

**VOLUME NO. 36****Opinion No. 78**

**STATE LANDS — Sale of land granted by Enabling Act; STATE PRISON—Transfer of prison site to City of Deer Lodge; 25 Stats. at Large 676; Ordinance 1, section 7, 1889 Montana Constitution; Article X, section 11, 1972 Montana Constitution; Chapter 9, Title 81, Revised Codes of Montana 1947; Sections 81-909, 81-910 and 81-912. Revised Codes of Montana 1947.**

**HELD: The state of Montana must adhere to the full market value requirement of the Enabling Act in disposing of the territorial prison site at Deer Lodge, absent a congressional waiver.**

May 11, 1976

The Honorable Thomas L. Judge  
Governor of the State of Montana  
State Capitol  
Helena, Montana 59601

Dear Governor Judge:

You have requested by opinion as to whether there are any alternatives available to facilitate the transfer of the territorial prison site to the city of Deer Lodge, other than sale for fair market value or a congressional waiver of that condition.

By the provisions of section 15 of the Act of Congress, approved February 22, 1889 (25 Stats. at Large 676), commonly known as the "Enabling Act", there was granted to the state of Montana "[T]he penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefore,...

Section 11 of the Enabling Act sets forth the conditions under which the land was granted, and reads in pertinent part:

That all lands granted by this act shall be disposed of only at public sale after advertising...

...provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

The terms of this grant were accepted by the state of Montana in section 7 of Ordinance 1, 1889 Constitution of Montana as follows:

The state hereby accepts the several grants of land from the United States to the state of Montana mentioned in an act of congress, [the Enabling Act]

See **Rider v. Cooney et. al.**, 94 Mont. 295, 304 23 P.2d 261 (1933).

In disposing of the land acquired under the Enabling Act, the state must (1) hold a public sale after advertising; (2) sell the land for full market value; (3) pursuant to the general laws providing for such disposition. Your specific question is whether the prison site may be sold for something other than full market value.

"Full market value", as used in this context was defined by the Montana Supreme Court in **Rider v. Cooney et al.**, supra, as follows:

"Value" means the price which property could command in the market. By "value", in common parlance, is meant "market value", which is no other than the fair value of property as between one desiring to purchase and another desiring to sell; and the words "value" and "market value" are often used interchangeable, and both as being equivalent of "actual value" and "salable value". (cites omitted)

There is nothing in the Constitution to indicate that the expression under consideration was used in a sense other than that expressed by it, as the ordinary person would understand it. The absence of competition in the leasing of any tract of state land is not conclusive evidence that there is no market for the land, but only evidence that in all probability there is no competitive or active demand for the particular tract. Furthermore, property may have a value notwithstanding there is no market for it. (cites omitted) 94 Mont. at 308.

Article X, section 11 of the 1972 Montana Constitution contains a provision concerning the disposition of state lands which is similar, though not identical, to the language in the Enabling Act. Chapter 9 of Title 81, R.C.M. 1947, entitled **Sale of State Lands**, provides for the disposition of all state lands. In accord with the Enabling Act, Chapter 9, **supra**, requires in part: sale at public auction (81-909); notice of sale (81-910); no land sold at less than appraised value (81-912).

In construing the provisions relating to the disposition of state land, the Montana Supreme Court stated in **State ex rel. Warner v. District Court**, 142 Mont. 145, 153, 382 P.2d 824 (1963) that a sale of state land "...must be held strictly in accordance with the prevailing law as interpreted herein."

Disposition of the land in question is not only subject to the requirements of the 1972 Montana Constitution and Chapter 9, Title 81, *supra*, it is also subject to the provisions of the Enabling Act which contains the full market value requirement. The Montana Supreme Court has specifically stated that the state cannot change the terms of the Enabling Act.

The Supreme Court in **State ex rel. Galen v. District Court et al.**, 42 Mont. 105, 112 P. 706 (1910) construed the Enabling Act and section 11 in particular. The court stated:

Neither can we agree that there is any question of the right of the United States to dictate and restrict the manner in which the state shall dispose of the lands... Neither is there any authority in the state to change the terms of the grant without the consent of the Congress of the United States. The framers of the state Constitution did not attempt to do so. They expressly agreed, for the state, not to dispose of any lands granted by the United States in any case in which the manner of disposition was prescribed in the grant, except in the manner prescribed, without the consent of the United States.... The Congress is presumed to have had good and sufficient reason for thus restricting the right of alienation, and the state solemnly accepted the conditions. 42 Mont. at 116.

The **Galen** case makes it clear that Congress had the right to restrict the manner in which the state disposed of the lands obtained under the Enabling Act. Further the state agreed to the conditions of the grant and cannot change the terms without the consent of Congress.

**THEREFORE, IT IS MY OPINION:**

The state of Montana must adhere to the full market value requirement of the Enabling Act in disposing of the territorial prison site at Deer Lodge, absent a congressional waiver.

Very truly yours,

**ROBERT L. WOODAHL**  
Attorney General