

## Opinion No. 14-1306

September 2, 1914

**BY:** FRANK W. CLANCY, Attorney General

**TO:** Hon. A. N. White, Superintendent of Public Instruction, Santa Fe, New Mexico.

### **ELEPHANT BUTTE DAM.**

Not illegal to apportion funds to the school district in which the Elephant Butte Dam is located. \$ 3.00 road tax collectible from persons residing at that point.

### **OPINION**

{\*161} I have on my desk by reference from your office, a letter from Dr. F. I. Given, Superintendent of Schools for Sierra County, and in accordance with your oral request, I now write with reference to the subject matter of Dr. Given's letter.

Dr. Given encloses with his letter a copy of another from District Attorney Tittman, which takes the position in substance, that the territory of the Elephant Butte Dam appears to be now under the jurisdiction of the United States by virtue of an act passed by the last legislature, which is printed as Chapter 47 of the Laws of 1912, and that on this account it might be illegal to apportion funds to the school district in which the Dam is located on the basis of the children at the Dam. The consequence of this position would be as Dr. Given clearly shows -- to deprive something over 300 children of any public school facilities. Dr. Given also refers to the refusal of the men at the Dam to pay the \$ 3 road tax upon the ground that they were outside of the jurisdiction of the county so far as taxes are concerned.

I have recently had occasion to examine substantially the same question which is now raised as to school matters, with regard to the admission into the asylum for the insane, of a woman who has been living at the Elephant Butte Dam, but was insane before she came there, and have written to Mr. Tittmann on that subject. The question arose in that matter on account of the existence of a statute which provides that no indigent insane person, not a resident of New Mexico, shall be received into the asylum unless he became insane within New Mexico. I expressed the opinion that Chapter 47 of the Laws of 1912 has no relation to the land of the United States acquired for use in connection with the irrigation project at the Elephant Butte and will here restate that opinion.

You will notice that said Chapter 47 gives the consent of the State in accordance with the seventeenth clause of the eighth section of the first article of the Constitution of the United States, to the acquisition by the United States of any land required for sites for certain enumerated buildings "or for any other purposes of the government." The last clause is the only one that could be construed to cover the case of land acquired for reservoir or damsites and there would be room for argument that the rule of ejusdem

generis would apply, and that this general clause would be limited to land for public {\*162} buildings. It goes beyond the language in the Federal Constitution which speaks only of "forts, magazines, arsenals, dock yards, and other needful buildings."

However this may be, the case of *Ft. Leavenworth Railroad Co. v. Lowe*, 114 U.S. 525, appears to be decisive, and directly applicable. In that case the military reservation at Ft. Leavenworth was the property of the United States even before Kansas became a state, and in 1875 the Kansas legislature passed an act ceding to the United States exclusive jurisdiction over all the territory included within the limits of the military reservation known as Ft. Leavenworth, with some reservations among which was the right of the state to tax railroad, bridge or other corporations on franchises and property on said reservation. The railroad company was assessed for state purposes, and the tax was paid under protest in order to prevent a sale of the property, and suit was then brought to recover the money upon the ground that the property, being entirely within the reservation, was exempt from assessment and taxation by the state. The Supreme Court, at page 532, distinctly declares that when the title is acquired by purchase by consent of legislatures of the states, the federal jurisdiction is exclusive of all state authority, but held in substance that as the military reservation was not so purchased, the constitutional provision would not apply, so that there was, therefore, no constitutional prohibition against the enforcement of the saving clause in the act of cession.

It will be seen that the land at the Elephant Butte, which had been all acquired by the United States prior to the enactment of the statute of 1912, and, indeed, prior to the establishment of our state government, does not fall within the scope of Chapter 47, as no consent by the state was necessary to the acquisition of title by the United States by way of purchase to land to which the government had already obtained title. There is nothing in the statute to show that it was intended to have any retroactive effect. It merely gives the consent of the state in accordance with the provision in the federal constitution to the acquisition by the United States by purchase, of land for public uses. That consent was unnecessary to an acquisition which was already an accomplished fact. Had it been the intention of our legislature to cede exclusive jurisdiction over the Elephant Butte land, it would undoubtedly have proceeded as it did in Chapter 35 of the Laws of 1913 with regard to the military reservation at Fort Bayard.

I call your attention also, as being of interest in this connection, to another case, also in 114 U. S., at page 545, which is cited in my opinion No. 1094, at page 266 of the opinions of this office for 1912 and 1913. In that case it was held, with regard to the Ft. Leavenworth military reservation, that a statute of Kansas relating to the killing of stock by railroads continued in force within the reservation after the cession of jurisdiction to the United States. The court said, at page 547, that the government of the state extended over the reservation, and its legislation was operative therein, except so far as the use of the land, as an instrumentality of the general government, may have excepted it from such legislation.

As to the collection of the road tax, I can see no reason to doubt {<sup>\*163</sup>} that the men employed at the Dam are liable for the tax if they reside within the district. There might be among them some persons whose regular residence may be in some other part of the state, or even outside of the state, and they would not lose that residence by temporary employment by the government in the work at the Dam. The law imposes this tax upon each able-bodied man and makes it payable to the road authorities of the district wherein he resides, and these men cannot claim any exemption on the ground that the laws of the state do not extend over the property of the United States.

I return herewith the letter from Dr. Given and accompanying papers.