Opinion No. 13-1108

September 23, 1913

BY: FRANK W. CLANCY, Attorney General

TO: James A. French, State Engineer, Santa Fe, New Mexico.

WATER RIGHTS.

Water of Palomas River unappropriated by Town of Palomas, is subject to appropriation by others.

OPINION

*{*282}* I have had, on my desk for some days, the papers received from your office relative to the application of McElroy and Austin, No. 655, for waters of the Palomas River and the protest against the same by Max L. Kahler, who appears to be acting not for himself alone, but also on behalf of the community of Palomas; but I have not been able sooner, on account of the press of other business, to respond to your letter.

The application of McElroy and Austin appears to be almost entirely for the storage of flood waters from the Palomas River and its drainage area to the top of the Black Range, and the opposition to the granting of the permit is founded principally upon the act of the legislative assembly of the territory of New Mexico, approved January 18, 1867, which is published as Chapter XIII of the local and special laws for the county of Socorro, at page 546 of the compilation of such laws made in 1884. There are some other grounds of objection urged which appear to involve questions of fact, which must be determined by you, either upon evidence or upon some personal examination by, or under the direction of, your office. It would appear, therefore, that the principal, if not the only matter as to which you ask my consideration, *{*283}* is as to the effect of the said special act of the territorial legislature.

That act provides, in substance, that the Palomas River is recognized as a public acequia throughout its whole course, that the mayordomo of that river shall have the same authority as the mayordomo of other public acequias, in conformity with existing acequia laws, and that if any person shall attempt to stop or impede the current of said river for the public use of the cultivated land of the town of Palomas, he shall be punished by fine. Under this act the claim is made that "all water of every description, even to the source of said Palomas creek, belongs to the people of the said Las Palomas acequia."

The first question, which naturally suggests itself, is as to the power of the legislature to pass such an act. As to this there is some doubt, to say the least. During the existence of the territorial government, the Organic Act, creating the territory and subsequent legislation of Congress applicable to New Mexico, or to territories generally, stood in the

place of a constitution so far as our government was concerned, and the legislative power could properly extend only as far as permitted by Congress. The original Organic Act, in Section 7 thereof, declared "That the legislative power of the territory, shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act." Under this broad power it is probable that such an act, as the one we are considering, would be held valid, but on March 2, 1867, Congress passed an act, which will be found in Vol. 14 of the Statutes at Large, beginning on page 426, by which it was declared "that the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits." It is difficult to contend that the special act of the legislative assembly, which was enacted nearly a year after the adoption of this act of Congress, does not grant something in the nature of a private charter and a special privilege and it may not, therefore, be valid when it comes in conflict with the rights of other citizens. This view is somewhat strengthened by the provision to be found in Section 8 of the Compiled Laws of 1897, originally enacted in 1895, which provides that all community acequias shall, for the purposes of the act, be considered as corporations.

Conceding for the present, however, the validity of the act of the territorial legislature, we are next led to a consideration of its effect and of the extent of the rights conferred by it. I find it impossible to accede to the view that this act can be so construed as to confer an absolute property right upon the people of Palomas in the waters of the Palomas River, to the exclusion of any other or different use than for "the cultivated land of the said town of Palomas." It cannot be that the people of that town are given absolute ownership of the water to use or not, as they see fit, so that if they do not use it they can prevent the use of it by others and the development of the country by irrigation. They have had forty-five years, since the passage of the act, within which to utilize the waters of the stream without let or hindrance by any other person. If they have failed actually to use all of the water, they ought not to be allowed to say that no one else *{*284}* shall use it. If, as is suggested on their behalf, they have used all of the water, then there is nothing which can be appropriated by McElroy and Austin, and any permit which you would give would be subject to the prior rights acquired by the appropriation and use of the water by the protestants. If you should find, as a matter of fact, that all of the water of the stream has been appropriated and used by the people of Palomas, you would refuse to approve the application on the ground that "there is no unappropriated water available."

If the assertions made by Mr. Austin in his correspondence with you are, in fact, true then there is no attempt on his part, in the language of the statute of 1868, to stop or impede the current of the river for the use of cultivated land of the town of Palomas, as he says, in substance, that the water of the Palomas River, above where he proposes to store it, does not go to the lands of Palomas at all. As to the correctness of this, it is within your province to determine as a matter of fact.

Reverting to the language used in the act of 1868, it is to be noted that, while the Palomas River is, in effect, declared to be a public acequia, yet no attempt is made, in direct terms, to confer any ownership of that acequia or of the water therein upon any person or community, and the present assertion of ownership by the people of Palomas is based entirely upon an inference to be drawn from the provision in Section 3, already referred to, making it an offense for any person to attempt to stop or impede the current of the river for the use of the cultivated land of the town of Palomas. That language, taken in connection with the general doctrine of rights acquired by appropriation of water for beneficial use, should be restricted to the amount of water actually appropriated and used for the irrigation of the lands of that town.

I am of opinion, therefore, that the special act of 1868 cannot be properly construed as interposing a serious obstacle to your consideration of the application of Messrs. McElroy and Austin, but as to the other matters in dispute, as indicated by the protest, accompanying argument and letters from Mr. Austin, I express no opinion because as hereinbefore indicated, they raise questions of fact as to which you may feel called upon to investigate and satisfy yourself before acting, with a view of acting intelligently and with due regard to any existing rights.

I return herewith the papers submitted to me by you.