

Opinion No. 14-1325

September 18, 1914

BY: FRANK W. CLANCY., Attorney General

TO: Mr. E. D. Tittman, Hillsboro, New Mexico.

ELEPHANT BUTTE DAM.

As to jurisdiction of state at Elephant Butte Dam.

OPINION

{*184} Your letter of the 4th inst. was received just as I was starting for Denver to attend the National Tax Conference, and your letter of the 6th was received while I was away. Since my return, I have not been able sooner to make responses to your letters, although I had intended to do so as soon as possible.

I have carefully read both of your letters, but I find myself compelled to adhere to the position that Chapter 47 of the Laws of 1912 cannot be construed to have any relation to the government land acquired for the Elephant Butte project.

You say that the land was acquired by the United States, not by purchase but by condemnation, the title vested before New Mexico became a state, and you reach the conclusion that it is, therefore, certain that the provision of the constitution of the United States does not apply because that relates only to lands acquired by the consent of a state legislature by purchase. I am still inclined to think, and this is a concession in the direction of holding our statutes to be applicable even if lands were acquired by condemnation, that condemnation is only a kind of purchase. It is resorted to only when the sovereign cannot agree with the owner of property as to the purchase price, and after the condemnation proceedings are concluded, payment must be made for the land, but this appears to me {*185} to be immaterial. If the land had been acquired by an ordinary purchase, I still think that our statute has no application. In other words, I am quite willing to consider that the acquisition of the land by condemnation proceedings was an acquisition by purchase within the meaning of the federal constitution, but this particular land was not acquired by consent of the State of New Mexico.

You say in one place that "the question then narrows itself to this: did the act of 1912 intend to cover lands acquired otherwise than by purchase with consent of the legislature?" I think that in order to state the question properly, as it presents itself to my mind, you should insert the word "previously" between the words "lands" and "acquired." The first section of the act is a distinct giving of the consent of the state in accordance with the provision in the constitution of the United States to the acquisition by the United States by purchase, condemnation or otherwise, of land required for public purposes. The second section upon the language of which you lay some stress, cedes exclusive

jurisdiction over "any land so acquired," and your argument is that that means lands acquired "by purchase, condemnation or otherwise," no matter when acquired. My view of the language in that section is that it means any land acquired by the United States in pursuance of the consent of the state contained in the first section and has no reference to previous acquisition of lands without the consent of the state.

In your second letter you suggest that a second perusal of Chapter 47 will convince me that the question of consent has nothing to do with this case. That has been my position from the beginning, and that therefore, Chapter 47 which relates only to land acquired by the consent of the state legislature, has no relation whatever to this land at and near the Elephant Butte.

I have had a letter from Mr. Dent, counsel for the Reclamation to lands already acquired, is not retroactive in its effect, but this assumes that the statute is attempting to cede jurisdiction over lands which have been already acquired, when, as I have already indicated, the scope of the statute is indicated by the first section which gives consent to the acquisition of land by the United States, not only by purchase, but by condemnation or otherwise, while the second section refers to land so acquired, that is to say -- by any method, but with the consent of the state.

I have had a letter from Mr. Dent, counsel for the Reclamation Service, which suggests an idea in support of which he cites the case of *Pundt vs. Pendelton*, 167 Fed. 997, that as to the collection of road tax from employes of the government living at the Elephant Butte, the men are to be regarded as instrumentalities of the federal government, and, therefore, not taxable by the state. It is a general doctrine with which we are all familiar that states may not tax instrumentalities of the national government, but I am not quite convinced that all of these men are to be thus regarded. Those of them who have legal residences elsewhere, whether in the state or out of it, could not be regarded as resident in the district where they now temporarily are living. Those of them who come from other states, if any, and who still retain their residence in those other {*186} states, would not be subject to any personal tax in New Mexico while in the employ of the government, but those who have residence elsewhere in the state, certainly ought to pay these personal taxes somewhere in New Mexico, the proper place being where they have their residence. I think I made this distinction plain in my letter to the Superintendent of Public Instruction.