Comments

ARIZONA'S ENABLING ACT AND THE TRANSFER OF STATE LANDS FOR PUBLIC PURPOSES

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THE PROBLEM DEFINED

Upon its admission to the Union, Arizona was granted certain lands within the State, set aside in trust, to be administered for the benefit of the public school system.[1] By the combined provisions of the Acts creating the Territory of Arizona[2] and the Enabling Act for Arizona statehood,[3] the State has been made trustee for four sections of every township in the State not otherwise appropriated.[4] Especially in a state where Indian reservations, national forests, national parks and other federal lands constitute more than seventy per cent of the total land area, these school trust lands are a significant portion of the land available for development.[5] These lands are held by the State, not as an instrumentality of the federal government, but in its own right subject, however, to the trust imposed by the Enabling Act.[6] Under the trust provisions, which are not unique to Arizona among the several

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[1] Arizona Enabling Act, ch. 310, §§ 24-30, 36 Stat. 572-76 (1910). Other institutions are allotted part of the public trust lands under the Enabling Act provisions, but the largest portion is set aside for school support and this comment deals primarily with them. Statements made with reference to the school lands apply equally to the other trust lands.

The Arizona Enabling Act is set forth in full in Volume 1 of the Arizona Revised Statutes beginning at page 79.

[2] Act of Sept. 9, 1850, ch. 44, § 15, 9 Stat. 457; Act of Feb. 24, 1863, ch. 56, § 2, 12 Stat. 665.

[3] Ch. 310, §§ 24, 28, 36 Stat. 572-73, 574 (1910).

[4] Sections 2 and 32 were granted to the State, and Sections 16 and 36, which earlier had been granted to the Territory, were reconfirmed to the State. Provisions is made in § 24 of the Enabling Act for indemnity sections to be selected if the specified sections in the township have been previously appropriated. The total land initially received was a little more than 10,500,000 acres.

[5] Arizona's total land area is 72,688,000 acres. Of this, the federal government owns 52,089,582.60 acres or 71.66%, State trust lands amount to 9,166,781.43 acres or 12.61%, and only 11,431,635.97 acres or 15.73% are privately owned. The private ownership figure includes lands owned by the State in its proprietary capacity (not as trustee) and by county and local governments. For a more detailed breakdown of land ownership see the 53d Annual Report of the State Land Commissioner of the State of Arizona, Statistics, p. 27 (1965).

[6] Kelly v. Allen, 49 F.2d 876 (9th Cir. 1931). The supervision of the trust lands is placed in the State Land Department and its head, the State Land Commissioner. See generally, ARIZ. REV. STAT. ANN. §§ 37-102, 37-132 (1956).

western states,[7] the State must use all revenue gained from sale or lease of the school trust lands solely and exclusively for the benefit of the public school system, and any use or disposition of the land contrary to the provisions of the Enabling Act is considered a breach of trust.[8]

To insure that the school fund will receive the greatest possible benefit from the sale or other use of the trust lands, Congress included in the Enabling Act the requirement that these lands "shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction,"[9] and essentially the same provision was included in the Arizona Constitution.[10] Even without the coinciding constitutional provision there could be no valid disposition of these public lands without a public sale,[11] and every sale or lease not made at a public auction is null and void.[12] This limitation on the manner of disposition is laudable in its goal of obtaining as much as possible of the support funds for the public schools from the income of the trust lands, and thereby reducing the tax burden on the State's residents, particularly the real property owners. As a general rule the public auction system works satisfactorily, but there are drawbacks.

One of the practical disadvantages of the public sale requirement is apparent only upon consideration of two additional factors. The first is the need by county and municipal governments and by state agencies for additional land for performance of essential services for the benefit of the general public.[13] Since the school trust lands constitute such a large portion of the usable land in Arizona, it is not un-

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[7] See, *e.g.*, Idaho Admission Act, ch. 656, § 5, 26 Stat. 216 (1890); Montana Enabling Act. ch. 180, § 11, 25 Stat. 679-680 (1889); New Mexico Enabling Act, ch. 310, § 10, 36 Stat. 563-65 (1910); North Dakota Enabling Act, ch. 180, § 11, 25 Stat. 679-680 (1889); Oklahoma Enabling Act, ch. 3335, § 9, 34 Stat. 274 (1906); South Dakota Enabling Act, ch. 180, § 11, 25 Stat. 679-680 (1889); Washington Enabling Act, ch. 180, § 11, 25 Stat. 679-680 (1889); Wyoming Admission Act, ch. 664, § 5, 26 Stat. 223 (1890). By contrast, however, the Alaska Statehood Act, 72 Stat. 339 (1958), granted all lands to that state free of any trust provisions.

[8] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910). Provisions for segregating funds derived from state lands are found in ARIZ. REV. STAT. ANN. §§ 37-521 to -526 (1956).

[9] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910).

[10] ARIZ. CONST. art. 10, § 3.

[11] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 575 (1910); Boice v. Campbell, 30 Ariz. 424, 248 Pac. 34 (1926).

[12] Arizona Enabling Act, ch. 310, § 28, 36 Stat. 575 (1910).

[13] The scope of this comment does not include the problem of acquisition of lands or rights of way for development of the public highway system. This matter is currently in litigation in Arizona and elsewhere. The Arizona Supreme Court has held in State *ex rel.* Arizona Highway Department v. Lassen, 99 Ariz. 161, 407 P.2d 747 (1965), that the State Highway Department need not pay for highway rights of way and materiel sites on trust lands since a good highway system increases the value of these lands. A similar position was taken by the Wyoming Court in Ross v. Trustees of University of Wyoming, 30 Wyo. 433, 222 Pac. 3 (1924) rehearing 31 Wyo. 464, 228 Pac. 642 (1924), but a contrary result was reached

common that the land which could serve the community for a given purpose, such as transportation terminals, recreational sites, sanitation facilities and the like, is part of the trust land.[14] The trust lands are not a contiguous block,[15] but are dispersed throughout the State so that it is likely that more and more of this land will be in demand as cities expand and public facilities are extended.

The second consideration is the present fiscal arrangement in Arizona. Under present conditions it is impossible for state agencies or political subdivisions to acquire needed land directly from the State Land Department. The expenditures of state agencies are limited by their respective budgets and legislative appropriations,[16] and local governmental units operate on a similar basis. It is seldom possible to determine in advance when trust property is going to be sold, much less to determine what the selling price will be on a given parcel,[17] and consequently the purchase cannot be provided for in the budget. It is obvious that the agency cannot attend the public auction with a blank check, so the land will go to the private bidder who will pay the highest price. The problem is further compounded by the requirement that governmental bodies pay cash for purchases[18] whereas private persons can make a small down payment with many years to pay the balance.[19] If the governmental agency wants the parcel of land badly

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in New Mexico which has the identical Enabling Act provisions as Arizona. State *ex rel.* State Highway Commission v. Walker, 61 N.M. 374, 301 P.2d 317 (1956). The controversy is now before the United States Supreme Court on an appeal from the *Lassen* decision. Lassen v .Arizona, *review granted*, 34 U.S.L. WEEK 3372 (U.S. May 3, 1966) (No. 1109). Montana, Nebraska, Wyoming, Oklahoma, Utah, New Mexico, North Dakota, South Dakota and Washington have joined Arizona in the appeal.

[14] An example of the strategic location of state lands is found in the 1962-63 quest for a satellite airport site by the City of Phoenix. At least 640 acres was needed and there was no suitable federal or private land in the area in which the airport was to be located. The only land available was state land which the city could not purchase directly from the State Land Department except through competitive bidding at a public auction. Even though the city had $768,000 in federal funds to aid in purchasing the property, it could not be certain it would be able to outbid all others.

[15] The specific grants were of Sections 2, 16, 32 and 36 of each township. See note 4 *supra.*

[16] ARIZ. REV. STAT. ANN. § 35-131.02B (Supp. 1966):

> The commissioner [of finance] may acquire, in the name of the state, by gift, grant, purchase, condemnation or any other lawful manner, real property which is necessary, useful or convenient for the use of the state, but *no land shall be acquired by purchase or condemnation without an ....appropriation of funds by the legislature for such acquisition.* (Emphasis added.)

[17] Under the provisions of ARIZ. REV. STAT. ANN. §§ 37-236 and -237, the sale can take place as little as 70 days after an appraisal of the particular land has been made.

[18] ARIZ. REV. STAT. ANN. § 35-181.01 (Supp. 1965).

[19] ARIZ. REV. STAT. ANN. § 37-241 (Supp. 1965):

> A. The terms of sale of state land shall be as follows:
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> 1. Ten per cent of the appraised value, which shall be applied to principal, together with classification and appraisal fee provided for

enough, it must then deal with the private purchaser who will make a profit on the transaction and the taxpayers will have to pay out more than they would have if the purchase had been directly from the State Land Department for the appraised price of the land without a public auction.

The problem has become particularly acute in expanding centers of population,[20] and it is primarily in these areas that the real conflict in philosophy arises with regard to which course of action is best for the public in the long run.

On the one hand, the school fund probably will benefit more by open public sale of choice land in growing areas, since the land speculators will pay more than the present appraised valuation with the idea that they will receive their costs plus a nice profit upon proper development of the acquired land. The more money taken into the school trust fund the lower the school tax should be. And, in theory, the private development of the land bolsters the overall economy, thereby benefiting the public.

On the other hand, the public as a unit probably will benefit more, in a direct sense, if the parcel in question is sold for a fair price to the governmental agency needing it in order to properly perform a public service function, even though the school fund does not receive as much income. School taxes might go up, but taxes required to support the specific public service function will be lessened by the elimination of the private speculator's profit referred to above.

This conflict in purpose is not easily resolved and it will become more significant as both the costs of a public education system and the desirability for an orderly, economical expansion of governmental services increase to keep pace with an exploding population.[21] It

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in § 37-108, shall be paid in cash or cashier's check upon announcement of the successful bidder.

2. If the amount bid for the land exceeds the appraised value, further payment shall be made within thirty days so that the total amount paid including the amount paid on the date of sale shall equal ten per cent of the amount bid, which shall be allocated to principal, together with the classification and appraisal fee provided for in § 37-108.

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C. . . . The balance of the purchase price shall be in twenty-five annual payments, with interest on the amount unpaid at the rate of five per cent per annum, payable annually.

[20] See discussion in note 14 *supra.*

[21] Though not faced with the trust fund problem found in Arizona, the federal government has recognized that the growth of the national population has made it more desirable to dispose of certain small, strategically located tracts of federal public lands than to retain ownership of these parcels. Pending implemenation of recommendations to be made by the Public Land Law Review Commission, Congress has authorized the Secretary of the Interior to dispose of public lands where it is determined that (a) the lands are required for the orderly growth and development of a community or (b) the lands are chiefly valuable for residential, commercial, industrial, or public uses or development. See the 1964 Public Sale Act, 78 Stat. 988, 43 U.S.C. § 1421 (1964).

would seem, however, that both interests can be reconciled with a minimum of detrimental effect upon either goal.

A Possible Solution

History

Members of the Arizona Legislature recognized, about five years ago, the desirability of having state agencies and local governmental units purchase public lands directly from the State Land Department. Toward this end, the state Senate was presented with a bill which would have established fees and procedures for sale or conditional lease of state lands to cities, counties and state agencies for public purposes.[22] While this bill was being processed through legislative channels, it was pointed out that the proposed method of sale or lease could not be accomplished without amendment of the Enabling Act.[23] To overcome this obstacle, the Legislature passed a joint memorial to Congress requesting that the Enabling Act be amended to permit sale or lease of State public lands to an agency of the State or to any county, city or other local government or agency thereof without regard to the limitations imposed by Section 28 of the Enabling Act.[24]

Pursuant to this memorial, a bill was jointly introduced in the United States Senate by Senators Hayden and Goldwater which provided for the requested amendment with a proviso that any such sale or lease must be conditioned upon the continued use of the particular land for public purposes.[25] The bill passed the Senate but never got out of the House Interior and Insular Affairs Committee during that session fo Congress.[26]

By the time the Arizona Legislature next convened, certain pressure groups had mustered forces in opposition to any amendment[27] and a

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[22] S.B. 254, 25th Leg., 1st Sess. (1961). The bill as introduced set a maximum price of $10 per acre for sale and 10¢ per acre per year for lease. The Senate Judiciary Committee eliminated both maximum fees.

[23] Ops. Ariz. Att'y Gen. 62-2-L (Dec. 4, 1961). The opinion stated that neither legislative enactment nor popular initiative vote could change the State land law as written into the Enabling Act.

[24] S.J.M. 3, 25th Leg., 1st Sess. (1962). The particular provisions sought to be avoided were those requiring appraisal, advertising, and competitive bidding and relating to the price at which these lands may be sold or leased.

The memorial passed the Senate unanimously and received only one dissenting vote in the House.

[25] S. 3283, 87th Cong., 2d Sess. (1962).

[26] H.R. 11712, 87th Cong., 2d Sess. (1962). The bill became pigeon-holed during the hearings on the Wilderness Bill in the House Public Land Subcommittee and did not reach the floor before the election year adjournment.

[27] Particularly vocal were the Arizona Educational Association, which expressed concern that the school fund would be impaired, and the Arizona Cattle Growers Association, whose representatives could not reach an agreement with the legislators on setting an acreage limitation on lands made subject to any direct sale or lease

new memorial was sent to Congress requesting that no action be taken in respect of changes in the Enabling Act.[28] No further steps have been taken by either side, but this in no way indicates that the problem no longer exists. To the contrary, the increased demand for land which can be developed for both public and private purposes will make the public trust lands an even more significant commodity and a solution must be found very soon.

Compromise

Former attempts to deal with the problem have been characterized by an "all or nothing" approach by both sides. The forces favoring maintenance of the status quo seem to feel that receiving anything less than the highest price at a public auction will seriously deplete the value of the school trust. On the other hand the advocates of amendment seem to want to dispense with all safeguards in the name of the public good. This is evidenced by the provisions of the proposed amendment to the Enabling Act which would permit sale or lease of the trust lands "*without regard to* the provisions . . . requiring *appraisal,* advertising, or competitive bidding *or* relating to the *price* at which such lands may be sold or leased." (Emphasis added.)[29] If there is to be no control over the price of sale or lease, certainly the pro-school forces have sufficient grounds to be alarmed. There could be a total depletion of the trust lands with almost no income — all in the name of the public good.[30]

There was included in the 1963 proposed amendment a proviso in the nature of a reverter which conditioned sale or lease "upon the continued use of the lands for the purpose for which the transfer was

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provisions. See, Arizona Republic, Jan. 16, 1963, p. 17, col. 6.

Had the Enabling Act been amended, it would not have been the first time. The cattlemen themselves (and others) successfully sponsored an amendment in 1936 which increased from five to ten years the maximum permissible period for leasing of public lands without public notice where the lease was for grazing or other agricultural purposes or for mineral purposes. Act of June 5, 1936, ch. 517, 49 Stat. 1477. Another amendment fifteen years later enabled the legislature to provide laws for the protection of lessees as to improvements made on the lands. Act of June 2, 1951, ch. 120, 65 Stat. 51.

[28] S.J.M. 2, 26th Leg., 1st Sess. (1963).

[29] S. 3283, 87th Cong., 2d Sess. (1962).

[30] The advocates of free transfer argue that just because the trust principle was felt to best promote the public good at the turn of the century is no reason for following it today, and that changed conditions have made free transfer desirable. Some policy support for this position is found in the passage of the Alaska Statehood Act, 72 Stat. 339 (1958). This Act imposes no trust provisions or other limitations on Alaska's state lands and could be interpreted as reflecting a change in Congressional policy since the time of Arizona's admission when it was felt that trust restrictions and limitations on the mode of transfer were desirable, necessary or both. For a discussion of the situation facing Alaska in the development of its land resources see Cooley, *State Land Policy in Alaska: Progress and Prospects,* 4 NATURAL RESOURCES J. 455 (1965).

made."[31] This proviso was apparently intended to prevent the transfer of lands to a governmental agency for a minimal amount only to have the agency turn around and dispose of the land for a profit. In theory this is commendable, but in actuality it could cause problems if the transferee agency uses the land for the intended public purpose over a period of time and then finds the property is no longer suitable for that purpose. It may be in the best public interest for the agency to sell the land and apply the proceeds to the acquisition of more suitable property. But this is impossible under the terms of the proviso. When the transferee ceases to use the land for public purposes it reverts to the trustee State Land Department. This creates complications in title and may frustrate the public interest.

A compromise could avoid most of the undesirable aspects of each position in the controversy. As the earlier discussion shows, no plan for transfer of land to governmental agencies could be accomplished without removal of the public sale requirement as it applies to these transactions. There must be an opportunity for purchase without competitive bidding if the agency is going to be able to budget for the particular land purchase.

A further requirement before the purchase can be budgeted is the establishment of a price. The proposed amendment to the Enabling Act contained no limitation, either maximum or minimum, on the purchase price,[32] nor was any limitation made a part of the proposed State legislation to permit the sale or lease of trust lands.[33] As indicated above, the "reverter" provision complements this unlimited price provision by preventing an improper disposition of the transferred lands by the conveyee. But this "reverter" would be unnecessary if the original transfer was for a fair price. There would be no violation of public policy if the transferee governmental body paid an adequate price for the land and later sold the land when it was no longer suitable for the original public purpose. The school fund already would have received an adequate consideration, and the public interest would best be served by sale of the former trust land.

Determination of a fair price necessitates an adequate appraisal of the particular parcel to be conveyed. Therefore, any disposal arrangement should provide for an appraisal which takes into account such factors as the present and intended uses for the land and the price of the land would bring on the present market. Sale should then be for the appraised value.

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[31] S. 3283, 87th Cong., 2d Sess. (1962).
[32] *Ibid.*
[33] S.B. 254, 25th Leg., 1st Sess. (1961). See discussion in note 22 *supra.*

In the final analysis, the compromise amounts to this. Once the need to have the land for a public purpose has been established by satisfactory evidence presented to the State Land Commissioner, an appraisal of the land would be made. The appraisal value would be budgeted by the particular governmental agency or body and then the land would be purchased free of any "reverter" provisions. The trust fund, though perhaps not realizing the highest possible income from the disposal of the land, nevertheless, would receive a fair amount so there could be no charge of breach of trust. The governmental body would acquire the land for the lowest fair amount, rather than having to buy at a higher price from a private speculator, and would take title free of any contingencies so that it could later dispose of the land if the public interest should so dictate.

Implementation of the plan will require amendment of the Enabling Act,[34] but that should not be any obstacle if there is wide public support for it. And finally there will need to be changes made in the Arizona Constitution[35] and statutes[36] relating to the disposal of trust lands. But here again there should be no difficulty if all interested groups will back the compromise.

It well may be that in years to come all parties to the present controversy will agree that it is in the public interest to have free transfer of trust lands to governmental bodies for public purposes. Until that time should arrive, the suggested compromise plan would give due recognition to the interests of all parties and the taxpayers of the State would be the ultimate beneficiaries.

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[34] The necessary amendment could be accomplished by inserting the following paragraph before the last paragraph of Section 28:

> Nothing contained in this section shall prevent the transfer by sale or lease by the State of Arizona of any lands hereby granted or confirmed, to any agency of the State or to any county, city, or other local government or agency thereof, created by or pursuant to the laws of such State, for use for public purposes, without regard to the provisions of this section or other provisions of law requiring advertisting or competitive bidding.

[35] The Arizona Constitution would have to be amended in one place and probably should be amended in another. Article 10, Section 3 must be amended by adding a paragraph at the end as follows:

> 4. The transfer by sale or lease of said lands to any agency of the State or to any county, city, or other local government or agency thereof, created by or pursuant to the laws of this State, for use for public purposes, without regard to the provisions of this section or other provisions of law requiring advertising or competitive bidding.

Article 10, Section 11 should probably be amended to provide that the acreage limitations of 160 acres of agricultural land and 640 acres of grazing land would not apply to a purchase of land for public use by a state agency or local government.

[36] Certain portions of ARIZ. REV. STAT. ANN. §§ 37-231 to -255, relating to sale of state lands, and §§ 37-281 to -294, relating to lease of state lands, will have to be amended to reflect the changes in the Enabling Act and the Arizona Constitution. Most of these changes will be minor.