

**State Lands—Mining Locations—Enabling Act—Public Sales  
—Patents.**

The provisions of the enabling act requiring lands granted to the state for school purposes to be sold at public sale do not apply to a mining claim located on state lands under sections 1905 and 1906, R. C. M. 1921.

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

November 5, 1925.

My dear Mr. Brandjord:

You have submitted to this office the application of Louis Ellingsen of Anaconda, Montana, for a patent to a mining location which he has located on state land.

You ask whether, under the provisions of sections 1905 and 1906, R. C. M. 1921, the applicant is entitled to a patent at the minimum price of \$10.00 per acre, or whether the land must be sold at public sale, as provided in the enabling act.

The state has, by the provisions of sections 1905 and 1906, made provision for locating a mining claim on state land where there has been a discovery of mineral and in acquiring title thereto where the state board of land commissioners has first determined that the land is chiefly valuable for mineral.

Section 1905 deals with the location of a claim and follows the provisions of the state and United States statutes with reference to locating a mining claim on unappropriated public land. The claim must not exceed 600 feet in width by 1500 feet in length, and location is made by making a discovery and posting notice of such discovery. The notice of location, however, need not be recorded in the office of the clerk and recorder but must be filed with the register of state lands.

In this case, it does not appear that the locator has filed his notice of location with the register. However, he may secure a certified copy of the notice recorded with the clerk and recorder and file the same with the register.

Under the provisions of section 1906,

“Before the locator will be allowed to purchase the claim located by him, satisfactory proof \* \* \* must be submitted to the state board of land commissioners that such claim is more

valuable for mineral purposes than for any other purpose, and that the same contains a body of mineral in place, or a placer deposit, of sufficient value to justify the operation of the same as a present fact; and provided further, that all hearings under the provisions of this section shall be had before the contest board, with like procedure as other contested cases; and provided further, that no lands classified under subdivision 4 of the classification in the constitution shall be sold as mineral lands, but the mineral therein may be sold separately from the surface."

It is apparent that under these sections the state has (as to land mineral in character, except as to oil and coal lands) offered to reward the discoverer of a vein or lode or ledge or placer by according him the right to purchase said land at a minimum of \$10.00 per acre, or to lease the same upon such terms as may be agreed upon. The size and dimensions of the claim are the same as a location under the federal mining law, being 600 feet in width by 1500 feet in length.

Lands known to be mineral in character at the time the grant of school lands took effect did not pass to the state. (*Ivanhoe Min. Co. vs. Kelstone Min. Co.*, 102 U. S. 167; 26 Law Ed. 126.)

And since it was not intended that lands mineral in character should pass to the state under the school grant, the enabling act is silent as to the disposition of lands subsequently found to be valuable for mining purposes. After the grant takes effect the discovery of mineral does not defeat the grant and the state's right to the mineral becomes absolute. (*Wheeler vs. Smith*, 32 Pac. 784; *Virginia Lode*, 7 Land decisions 459; *Colorado C. & I. Co. vs. U. S.*, 123 U. S. 307, 31 Law Ed. 182; *Lindley on Mines*, 3rd edition, sec. 142, note 45.)

Lindley in his work on mines at section 55, in speaking of the policy of the federal government in opening to occupation and exploration the mineral lands of the public domain says:

"It (the government) forever abandoned the idea of exacting royalties on the products of the mines, and gave free license to all its citizens, and those who had declared their intention to become such, to search for the precious and economic minerals in the public domain, and, when found, gave the assurance of at least some measure of security in possession and right of enjoyment."

Owing to the uncertainty attending mining ventures and the fact that discovery is only a preliminary step, the state has by the provisions of sections 1905 and 1906 followed the policy of the federal government with relation to rewarding those who have discovered mines in state land and has offered to them the right to purchase or lease the same.

Section 11 of the enabling act provides:

"That all lands granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre. \* \* \*"

Section 1 of article XVII of the constitution provides:

"nor shall any lands which the state holds by grant from the United States 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. Said lands shall be classified by the board of land commissioners as follows: First, lands which are valuable only for grazing purposes. Second, those which are principally valuable for the timber that is on them. Third, agricultural lands. Fourth, lands within the limits of any town or city or within three miles of such limits; \* \* \*"

Section 2 of this article provides:

"The lands of the first of said classes may be sold or leased, under such rules and regulations as may be prescribed by law. The lands of the second class may be sold, or the timber thereon may be sold, under such rules and regulations as may be prescribed by law. The agricultural lands may be either sold or leased, under such rules and regulations as may be prescribed by law. The lands of the fourth class shall be sold in alternate lots of not more than five acres each, and not more than one-half of any one tract of such lands shall be sold prior to the year one thousand nine hundred and ten (1910)."

Section 3 of this article provides:

"All other public lands may be disposed of in such manner as may be provided by law."

Under these provisions of the constitution and enabling act the question naturally arises whether the granting of this exclusive right to purchase at the minimum price is not in conflict with these provisions since it would necessarily exclude public bidding. As to lands in class 4, it is to be observed that only the right to purchase the minerals is granted. This would necessarily carry with it the use of such surface land as was necessary to carry on mining operations. The classification of land as mineral would take it out of the other three classes enumerated in the constitution. It would, therefore, be a declaration by the state land board that the land was not valuable for any purpose designated in classes 1, 2 and 3. Since the state receives the minimum price of \$10.00 per acre at the sale, as provided for in the enabling act, the only other provisions that could be violated are the provisions regarding public sale and full market value. Public sale can mean nothing more than sale to the highest bidder.

However, as before stated, there was no intention on the part of congress to grant mineral lands to the state, and where lands were known to be mineral in character at the time of the taking effect of the grant such lands did not pass to the state but were reserved for exploration and development as other mineral lands. Where the mineral character was unknown at the time of the taking effect of the grant the state did acquire the whole fee, including the minerals, should any subsequently be discovered therein.

When the enabling act required lands to be "disposed of only at public sale," it contemplated only that character of lands which the state was entitled to receive under its grant, to-wit, unappropriated land non-mineral in character.

Under the provisions of sections 1905 and 1906 the land located must first be determined to be chiefly valuable for mineral, and when so found this takes the land out of any classification contemplated by the enabling act and outside of the requirement of public sale as contained therein which would destroy all reward to the discoverer and give the benefit of his industry and effort to the highest bidder.

It is, therefore, my opinion that sections 1905 and 1906, R. C. M. 1921, are not in conflict with the provisions of the enabling act with respect to public sale and that the mineral and surface rights embraced within the lines of location can be sold to the purchaser at the minimum price of \$10.00 per acre, upon his making proof of the mineral character of the land to the satisfaction of the board, and without public bidding.

Very truly yours,

L. A. FOOT,  
Attorney General.