

**State Land Board—State Lands—Right-of-Way.**

The provisions of the constitution and enabling act requiring certain land granted to the state to be disposed of at public sale and for a minimum price of \$10 per acre do not prevent the state land board from granting a free right-of-way over state lands for the extension of the Great Northern Railway.

I. M. Brandjord, Esq.,  
Register of State Lands,  
Helena, Montana.

July 17, 1925.

My dear Mr. Brandjord:

You have submitted for an opinion the question whether the state land board has authority to grant a free right-of-way across state land in northern Daniels and Valley counties for the purpose of extending the Great Northern branch line from Scobey to Opheim.

The enabling act contains several land grants to the state and places certain limitations on the alienation thereof.

Thus, section 10 contains a grant of sections 16 and 36 with lieu lands for the support of the common schools, and section 11 (referring to lands granted by section 10) provides that "all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price of not less than \$10 per acre."

Section 12 grants 50 sections to be selected by the state for the purpose of erecting public buildings at the capitol. There is no limitation upon the disposal of these lands. Whether any of this class of land will be included in this selection will be disclosed by your record after the plat of the proposed route has been filed.

Section 17 makes grants to the state of Montana of 500,000 acres to be selected by the state for various schools, colleges and public buildings. There is no limit placed on the sale of these lands, and it is provided that "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide."

Therefore, if the sections of land crossed by this proposed branch line are lands granted for buildings at the state capitol under section 12, or for certain schools and colleges, as provided in section 17, that is, if they are selections made by the state under these sections, then there is no limit at all as regards their disposition, except such as may be found in the statutes.

The question of limitation upon the right, therefore, relates only to sections 16 and 36 and lands granted in lieu of lost sections 16 and 36 under sections 10 and 11, and lands theretofore granted to the territories under section 14. The question as to whether the limitation applies to a proposed grant of a railroad right-of-way is found in the expression that "all lands herein granted \* \* \* shall be disposed of only at public sale, and at a price not less than \$10 per acre."

Section 38 of article V of the constitution is as follows:

"The legislative assembly shall have no power to pass any law authorizing the state, or any county in the state, to contract any debt or obligation in the construction of any railroad, nor give or loan its credit to or in aid of the construction of the same."

I believe that the provisions of this section have no application to the question here presented. The state is not contracting a debt or obligation in the construction of the railroad, nor is it giving its credit in aid of its construction. The construction of the road will greatly aid in the sale and development of state lands in this locality, and will no doubt enhance the value of all state lands served by this line. If the road is not constructed the land will revert to the state.

The pertinent provisions of the constitution relative to the disposition of state lands are found in article XVII. This section defines as the public lands of the state all lands that have been granted to the state by congress, and all lands otherwise acquired by gift, grant or devise. It provides that the public lands thus defined "shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised." This article further provides "nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States." It further provides for the classification of such lands into grazing lands, timber lands, agricultural lands, and lands within the limits of any town or city or within three miles of such limits, and provides that the lands in the first three classes may be sold or leased under such rules and regulations as may be prescribed by law.

Section 1851, R. C. M. 1921, provides:

"The state board of land commissioners may grant the right of way across or upon any portion of state lands, upon such terms as may be agreed upon, for any ditch, reservoir, railroad, private road, telegraph or telephone line, or for any other public use, as defined in the code of civil procedure."

The statute then goes on to provide that "whenever lands granted for any of the purposes mentioned in this section shall cease to be used for such purposes, said lands shall revert to the state, upon notice to that effect to the person to whom such grant was made."

In granting a right-of-way the state will not part with the fee to these lands, but will grant either an easement in fee for the construction and operation of a railroad, or will, as in the case of the United States, grant a base fee giving the railroad the right to exclusive possession and ownership of the land for railroad purposes only, with a reversion in the event that the land is abandoned for railroad purposes. The state, upon selling these subdivisions through which the proposed right-of-way ex-

tends, will not carve out the acres embraced within the right-of-way as in the case of a sale, but will grant to the proposed purchaser the entire subdivision at a given, appraised value.

While the price received may be lessened by reason of the location of the right-of-way over the particular subdivision—that is, by reason of its cutting off some portion of the subdivision from the remainder of the land and making it less accessible and less practical to use in connection with the remainder of the land—it will nevertheless add to the value of the land as a whole and the subdivision will be sold in its entirety. In case it is abandoned the easement will revert to the future purchaser of the fee. The value as a whole, however, will be enhanced by reason of the construction of the railroad.

It does not seem that a grant of this sort is within the general prohibition above noted. These provisions are expressly inapplicable to the case of a railroad right-of-way.

It is apparent that the sale which congress had in mind when it provided that "all lands herein granted shall be disposed of only at public sale, and at a price of not less than \$10 per acre," had reference to a public sale only and to those cases where more than one bidder is contemplated. In the case of a sale of land for right-of-way for railroad purposes there can be but one purchaser, to-wit, the railroad desiring the particular right-of-way. There is, therefore, no competitive bidding. The sale must be made purely with reference to the value of the land and the injury done to any particular subdivision. A sale to a railroad is not a sale and has none of the characteristics of the subject over which congress was legislating. The state grants only such land as is absolutely necessary for the right-of-way, and proximity to the right-of-way of other lands belonging to the state enhances their value.

The sections of the statute relating to grants of rights-of-way do not contemplate that the purchase price of \$10 per acre shall be required. The earlier section was 3503 of the political code of 1895. It provided that "in any case where lands heretofore or may hereafter be purchased by or donated to the state of Montana, or may be purchased by or may have been donated to the territory of Montana, and the state of Montana remains the owner thereof, either for the erection of public buildings or other purposes, and it is deemed expedient to grant a right-of-way over and upon such lands, the governor and secretary of state are authorized to execute and sign, on behalf of the state, the proper deed or other instrument of writing therefore," and this same section authorized the state to plat state lands and dedicate the streets on the plat. These sections are also found as sections 43 and 46 of an act of the second legislative assembly of the state of Montana, approved March 6, 1891, p. 174. This act of 1891, as regards ordinary sales, repeatedly forbids sales at less than \$10 an acre, but no such limitations are found as regards the granting of rights-of-way.

It thus appears that almost immediately upon the state being formed, and continuously for more than 30 years since that time, legislation has been passed and acted upon authorizing the state to grant these rights-of-way without any limitations upon this power.

Section 1849, R. C. M. 1921, as regards grants to the United States, draws the distinction between general lands which the United States might need in its irrigation and reclamation works, and provides that such grants will be made by Montana to the United States at the minimum price of \$10 per acre; but as regards rights-of-way for ditches, canals, tunnels, telephone and telegraph lines to be constructed in furtherance of the reclamation work, these rights are granted free of charge, doubtless on the basis that such rights-of-way are a benefit to the land over which they cross. Section 1950 enacted in 1899 grants to counties and cities, free of charge, a similar right-of-way for public highways.

Section 1851 relates to grants to private corporations which are engaged in public service. It provides that the state board of land commissioners may grant these easements for public purposes to private public service corporations "upon such terms as may be agreed upon."

If the state land board may grant rights-of-way "upon such terms as may be agreed upon," then it may grant a right-of-way for no consideration other than the benefit which will accrue to other state land.

It is, therefore, my opinion that the limitations as found in the constitution and enabling act are not applicable, and that the state board of land commissioners has power to grant a right-of-way, free of charge, over the class of land designated in the enabling act as lands which must be disposed of at public sale and at a minimum of \$10 per acre.

Very truly yours,

L. A. FOOT,

Attorney General.