

Opinion No. 13-1021

April 21, 1913

BY: FRANK W. CLANCY, Attorney General

TO: Honorable C. W. G. Ward, Las Vegas, N. M.

TAXATION OF UNPATENTED LANDS.

Lands of the United States not subject to taxation until patent has been issued.

OPINION

{*184} I have this morning received your letter of the 18th inst. in which you say that you are told that I had stated that I had found authority to the effect that, unless a state legislature made an exception, government lands upon which final proof had been made were taxable.

If you will refer to my published opinions, of which you have a copy, you will find, beginning on page 162, an opinion dated November 14, 1910, as to the then condition of the law on this subject, together with some statement of the practical reasons why such taxation is unjust.

You ask me to refer you to decisions that the legislature has the power to exempt these lands from taxation, especially in view of the New Mexico Constitution. I have never looked for any such decisions, but there cannot be the slightest doubt, unless restrained by some constitutional limitation on its power, the legislature may exempt any property from taxation. I do not, however, consider the provision in the recent act of the legislature, House Bill No. 344, as an exemption of property from taxation, but as a legislative construction that the title is not so vested as to make the land properly taxable until the patent is received. The causes which make such legislative construction reasonable and proper, are touched upon in the opinion above referred to and must be obvious to anyone who has had experience with the land department of the Government. I have known of homestead cases where the patent was withheld for more than three years after final proof and, even though the entryman could {*185} have sold and given good title, yet we know as a practical fact that he could not get anything approaching full value for it until his patent has been issued.

I am not certain as to what you have in mind in referring to the state constitution. I do not find anything in the article on taxation which, in any way, limits the power of the legislature. There is not a word therein to the effect that all property must be taxed, except in Section 9. Section 1 provides that the rate of taxation shall be equal and uniform upon all subjects of taxation, but that does not declare what shall, or shall not be, the subjects of taxation. The only prohibitions, or limitations on the power of the legislature are to be found in Sections 2 and 8, the first of which prevents double

taxation, while the other prevents the relinquishment or suspension by the state of the power to license and tax corporations and corporate property, with certain special provisions for possible exemptions.

Section 9, above referred to, provides that "All property within the territorial limits of the authority levying the tax, and subject to taxation, shall be taxed therein for state, county, municipal and other purposes." It seems to me that this must be the clause of which you are thinking, but you will notice that it refers only to property which is "subject to taxation," and it is left to the legislature to declare what shall be subject to taxation.

You say that you originally advised the assessor that government lands, upon which final proof had been made, were taxable, although patent had not been issued, but you do not say when you so advised the assessor, and I assume that it must have been prior to the enactment of the last statute on taxation and, if so, there can be no doubt that your advice was correct. Since the enactment of that statute, however, I am quite convinced that no such officers as you or I, or a county assessor, can have any right to disregard the statute, or do otherwise than follow the legislative will. No district attorney or attorney general, or assessor, can reasonably set himself up as a court to adjudicate and declare the invalidity of a statute, nor do I think it would be proper to either of us to make a case to test the validity of legislation. Such action should be brought before the court by some member of the public, who complains of what the legislature has done. Every presumption is in favor of the validity of legislation and governmental officials ought to be the last to question it.