Irrigation Projects, Conveyance of State Lands For. School Lands, Conveyance to United States Government.

Chapter 53, Laws 1905, is a valid enactment of the legislative assembly, and under such law the state board of land commissioners are required to convey lands to the United States government at a price of $10 per acre for use in carrying on the reclamation work.

Helena, Montana, August 13, 1908.

State Board of Land Commissioners,
Helena, Montana.

Gentlemen:

Your letter of August 11th received, enclosing a letter from Mr. H. N. Savage, supervising engineer of the United States reclamation service, in which he requests the state board of land commissioners to convey to the United States the southwest quarter of the southeast quarter, the south half of the southwest quarer, and he northwest quarter of the southwest quarter of section 16, township 31 north, range 26 east, M. P. M., stating that such land is necessary for flowage purposes in constructing the Dodson reservoir in the Milk river project. In your letter you request an opinion as to whether or not the state is obliged to grant the request of the federal government.

The legislature of this state, by Chapter 53, Laws of 1905 (Section 2212, Revised Codes), has provided that:

> "Any lands now, or hereafter owned by the State of Montana and needed for such irrigation and reclamation work shall, upon application made therefor to the state board of land commissioners, be conveyed to the United States at the minimum price of ten dollars per acre."

The enabling act, in granting lands to the State of Montana, placed the same under the regulations of the legislature of the state, with certain limitations; viz: that the lands should be sold at a price of not less than $10 per acre, and that the funds received from the sale should constitute a permanent fund, the interest of which should be used for the maintenance of the institutions. Subject to the above limitations contained in the grants to the state, the direction, control, leasing and sale of school lands are under the regulations and restrictions prescribed by the legislature, as Section 4, Article XI of the state constitution provides:

> "The governor, superintendent of public instruction, secretary of state and attorney general shall constitute the state board of land commissioners, which shall have the direction, control, leasing and sale of the school lands of the state, and the lands granted or which may hereafter be granted for the support and benefit of the various state educational institutions, under such regulations and restrictions as may be prescribed by law."

In discussing the normal school land grant, our supreme court, in State vs. Rice, 33 Mont. 388, said:

> "The state may act through its constitutional convention, and, if it does so, such action is conclusive. In the absence of constitutional provisions, it may act through its legislative assembly."

The only question then is whether the legislature exceeded its authority in enacting said Chapter 53, for the meaning and purpose of said law, if valid, is plain.

That the law violates no provision of the state constitution is clear.

Section 11 of the enabling act, in addition to fixing the minimum price per acre, also says that the lands shall be disposed of only at public sale. This presents the question whether or not the legislature has authority to authorize the conveyance of land to the United States for reclamation purposes at the price of $10 per acre, without having a public sale of the land. The legislature, in enacting said Chapter 53 of the Laws of 1905, has evidently construed this provision of Section 11 of the enabling act as applying only to the sale of land to private individuals or companies, and that it does not apply to lands necessarily required by the national government in its work of reclaiming the arid lands of the state of Montana.

In our opinion, such a construction is just and reasonable, for the reason that the United States government, in such a case, is merely asking the state to take $10 per acre in lieu of the lands theretofore granted the state.

In cases where the title in the land has not vested in the state at the time its use becomes necessary for reclamation purposes, the United States, in order to insure the full grant to the state, gives it the right to make lieu selections. So in cases where lands, the title of which has vested in the state, are needed for reclamation work, it is not a sale of the land to the United States goverment, but merely an xchange in which the state is given the cash in lieu of the land theretofore granted it by the United States. In this manner, the state's original grant is fully protected, as it gets the equivalent of the land in the form of cash.

Clearly such procedure does not violate the spirit and purposes of the land grants contained in the enabling act.

Probably the United States should condemn the land necessary for its reclamation work; but instead of pursuing such a course, the officers of the reclamation service went before the legislatures of the western states, in which the reclamation work is being carried on, and asked them to co-operate in the work of reclaiming the arid lands of such states.

Mr. Savage met with a committee of the legislature of this state, and representatives of the state land board, and agreed upon the bill which was afterward enacted as said Chapter 53, and by this law, the legislature, which, as shown above, has the authority to direct the manner of the holding and disposing of the school lands, has clearly provided that lands owned by the state, and needed for such irrigation and reclamation works, shall, upon application therefor to the state

board of land commissioners, be conveyed to the United States, for the sum of $10 per acre.

Under such circumstances, if the invalidity of the law does not clearly appear, it should be followed as a matter of executive policy by the officers of this state, in dealing with the United States authorities.

However, aside from the question of executive policy, we believe that on the grounds of public policy, and in view of the great benefits to be derived from these irrigation projects, as well as under the enabling act and state constitution, the courts would uphold the provisions of said Chapter 53 as a valid exercise of legislative authority.

In a former opinion given by this office to the Hon. John P. Schmit, register of the state land office (Opinions of Attorney General, 1905-6, page 89), construing the first section of said Chapter 53, it was said:

> "All such state lands as are not sold prior to the time when water is actually ready for delivery from the works constructed by the United States, shall, from that time on, be sold at the minimum price fixed by the enabling act."

We are therefore of the opinion that, where the United States reclamation services hows that certain state lands are necessary for the construction of reservoirs, for the purpose of irrigating and reclaiming arid lands, it is the duty of the board, under Section 2 of said Chauter 53, to convey such necessary lands to the United States government, at the minimum price of $10 per acre. You will notice that the latter part of said Section 2 provides that, in case the land required by the United States for such purpose is in possession of any lessor, such lessor shall be reimbursed by the national government for actual damages by him sustained as to improvements by him placed thereon, such damages to be determined by appraisement, as the state board of land commissioners may direct.

Yours very truly,

ALBERT J. GALEN,

Attorney General.