

No. 452

**COMMISSIONER OF STATE LANDS—STATE LANDS—
MORTGAGE LANDS—PREFERENCE OF LEASES—
PRIVATE SALE**

Held: Where the Commissioner of State Lands offers "mortgage land" for sale under the procedure outlined in Section 1805.77, Revised Codes of Montana, 1935, and receives a sealed bid from the lessee of the land in the same amount as the highest sealed bid from any other person, the bid of the lessee should be accepted if otherwise complying with said section. Where the Commissioner sells at private sale under the authority of Section 1805.78, Revised Codes of Montana, 1935, in the event the lessee makes an offer equal to any other offer received, the offer of the lessee should be accepted if in all other respects qualified. The Commissioner, however, may sell at private sale any time within the two year period to any qualified person who will pay the appraised price as advertised and make the initial payment under the provisions of Section 1805.78, supra. The said statute does not contemplate nor require sealed bids at such private sale.

July 25, 1942.

Mr. J. W. Walker, Commissioner
State Lands and Investments
State Capitol
Helena, Montana

Dear Mr. Walker:

You have submitted for my opinion the following:

"In order to properly administer the sale of mortgage lands within the two year period succeeding the legal advertising of such land for sale, an opinion is requested to define what, if any, preference right a lessee of the land has if more than one application to purchase is on file in the state land office.

"Is it obligatory to offer the sale of the land at sealed bidding when more than one application is on file?

"Does the lessee have the preference of meeting the highest bid the same as is done under the leasing of state land or is he compelled to compete with other applicants?"

In answering your inquiry it is well to note Chapter 60, Laws of 1927, sets up the whole procedure of handling state lands by your department, and was carried forward in our Code as Sections 1805.1 to 1805.121, inclusive.

Section 1805.2, Revised Codes of Montana, 1935, in part provides:

"The term, 'state land' or 'lands' shall mean and include all lands that have heretofore been granted and that hereafter may be granted to the state by the United States for educational purposes or for any other purpose, either directly or through exchange for other lands; all lands that have become the property of the state through deed or devise from any person; all lands to which the state has become the owner through a mortgage to the state, either by foreclosure or otherwise; and all lands that have become the property of the state through operation of the law. . . ."

The act then provides for the sale of state lands at public auction and that "mortgage lands" shall be offered for sale at such sales of state lands, and then provides:

"It is further provided that the lessee of the land need not make a higher bid than others, but shall if bidding an equal amount be given preference." (Section 1805.75, Revised Codes of Montana, 1935.)

Section 1805.77, Revised Codes of Montana, 1935, provides:

"Mortgage lands may also be advertised and sold at other than the regular sales of state lands at county seats whenever the board so orders and in all such cases the sale shall be at the office of the commissioner by means of sealed bids. Before mortgage lands can be so sold, notice of the sale containing substantially the same information as the notice for the sale of other state lands, must be given by publication once each week for three (3) successive weeks in the official county paper of the county where the land is located. Sealed bids shall then be received by the commissioner up to a certain date not less than twenty-one (21) days and not more than thirty (30) days from the date of the first publication of the notice of sale, and this date must be given in the notice. On such date the bids shall be opened and the highest bid accepted if it is for not less than the appraised value and is accompanied by the required initial payment and fees."

Section 1805.78, Revised Codes of Montana, 1935, provides:

"After mortgaged lands have once been advertised for sale either at the office of the commissioner or at a sale of state lands at the county seat of the county where they are located, and the same have not been sold, they may be sold by the commissioner at private sale, at any time within two (2) years from the date fixed for the sale under the previous notice to any qualified person who will pay the appraised price as advertised and make the required initial payment."

It will therefore be noted that, before mortgage lands can be sold under Section 1805.77, supra, under "sealed bids," notice of sale must be given as therein provided. Then sealed bids shall be received by the commissioner up to a certain date not less than twenty-one (21) days and not more than thirty (30) days from the date of the first publication of notice of such sale. If the said "mortgage lands" have not been sold after advertising for sale either at the office of the commissioner or at a sale of state lands at

the county seat of the county where located, then the commissioner may sell such lands at private sale at any time within two years from the date fixed for the sale as above noted.

The Legislature has given the lessee the preference in releasing such lands (Section 1805.35, Revised Codes of Montana, 1935) and has given preference to the permittee and lessee for prospecting and mining (Chapter 148, Laws of 1937) and to the lessee on sale (Section 1805.75, Revised Codes of Montana, 1935). The intention of the Legislature appears plain to give such preference to the lessee throughout the act.

It is therefore my opinion that, where the commissioner offers such "mortgage land" for sale under the procedure outlined in Section 1805.77, Revised Codes of Montana, 1935, and receives a sealed bid from the lessee of the land in the same amount as the highest sealed bid from any other person, the bid of the lessee should be accepted if otherwise complying with said section.

The lessee—having had notice of the sale as advertised—may protect his interests at the sale, under Section 1805.78, Revised Codes of Montana, 1935. The commissioner may sell at private sale at any time within the two year period to any qualified person who will pay the appraised price as advertised and make the initial payment under the provisions of Section 1805.78, supra. The said statute does not contemplate nor require sealed bids at such private sale, nor does the statute extend any preference to the lessee at such private sales.

Sincerely yours,

HOWARD M. GULLICKSON
Attorney General