

Opinion No. 17-2017

July 7, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. F. W. Meyers, County Clerk, Gallup, New Mexico.

Establishment of School Districts Upon Indian and Military Reservations.

OPINION

This is in reply to your letter inquiring as to the amount of salary which should be paid to the County School Superintendent of McKinley County, which, I am advised, is classified as a second-class county.

By the provisions of Section 2, Chapter 12, Laws of 1915, at page 25, same being the County Salary Act, the Superintendent of Schools in counties of the second class shall receive a salary of \$ 1,800. However, the following provision appears in the same section, at page 27:

"And provided, further, in counties in which there are less than eleven school districts, the preceding year, the salary of county superintendents of schools shall be seven hundred and fifty dollars, anything hereinbefore contained to the contrary notwithstanding."

In your letter, you state that there are thirteen districts in the county, two of which are on the Fort Wingate military reservation, and one in a Government building at the Government Indian School at Crown Point. You inquire whether or not public schools may be lawfully maintained upon this military reservation and at Crown Point. This is material in determining the amount of salary of your County School Superintendent, for, if public schools may not be maintained at these points, you would have but ten districts left in your county, and the salary would be only \$ 750.00 per annum. On the other hand, if a school may be maintained at any one of these points, the school superintendent would be entitled to a salary of \$ 1,800.

We shall first consider the status of the schools located on the Fort Wingate military reservation. Article II, Section 8 of the Constitution of the United States confers authority upon Congress to exercise exclusive legislation "over all places purchased by the consent of the legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Pursuant to such Constitutional provision, the legislature of our State, by Act of June 10, 1912, enacted the following legislation, which now appears as Sections 5562 and 5563, Codification of 1915.

"5562. The consent of the State of New Mexico is hereby given, in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States, by purchase, condemnation, or otherwise, of any lands in this State required for sites for custom houses, court houses, post offices, arsenals, of other public buildings whatever, or for any other purposes of the government."

"5563. Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands."

The question to be determined is as to whether or not exclusive jurisdiction as to this military reservation was ceded by the State to the United States. If so, I am of the opinion that public schools could not be maintained upon the reservation, and that residents of the reservation would not be entitled to the benefits of the public schools. The courts have held in numerous instances that where property was so acquired by the Government, and where jurisdiction had been ceded by the legislature of the State to the Federal Government, the authority and jurisdiction of the United States over such territory was exclusive. In such cases, the courts have held that residents of such territory are not entitled to vote in State elections, and have even held that children residing upon such territory are not entitled to the benefits of the public schools.

From the information available, I find that the Fort Wingate military reservation was established by executive order, dated February 18, 1870, and that the land at that time was a part of the public domain of the United States, and was reserved by such executive order for military purposes, subject to certain rights that had been acquired by the Atlantic and Pacific Railroad Company, and subject to certain easements.

The facts involved in the case of Fort Leavenworth Railroad Co. v. Lowe, 114 U.S. 525, are by the court distinguished from the facts which ordinarily enter into such cases. The question involved in that case the right of the State to tax the Railroad Company. The land constituting the Fort Leavenworth Military Reservation was a part of the territory acquired in 1803 by cession from France. For many years before the admission of the State of Kansas into the Union, the land included in the Reservation had been reserved by the proper authorities of the United States for military purposes. Kansas was admitted into the Union upon an equal footing with the original States in 1861. In 1875, the legislature of the State of Kansas passed an Act by which the State ceded exclusive jurisdiction to the United States over all territory included within the limits of said Reservation. The Supreme Court of the United States, in its opinion in said case, in construing the provisions of the Federal Constitution referred to by me, and the Act of the State Legislature, called attention to the fact that the provisions of the Federal Constitution relate to lands "purchased by the consent of the legislature of the State." It further called attention to the fact that the land embraced within the Fort Leavenworth Military Reservation was not purchased by the consent of the State, but that, on the

contrary, was reserved by the Federal Government from the public domain long before the admission of the State of Kansas into the Union. The court in its opinion said:

"That the purchase of land by the United States for public purposes, within the limits of the State, did not, of itself, oust the jurisdiction or sovereignty of the State over the lands purchased; but that the purchasing must be by consent of the legislature of the State and then the jurisdiction of the United States under the Constitution became exclusive."

The court further said:

"But with reference to land owned by the United States, acquired by purchase without the consent of the State, or by cessions from other Governments, the case is different. Storey in his Commentaries on the Constitution says: 'If there has been no cession by the State of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other Constitutional purposes, the State jurisdiction still remains complete and perfect.'"

The court, in its conclusion, said:

"The Military Reservation of Fort Leavenworth was not, as already said, acquired by purchase with the consent of Kansas. And her cession of jurisdiction is not of exclusive legislative authority over the land, except so far as that may be necessary for its use as a military post."

It is useless for me to point out the similarity in the facts of the case just cited and the facts which I have under consideration. As I have before stated, Fort Wingate Military Reservation was created by executive order in 1870, long before the admission of the State into the Union. From this, you may see that the case cited is a case squarely in point, or what is sometimes referred to as a case on all fours with the matter under consideration. The Fort Wingate Military Reservation was not acquired by purchase with the consent of the legislature of the State of New Mexico, and, in my opinion, Congress has not acquired the right to exercise exclusive jurisdiction over the territory embraced within the Reservation. My further opinion is that the State is still entitled to the exercise of jurisdiction over this Reservation, except in so far as its use is necessary to the United States as a military post. In my opinion, the creation and maintenance of the two school districts upon the Fort Wingate Military Reservation are authorized by law, which makes the number of districts in the County twelve. My further opinion is that your County School Superintendent, under the provisions of Chapter 12, Laws 1915, is entitled to a salary of \$ 1,800 a year.

In expressing an opinion upon the question submitted by you as to the amount of salary to which your County Superintendent is entitled, it is unnecessary for me to determine whether or not the school at Crown Point is a public school. I have not been able to determine the exact status of the Government Reservation at Crown Point. From information available, I find that it is not on the Navajo Indian Reservation. I learn that this school was established as a Government Indian School long before the admission

of the State into the Union. If it is nothing more than a Government reservation for the use of an Indian School, its status, with relation to the jurisdiction of the Federal and State Government would be the same as that of the schools on the Fort Wingate Reservation. However, if this school is located on Indian land, I entertain serious doubts as to the jurisdiction of the State over the same. By Section 2 of the Enabling Act, it was required that the State forever disclaim all right, and title to lands owned or held by any Indian or Indian Tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of Congress. By the provisions of Article XXI, Section 2, of the Constitution, the State disclaimed all right to these lands and the jurisdiction and control of the same in almost the identical language of the Enabling Act. Because of such provision of the Enabling Act and of the Constitution, I entertain very serious doubts as to the right to establish or maintain public schools upon Indian lands. As I have before stated, however, the solution of this problem is not necessary in determining the amount of salary to which your County School Superintendent is entitled for, exclusive of this school at Crown Point, in my opinion, you have twelve school districts in your county.