

Opinion No. 17-1938

February 26, 1917

BY: MILTON J. HELMICK, Assistant Attorney General

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

Effect of Unconstitutional Proviso of Chapter 11, Laws of 1915, Respecting Irrigation Projects in San Juan County

OPINION

I have your favor numbered 40 in which you state that a certain irrigation company in San Juan county in asking your office to give them an extension of time to complete their system under the provisions of Chapter XI of the 1915 Session Laws. The said Chapter specifically exempts the County of San Juan from its provisions and you, therefore, ask whether your office should grant the application for extension of time asked for.

It is my advice and opinion that you do not grant the extension. The chapter expressly states that its provisions are not applicable to San Juan County, and it seems to me that prudence should require you to abide by the terms of the chapter. It has been suggested that the proviso in said chapter exempting San Juan and three other counties, is unconstitutional. It does not seem to me proper to pass on this constitutional question at this time, but if I were doing so, I would be strongly inclined to conclude that the proviso is bad and invalid. Such opinion on my part would be induced by the language of Justice Hanna in *A. T. & S. F. Ry. vs. Lopez*, 20 N.M. at page 596, where he discusses arbitrary classifications of counties for which there is no basis pointed out in the act, and which is not based upon any facts which the court could judicially notice. Moreover, if the proviso above mentioned is unconstitutional it then becomes a serious question whether or not the entire act is not invalid thereby. I have looked up a number of authorities on the question and the prevailing rule in this country seems to be that, where an invalid geographical exemption from the provisions of the act is contained in the act, that the invalidity of such exemption will not extend the operation of the act in the geographical localities attempted to be exempted. The reason for this rule is that the legislature had no intention of legislating for the exempted territory, and the courts cannot provide legislation in such territory.

However, as I said in the beginning, I do not feel called upon to pass upon the validity of this chapter. Even if the proviso is unconstitutional, you cannot take it upon yourself to grant the extension because the invalidity of the proviso, as above stated, might invalidate the whole act and there would then remain no authority at all for granting the extension. In other words, it seems to me that you are prohibited from granting the extension by the express language of the proviso if valid, and also by the possible invalidity of the entire act if the proviso is bad. However, the basis of my advice is that

you should be governed by the express provisions of the act, and that you should refuse to grant an extension under the chapter in San Juan County.