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COMPENSATION FOR HIGHWAY EASEMENTS OVER SCHOOL TRUST LANDS

The western territories of the United States were admitted to statehood by congressional enabling acts which specified that four sections of every township¹ be held in trust by the respective states for support of public schools.² Each of these enabling acts contains similar procedures for disposition of the trust lands³ and requires that the resulting revenues be held in trust subject to the same restrictions that apply to the land.⁴ Trust lands comprise a large area in each of the western states.⁵ Prior to the principal case the state courts were divided on the

¹ The enabling acts grant sections 2, 16, 32, and 36 of every township, or lands in lieu thereof, to the state to be held in trust. Sections 16 and 36 were granted to the Arizona Territory for the support of public schools. Ch. 44, § 15, 9 Stat. 457 (1856), ch. 56, § 2, 12 Stat. 665 (1863). These two sections were reconfirmed to the state, and sections 2 and 32 granted for the same purpose by the New Mexico-Arizona Enabling Act. Ch. 310, § 24, 36 Stat. 572 (1910).

² Arizona's Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910), establishing the trust and its governing restrictions, provides:

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

... Said lands shall not be sold or leased, in whole or in part except to the bidder at a public auction . . . notice of which public auction shall first have been duly given by advertisement.

³ The required procedures of four of the western states have been amended by Congress. See note 23 *infra*.

⁴ Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910); Idaho Admission Act, ch. 656, § 5, 26 Stat. 216 (1890); Montana Enabling Act, ch. 180, § 11, 25 Stat. 679 (1889); Nebraska Enabling Act, ch. 59, § 12, 13 Stat. 49 (1864); New Mexico Enabling Act, ch. 310, § 10, 36 Stat. 563 (1910); North Dakota Enabling Act, ch. 180, § 11, 25 Stat. 679 (1889); Oklahoma Enabling Act, ch. 3335, § 9, 34 Stat. 274 (1906); South Dakota Enabling Act, ch. 180, § 11, 25 Stat. 679 (1889); Utah Enabling Act, ch. 138, § 10, 28 Stat. 110 (1894); Washington Enabling Act, ch. 180, § 11, 25 Stat. 679 (1889); Wyoming Admission Act, ch. 664, § 5, 26 Stat. 223 (1890).

Compare Alaska Statehood Act, 72 Stat. 339 (1958) (granting all lands to that state free of any trust provisions).

⁵ State	Total Land Area	School Lands Granted	Percent of State
Arizona	72,688,000 acres	8,093,156 acres	11.1%
Montana	93,271,040 "	5,198,258 "	5.6%
Nebraska	49,031,680 "	2,730,951 "	5.6%
New Mexico	77,766,400 "	8,711,324 "	11.2%
N. Dakota	44,452,480 "	2,495,396 "	5.6%
S. Dakota	48,881,920 "	2,733,084 "	5.6%
Utah	52,696,960 "	5,844,196 "	11.1%
Washington	42,693,760 "	2,376,391 "	5.6%
Wyoming	62,343,040 "	3,470,009 "	5.6%

proper procedures for acquisition and compensation for public highway easements over these lands.⁶ The principal case marked the first resolution of these questions by the United States Supreme Court.

The Arizona Land Commissioner gave notice of a proposed rule⁷ to require compensation for highway right-of-way easements over school lands held in trust by the state pursuant to the New Mexico-Arizona Enabling Act.⁸ The Arizona Highway Department filed an original proceeding in the Arizona Supreme Court to prohibit the Land Commissioner from enforcing the proposed rule. Issuing a writ of prohibition, the court held it was the duty of the Land Commissioner to grant state highway right-of-way easements over school lands without compensation to the trust, because highways so enhance the value of the remaining school lands as to offset the value of land taken.⁹ On writ of certiorari to the Supreme Court, judgment was reversed and the case remanded. *Held*: The procedural restrictions of the Enabling Act governing disposition of trust lands are inapplicable to state acquisition of highway easements, but the state, by proceedings in the nature of eminent domain, must compensate the trust for the full appraised value of the land taken. *Lassen v. Arizona*, 87 Sup. Ct. 584 (1967).

⁶ Requiring Compensation: *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910); *State ex rel. Ebke v. Board of Educ. Lands & Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951); *State ex rel. Johnson v. Central Neb. Pub. Power & Irrigation Dist.*, 143 Neb. 153, 8 N.W.2d 841 (1943); *State Highway Comm'n v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956); *State Highway Comm'n v. State*, 70 N.D. 673, 297 N.W. 194 (1941).

Not Requiring Compensation: *State ex rel. Arizona Highway Dep't v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965); *Ross v. Trustees of Univ. of Wyo.*, 30 Wyo. 433, 222 Pac. 3 (1924), *aff'd on rehearing*, 31 Wyo. 464, 228 Pac. 642 (1925).

Despite the holding of *Ross v. Trustees of Univ. of Wyo.*, *supra*, that compensation is not required for easements over trust lands, that case has been construed to apply only to county rights-of-way, and the practice now followed in Wyoming is that payment of compensation to the Wyoming State Board of Land is required. See Brief of the States of Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming as Amicus Curiae, p. 4, *Lassen v. Arizona*, 87 Sup. Ct. 584 (1967). It would appear that Arizona was the only state which, by judicial decision *and* actual practice, did not require compensation for state acquisition of easements over trust lands.

Washington practice requires compensation for the acquisition of easements through proceedings in eminent domain. See note 23 and accompanying text, *infra*.

⁷ Proposed Rule No. 12 of the State Land Department:

State and County highway rights-of-way and material sites may be granted by the Department for an indefinite period for so long as used for the purpose granted after full payment of the appraised value of the right-of-way or material site has been made to the State Land Department. The appraised value of the right-of-way or material site shall be determined in accordance with the principles established in A.R.S. 12-1122.

⁸ Ch. 310, 36 Stat. 557 (1910).

⁹ *State ex rel. Arizona Highway Dep't v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965).

Noting that the United States has a continuing interest in the trust,¹⁰ the Court defined the two issues before it as: (1) whether Arizona could acquire highway easements over trust land without first satisfying the Enabling Act's procedural restrictions,¹¹ and (2) if so, what measure of compensation must Arizona employ to recompense the trust for the land taken? The Court, after considering the legislative history of Arizona's Enabling Act,¹² found that the disposition procedures "were material only so far as necessary to assure that the trust sought and obtained appropriate compensation."¹³ The Court reasoned that there was no need to impose such restrictions upon the state as the abuses at which they had been originally directed¹⁴ were no longer likely to occur. Demonstrating that state adherence to the procedural restrictions would be either empty formality or circuitous, the Court concluded that the restrictions did not apply to state acquisition of trust land. In resolving the question of the proper measure of compensation, the Court rejected the Arizona court's holding that non-compensation was justified by the conclusive presumption that highways so enhance remaining trust lands as to offset the value of the land taken.¹⁵ The Court also expressly rejected the argument of the United States that, while the state should pay full appraised value for trust land taken, a reduction in payment should be allowed to the extent the state proved enhancement in value to the remaining lands.¹⁶ Reasoning that the provisions of the Enabling Act were intended to insure maximum support for the trust, the Court concluded that the proper measure of compensation to the trust was the full appraised value of

¹⁰ New Mexico-Arizona Enabling Act, ch. 310, § 28, 36 Stat. 574 (1910), provides: It shall be the duty of the Attorney General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

¹¹ *Supra* note 2.

¹² S. REP. NO. 454, 61st Cong., 2d Sess. 18 (1910); Remarks of Senator Beveridge, 45 CONG. REC. 8227 (1910).

¹³ 87 Sup. Ct. at 587.

¹⁴ The abuses to which the Court adverted were the unauthorized leases of timber lands granted to the New Mexico Territory for support of common schools and colleges. The violations and breaches of trust by the territorial authorities were the basis of suits, prosecuted by the Department of Justice, known as the "tall timber" cases. See S. REP. NO. 454, 61st Cong., 2d Sess. 19-20 (1910).

¹⁵ The Supreme Court interpreted the holding of the Arizona court to be that enhancement of value of the remaining trust lands would be "conclusively presumed." 87 Sup. Ct. at 588. However, the Arizona court based its decision on judicial notice of such enhancement, stating, 407 P.2d at 750: "It is well known that good highways throughout a state increase the value of the lands."

¹⁶ Brief for the United States as Amicus Curiae, p. 17, *Lassen v. Arizona*, 87 Sup. Ct. 584 (1967).

lands taken, and that, because the act's enumeration of purposes for which the trust funds may be used was exclusive, there could be no diversion of funds due the trust to serve other purposes.¹⁷

The result in the principal case is commendable in many respects. Reflecting an appreciation of the importance to the western states and the United States of the questions involved, the Court not only fully resolved the controversy before it,¹⁸ but also set forth general principles applicable to states operating under other enabling acts. The Court, with this decision, established the broad principle that the procedural restrictions of state enabling acts are inapplicable to state acquisition of trust land *for public uses*, providing compensation is made to the trust for the full appraised value of land taken. By so doing, not only did the Court resolve the division among state courts,¹⁹ but it established precedent applicable to pending²⁰ and future litigation involving state acquisition and use of trust lands. Substantively, the Court's decision constituted approval of a manageable procedure, safeguarded by the requirement of full compensation, in the administration and disposition of trust land. However, despite the commendable result reached by the Court, its reasoning requires critical analysis.

The Court recognized that the New Mexico-Arizona Enabling Act's procedural restrictions were intended to prevent depletion of the trust by corrupt administration, yet it denied the present applicability of these restrictions because of the unlikelihood of recurrence of such abuses. Conceding the absence of recent public land scandals affecting trust lands, the Court effectively amended the act by exempting the state from provisions originally intended to apply primarily to it.²¹

¹⁷ Implicit in the Court's reasoning was the realization that funds otherwise due the trust would, under either the holding of the Arizona court or the argument of the United States, be diverted for highway construction.

¹⁸ The United States argued that, because the Arizona court had not reached the question of the proper standard of compensation, the Court should limit its decision to the applicability of the procedural restrictions, and defer the compensation question. See Brief for the United States as Amicus Curiae, p. 17, *Lassen v. Arizona*, 87 Sup. Ct. 584 (1967). The Court expressly rejected this argument, holding that full adjudication required determination of the proper compensation measure for state acquisition of trust lands. 87 Sup. Ct. at 588.

¹⁹ See cases cited note 6 *supra*.

²⁰ The decision in the principal case is applicable to two cases now pending in the State of Washington: *Cole v. Odegarrd*, Cause No. 39133, Washington Supreme Court; and *United States v. 111.2 Acres of Land*, Civil Cause No. 2619, United States District Court, E.D. Wash.

²¹ Congressional consideration of the New Mexico-Arizona Enabling Act took place during pendency of the "tall timber" cases, in which the Justice Department was prosecuting territorial authorities of New Mexico for exploitation and unauthorized use of timber on school trust lands. The legislative history of the act documents

It is significant that Arizona previously had sought Congressional relief from the procedural restrictions of its Enabling Act, and Congress had denied such relief.²² Where Congress has imposed restrictions intended to limit state action, the Court's reasoning is subject to legitimate criticism when, recognizing such Congressional intent, it denies applicability of the legislation on the ground of improbable recurrence of the evil toward which the legislation was directed.

The Court's refusal to require the empty formality and circuitry demanded by the act's procedural restrictions is more persuasive. Its observations that the state is the only builder of public highways and possesses powers of eminent domain which it could exercise were it out-bid at a public auction cannot be denied. It is a needless formality to require notice and public auction for the disposition of a highway easement if the only participant is the state highway commissioner. Even assuming that another party participated and offered the winning bid, the state would need only bring proceedings in eminent domain to acquire the easement.

The Court, rather than judicially amending application of the Enabling Act's procedural restrictions, could have based its decision upon the practice of other western states under similar enabling acts, and the import of Congressional amendments to those acts. Congress has amended the enabling acts of four western states to authorize acquisition of easements over trust lands through eminent domain proceedings.²³ Prior to these amendments, the majority of those states had concluded that, notwithstanding the absence of express provision for disposition of public easements, the states had an inherent power to acquire easements over trust land through eminent domain.²⁴ The

an awareness by Congress of these cases, and its attempts to include within the act restrictions, *applicable to the states*, to prevent future exploitation and abuse of the trust. See S. REP. No. 454, 61st Cong., 2d Sess. 19-20 (1910); Remarks of Senator Beveridge, 45 CONG. REC. 8227 (1910). See generally *Murphy v. State*, 54 Ariz. 338, 181 P.2d 336 (1947).

²² For a full discussion of Arizona's unsuccessful attempts to obtain Congressional amendment of its Enabling Act's procedural restrictions, see Udall, *Arizona's Public Lands—Mixed Blessing, Mixed Burden*, 8 ARIZ. L. REV. 11, 13 (1966).

²³ Congress adopted general amendments to the enabling acts of the states of North Dakota, South Dakota, Montana, and Washington. Ch. 61, 42 Stat. 158 (1921); Ch. 172, 47 Stat. 151 (1932).

²⁴ Washington has denied that the restrictions of its enabling act limited the state's power of eminent domain in acquiring easements over trust lands. *Tacoma v. State*, 121 Wash. 448, 209 Pac. 700 (1922); *Roberts v. Seattle*, 63 Wash. 573, 116 Pac. 25 (1911). The Washington holdings were consistent with that of Idaho. See *Hollister v. State*, 9 Idaho 8, 71 Pac. 541 (1903). Of the four states whose enabling acts were amended, only Montana held that Congress had intended to divest the state of its power of eminent domain over trust lands. *State ex rel. Galen v. District Court*, 42 Mont. 105, 112 Pac. 706 (1910).

primary purpose and effect of these amendments was to confirm the earlier holdings of the state courts, manifesting Congressional approval of a state's freedom to acquire trust lands for public use by proceedings in eminent domain without violating the procedural restrictions of the enabling acts. Rather than indulging in judicial legislation, had the Court adopted this reasoning in combination with its demonstration of unnecessary formality and circuitry, its resolution of the procedural question would have had a sounder basis.

Resolving the issue of proper compensation, the Court held that the state was "unequivocally" bound by the Enabling Act to pay the trust full appraised value for the land taken.²⁵ Although the Court might be criticized for inconsistency in denying applicability of the procedural restrictions to the state while holding it bound by the compensation requirement of the same act, the better analysis would be that strict enforcement of the act's compensation requirement is a necessary corollary to resolution of the procedural question. By liberalizing the procedural restrictions upon the state, the Court allowed broad state discretion in methods of acquisition. To check potential misuse of this discretion, however, the Court required that the state unqualifiedly adhere to the requirement of compensation at full appraised value. Implicit in the Court's reasoning is the theory that, of the two methods of safeguarding the trust, the procedural restrictions apply only to acquisition of trust lands by private parties, while the compensation requirement applies to *all* acquisitions of trust lands. Consistent with this theory, the Court concluded that the sole provision of the Enabling Act applicable to state acquisition of trust land was compensation at full appraised value.

The Court's determination that the compensation requirement should be the controlling trust safeguard in state acquisition necessarily required rejection of both the holding of the Arizona court²⁶ and the position taken by the United States.²⁷ The Court correctly reasoned that this single remaining restriction could not be qualified without jeopardizing the trust. It is significant that enhancement of value or general benefits accruing to private land not abutting that taken by eminent domain have not been allowed to qualify or diminish a condemnation award.²⁸ Although one writer characterizes di-

²⁵ 37 Sup. Ct. at 588.

²⁶ See text accompanying note 9 *supra*.

²⁷ See text accompanying note 16 *supra*.

²⁸ 3 NICHOLS, EMINENT DOMAIN § 8.6205 (rev. 3d ed. 1965).

minution of compensation because of general enhancement as a "vicious circle,"²⁹ the primary reason for disallowing this basis of reduced compensation is its uncertain and speculative measurement.³⁰ The value by which a *particular* tract of land, whether it be publicly or privately owned, will be enhanced by future construction of a highway is indeed speculative. In the case of trust lands dispersed throughout a state, the value by which they collectively will be enhanced by a future highway is purely conjectural.³¹

The Court not only sought to insure that the trust receive a proper measure of compensation, but also that funds due the trust would not be diverted to other uses under the guise of a diminution of the condemnation award. In *Ervien v. United States*,³² the Court, invalidating a New Mexico statute authorizing expenditure of trust funds for publicity designed to promote the state's resources, stated that the Enabling Act contained "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose."³³ It might be argued that the public benefit served by safe modern highways justifies the comparatively minor encroachment upon the trust (in the form of diminished condemnation awards) or, more pragmatically, that payment for highway easements would only amount to taking funds from one state "pocket" and putting them into another.³⁴ Neither contention, however, justifies disregard of the Enabling Act's requirement of full compensation or its exclusive enumeration of purposes for which the trust funds may be used. The legislative history of the New Mexico-Arizona Enabling Act in particular, and the enabling acts of western states generally, manifest a Congressional intent that the trust be maintained for con-

²⁹ ORGEL, VALUATION UNDER EMINENT DOMAIN § 104 (1st ed. 1936).

³⁰ 3 NICHOLS *op. cit. supra* note 28, at § 8.6205.

³¹ Arizona's brief presented a number of studies which purported to demonstrate that the increased valuation of adjacent and nearby lands could be measured with accuracy. Brief of Respondent, p. 27, *Lassen v. Arizona*, 87 Sup. Ct. 584 (1967). These studies, however, only demonstrated the ability to measure increases in land valuation *after* construction and opening of a highway. The studies failed to provide a definite measure of increased valuation to land for *prospective* highway construction. Thus it would appear that the Court was correct in holding the measure of "prospective enhancement" to be too indefinite and conjectural a basis for a present condemnation award.

³² 251 U.S. 41 (1919).

³³ *Id.* at 47.

³⁴ This involves the necessary consequence of shifting the tax burden among a state's citizens. Funds for highway construction are derived primarily from gasoline taxation, while education is supported by property taxation. The result of treating the school land trust as simply another state "pocket" would be to shift onto property owners part of the tax burden of highway construction previously borne by highway users.

tinuing support of public education, safeguarded from infringement by lesser interests.³⁵ The Congressional mandate is effectuated and the trust funds protected from diversion by the strict and unqualified requirement of compensation at full appraised value. The Court's decision allows maximum beneficial use by the state of trust lands, while insuring that the high place Congress accorded to public education in the hierarchy of competing public policies is not endangered.

MODIFICATION OF IRREVOCABLE INTER VIVOS TRUSTS WITH REMAINDER INTEREST IN SETTLORS' HEIRS

Plaintiff executed a spendthrift trust reserving to herself an income interest for life. Upon her death corpus was to be paid over as she appointed by will, or in default of appointment to "such of her next of kin . . . as by the law in force in the District of Columbia at the death of the . . . [settlor] shall be provided for in the distribution of an intestate's personal property therein." The trust by its terms was irrevocable, and there was no reserved power to alter, amend, or modify. Settlor sought modification of the trust, invoking the doctrine of worthier title in an attempt to construe the future interest as a reversion in herself, rather than a remainder in her next of kin. As both sole beneficiary and settlor, she claimed the power to revoke or modify the trust at will. On appeal from summary judgment for defendant-trustee, the Court of Appeals for the District of Columbia affirmed. *Held*: The doctrine of worthier title is rejected in the District of Columbia; therefore settlor-beneficiary cannot modify the trust without consent of remaindermen; however, when a trust instrument creates a remainder interest in a settlor's heirs or next of kin, a guardian ad litem representing unborn and unascertained heirs may bargain with the settlor for trust modification and consent thereto on their behalf.¹ *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).²

³⁵The New Mexico-Arizona Enabling Act was introduced in the 61st Congress as H.R. 18166. Definite concern was expressed that the state receive adequate return from the disposition of the trust lands for support of public education. See H.R. REP. No. 152, 61st Cong., 2d Sess. (1910). During the act's passage there were substitutions and amendments to strengthen the trust provisions. See 45 CONG. REC. 8487 (1910); S. REP. No. 454, 61st Cong., 2d Sess. 18 (1910). When the bill came before the entire Senate, the chairman of the Senate Committee of Territories stressed the importance of the trust provisions in providing continuing support of public education. See Remarks of Senator Beveridge, 45 CONG. REC. 8227 (1910).

¹The sole issue in the principal case was whether the court would apply the doctrine of worthier title as a means of trust modification. Affirmance of the judgment for the trustee was without prejudice to future modification attempts by settlor based on the court's dicta.

²16 CATHOLIC U.L. REV. 239; 66 COLUM. L. REV. 1552; 28 OHIO ST. L.J. 166; 51 N.Y.U.L. REV. 1228.