101, the word "improvements" is defined as follows:

"Improvements" means anything permanent in character the result of labor or capital expended by the lessee or his predecessors in interest on state land in its reclamation or development, and the appropriation of water thereon, which has enhanced the value thereof."

The Territorial Supreme Court in the case of Schley v. Vail, 11 Ariz. 226, interpreted a statute defining improvements almost identical with the provision of Section 37-101 and it said:

"It is urged by the appellant that placing upon school lands a dwelling house, barns, corrals, fences, cleaning off the brush and undergrowth to prepare ground for grazing purposes, and the cultivation of ground for raising crops thereon without irrigation should confer upon the occupant a preferred right to lease without the appropriation of water on such land. The answer to this is that in case the land was not susceptible of irrigation, and the occupant was using it for grazing purposes or for dry farming, these improvements unquestionably would confer such right, and constitute one class of improvements contemplated in paragraph 4037 (section 6); but the complaint in this case does not allege the placing upon the land described therein of any such improvements, and the appellant herein cannot, therefore, be aided by that fact. There is no allegation in the complaint that the improvements are not such as might be readily removed from the land, and therefore, though valuable and permanent in themselves, confer no enhanced value upon the land. A frame house, firmly constructed, would be a permanent structure, and could be properly termed a 'valuable improvement', and might be used by the occupant for a warehouse in which to store goods or machinery or supplies to use on adjacent property, or to sell to operators of adjacent properties, or for a saloon to invite the patronage of employees of

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adjacent properties; but, if placed on blocks or pillars, as such buildings frequently are, it would not be an appurtenant to the realty, but could be readily removed and neither being the result of labor or capital expended on such land in its reclamation or development, nor having enhanced the value of the same beyond what said lands would be worth, had it been permitted to remain in its original state, would not constitute either 'improvements' or 'appurtenances' thereon, 'as set forth in section 5' above cited."

The Schley case was followed by our Supreme Court in Charlebois v. Renaud, 28 Ariz. 378.

After consideration of the statutes and authorities, the Attorney General is of the opinion that each case presents a question of fact as to whether improvements are permanent in character, the result of labor and capital, result in the lands reclamation or development, and enhance the value of the lands.

It is concluded therefore that a pipeline as herein described does not meet the criteria established in that it does not enhance the value of the land.

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