

## Opinion No. 14-1330

September 18, 1914

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

**TO:** Honorable P. W. Dent, District Counsel, U. S. Reclamation Service, El Paso, Texas.

### **ELEPHANT BUTTE DAM.**

As to jurisdiction of state at Elephant Butte Dam.

### **OPINION**

{\*190} Your letter of the 4th instant reached Santa Fe just as I was starting for Denver to attend the National Tax Conference which lasted until Friday last, so that I reached home on Saturday night, the 12th instant, and since then I have been so occupied that I have not been able sooner to examine your letter, for which I am really obliged to you as I readily understand that your position is not one of captious fault-finding, and that you are animated only by a desire for a proper administration of the Reclamation Service matters with which you are concerned.

You call my attention to the case of *United States v. Tucker*, 122 Fed. 518, and say that this apparently disposes of the question raised in my letter as to the state act of 1912 not being retroactive and not applying to the reservation at Elephant Butte because the land so acquired by the United States does not come within the purview of the provision of the federal constitution authorizing acquisition for certain enumerated purposes and cession of exclusive jurisdiction over the same by the state. You call attention to the fact that in {\*191} that case the land had been acquired for a lock and dam designed to improve navigation, and that the court held that such land falls within the provision of the federal constitution, and your conclusion is that the works at Elephant Butte are of the same character.

As to the first suggestion that the *Tucker* case disposes of the question of our act not being retroactive, and, therefore, not applying to the reservation at Elephant Butte, I call your attention to the fact that the statute of Kentucky, which is quoted at page 520 in the *Tucker* case, distinctly gave the consent of the commonwealth to the acquisition by the United States of lands "heretofore legally acquired or that may be hereafter legally acquired, by purchase or condemnation," and specified particularly "lands for locks, dams and canals." My point as to Chapter 47 of our Laws of 1912 was that there was no word in it to indicate any legislative intent to refer to any land already acquired by the United States.

Your other suggestion, that the *Tucker* case holds that land acquired for a lock and dam to improve navigation falls within the provision of the federal constitution, is correct, yet

it does not do so very clearly and satisfactorily as you will see by reference to the paragraph numbered three on page 522, where the court admits that there might possibly be some difficulty under the rule of ejusdem generis if the question were "res integra" as to the proper construction of the constitutional language. It merely declares that the cases seem to leave no doubt that the broadest construction has been put upon that language making it cover all structures at all places necessary for carrying on the business of the national government. I doubt very much if the cases will bear out this conclusion of the court.

I will admit that your suggestion as to road tax upon the employes at the dam, and this would be equally applicable to the poll tax, that the men are necessary instrumentalities of the United States in carrying out work authorized by an act of congress, and, therefore, are exempt from the imposition of such tax, is something which I had not previously considered, and the suggestion is a very plausible one. I am not yet quite clear that those employes are to be considered as on the same footing with regular teamsters in the permanent employment of the quarter master department, as in the case of *Pundt v. Pendelton*, 167 Fed. 997, which is cited in your letter, and there is a difference in the status of the land at the Elephant Butte and the land at Fort Oglethorpe which was in question in the last cited case. It is stated in the decision in that case that the land had been acquired by the United States by the consent of the legislature of the state. It cannot be said that the land at the Elephant Butte was acquired by the consent of the legislature of the State of New Mexico as it was acquired before the state came into existence. The general doctrine that instrumentalities of the federal government are not subject to state taxation is a familiar one, but I am not yet convinced that this can extend to the taxation of men who are mere temporary employes of the government engaged in government work. You will notice that in my letter to Mr. White I limited my opinion as to the road tax to men whose residence was within the district, and called attention to the fact that {\*192} there might be persons whose legal residence may be in other parts of the state, or even outside of the state, and they would not lose their residence by temporary employment by the government in the work at the dam.

You further say that the *Fort Leavenworth* case, in 114 U. S., seems to you not applicable here, because the point in issue there was the right of the the state to impose a tax upon railroad property within the reservation, which right had been expressly reserved by the state in ceding jurisdiction. If you will further examine that case, however, you will find that it makes a distinction between lands title to which is acquired by purchase by consent of the legislatures of the states and lands acquired in any other way, within the limits of the state, than by purchase with her consent. Over lands acquired by the first method the federal jurisdiction is exclusive of all state authority, but as to lands acquired in any other way, the lands are held subject to this qualification; that if upon them public buildings are erected for the uses of the general government, such buildings, as instrumentalities for the execution of its powers, may be free from such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed, but when not used as such instrumentalities, the legislative power of the state over the places acquired is as full and complete as over any other places within her limits. No one would claim for a moment that the property of

the United States at or near the Elephant Butte could be taxed or in any way subjected to the state jurisdiction, even if our state constitution had not expressly exempted the property of the United States from taxation.

I am still strongly of the opinion that Chapter 47 of the Laws of 1912 cannot be considered as having any reference to the land and property at Elephant Butte. I believe that that land is still in the same position that the Fort Bayard Sanatorium was prior to the passage of the act which appears as Chapter 35 of the Laws of 1913 which expressly and definitely cedes exclusive jurisdiction over that military reservation.