

No. 495

**STATE BOARD OF LAND COMMISSIONERS—STATE  
LAND—CONSTITUTION**

**Held:** State Board of Land Commissioners authorized and empowered by Section 1805.115, Revised Codes of Montana, 1935, to execute a deed to the United States for a section of school land, heretofore patented to the State, where a portion of said section is mineral land. Said Section 1805.115 held constitutional under facts of opinion.

September 30, 1942.

Mr. J. W. Walker  
Commissioner  
Department of State Lands  
Helena, Montana

Dear Mr. Walker:

You have advised the United States has issued patent to the State of Montana, covering Section 36, Township 19 North, Range 30 West, but the patent was issued in error by reason of the fact that in 1903 the United States issued a patent on a mineral claim on about seventy-eight acres of the section; further, the Commissioner of the General Land Office advises, since title had already passed from the government when patent was issued to the state, the conflict in title to the seventy-eight acres must be resolved by court action. However,

"If . . . the State is in a position to do so and will quit claim to the United States Sec. 36, T. 19 N., R. 30 W., as described in patent No. 1100394, an amended township plat may be prepared showing the section exclusive of patented mining claims therein, after which a new and correct patent, in lieu of patent No. 1100394, may be issued to the State for the land in Sec. 36, supra, in accordance with the Act of 1934, mentioned above."

In connection with the facts set forth, you ask the opinion of this office whether Section 1, Article XVII of the Montana Constitution, or any statute, would prohibit the state from quit claiming this land to the United States, for the purpose of securing a correct patent to that part of the section not covered by the prior mineral patent.

Section 1805.115, Revised Codes of Montana, 1935, authorizes, empowers and directs the State Board of Land Commissioners to cause to be corrected any and all errors, mistakes and misdescriptions in any and all deeds and conveyances of property to the State of Montana; and, in order to carry into effect the provisions thereof, all deeds or other conveyances as may be necessary shall be made and executed in the manner provided for the execution of patents by the state.

That the patent from the United States is such a deed or conveyance as is contemplated by this section appears from the following definition appearing in 50 Corpus Juris 1095:

"A patent is the Government conveyance; the instrument which, under the laws, passes the title of the United States; a patent is the deed of the Government."

It follows that, unless Section 1, Article XVII of the Montana Constitution is a bar, this section of the statute authorizes the State Board of Land Commissioners to execute such deed, or other conveyance, in the form of a patent, as may be necessary to correct the error which occurred when the United States issued its patent to the State of Montana.

The rule applicable in the determination of the constitutionality of a statute is set forth in *Rider v. Cooney*, 94 Mont. 295, 307, 23 Pac. (2nd) 261, in the following quotation from the case:

"Where a legislative Act is attacked on the ground of its unconstitutionality, the question presented is not whether it is possible to condemn it, but whether it is possible to uphold it, the presumption being in favor of its validity, and it must be upheld unless its unconstitutionality appears beyond a reasonable doubt."

Approaching a consideration of the question of the constitutionality of the statute, permitting action by the State Board of Land Commissioners to make the correction required in the matter under examination, having in mind the duty to uphold the statute unless its unconstitutionality appears beyond a reasonable doubt, reference must be had to the Act of Congress granting to the State of Montana Sections 16 and 36 in every township. The act was approved February 22, 1889, (25 Stat. 676) and is commonly known and referred to as the "Enabling Act."

Section 10 of the Enabling Act provided that, upon the admission of Montana into the Union as a state, Sections 16 and 36 in every township was granted to the state, for the support of the common schools; however, Section 18 of the Enabling Act specifically stated all mineral land was excepted from the grants of land made by the act, provision being made authorizing the state to select lieu land covering any of said sections, or parts thereof, which the Department of the Interior found to be mineral land.

The terms of the grant contained in the Enabling Act were accepted by the state (Section 7 of Ordinance 1).

By reason of the terms of the grant contained in the Enabling Act, and the acceptance thereof by the state by said section of the ordinance, the

grant to the state did not cover mineral lands in Sections 16 and 36. The mineral land was expressly excluded from the grant; and, for that reason, the state's title to the mineral portion of the land in the section in question is defective. The state has no ownership of that portion of the section which is mineral land.

Section 1, Article XVII, of the Montana Constitution was incorporated into the Constitution, adopted by the Constitutional Convention, and ratified by the people, for the purpose of giving effect to the provision of the Enabling Act that the grant was for the support of the common schools. The constitutional section provided this land shall be held in trust for the people, to be disposed of as therein provided, for the purposes for which it was granted.

That the constitutional prohibition against disposal of state land, except as provided therein, was not meant to cover a situation where the title conveyed to the state by the government did not meet the conditions set forth in the Enabling Act, and was not meant to prevent the officers of the United States and officers of the State of Montana from correcting errors which would naturally occur in working out the terms of the grant, is clearly indicated by the Supreme Court in *State ex rel. Boorman v. State Board of Land Commissioners*, 109 Mont. 127, 134, 94 Pac. (2nd) 201. In the case, mandamus was instituted against the board to compel it to refund the purchase price of an illegal sale of state land. Petitioner relied upon Section 1805.116, Revised Codes of Montana, 1935; making it the duty of the board to cause money erroneously paid to the state to be refunded to the person entitled thereto from the proper fund. The court stated:

"It is our opinion that the \$3,200 is not part of the common school fund which must be kept inviolate, and that it is the duty of the board to cause the amount to be refunded, not because of any particular equitable grounds, but because it sold something to which it cannot convey legal title, and it is powerless to remedy the situation and convey title of any nature, clear or otherwise . . . We think the legislature must have enacted this section to take care of just such matters as that involved in this proceeding, without the necessity and delay attendant upon a specific appropriation by the legislature. No injury is done to any one by the state's refunding money it received on a void contract, and this statute provides a simple and effective mode that should be followed in refunding money the board holds, such as that involved here."

Therefore, as to the land in question: The state under the Enabling Act and the ordinance accepting it, has no ownership to the mineral land included within the patent; the United States has agreed to issue a new and correct patent covering the portion of the land included within the grant; no injury will result to the common school fund by a correction of the error.

It is, therefore, my opinion that Section 1805.115, Revised Codes of Montana, 1935, is constitutional, as applied to the facts under examination, and that the State Board of Land Commissioners is authorized and empowered to execute a deed to the United States, under its agreement to issue a new and correct patent for the portion of the section covered by the grant contained in the Enabling Act.

Sincerely yours,

R. V. BOTTOMLY  
Attorney General