

Opinion No. 17-2046

August 17, 1917

BY: HARRY L. PATTON, Attorney General

TO: Hon. H. L. Hall, State Treasurer, Santa Fe, New Mexico.

Chapter 111, Laws of 1917, Known as the Boundary Bill, and Providing for the Settlement of the Texas and Colorado Boundary Disputes and for the Employment of Private Council, Is Invalid.

OPINION

I am just in receipt of your inquiry wherein you state that you are informed that one of the attorneys recently appointed by the State Boundary Commission is about to present to you for payment a warrant drawn in his favor by the State Auditor, as part payment of special counsel fees. You state that you entertain grave doubts as to the constitutionality of Chapter III of the Laws of 1917, commonly known as the Boundary Bill, under the provisions of which act the warrant in question has been drawn, and you state further, that owing to your uncertainty as to the validity of the boundary bill you hesitate to honor the warrant which will be presented to you. You ask for my opinion as to the validity of the boundary bill.

It seems to me that in order to answer your question intelligently it will be necessary to outline rather fully the history of the boundary bill since its first introduction in the legislature, as well as the provisions which it now contains in its final form.

The bill as first drawn was entitled "An Act to provide funds and Associate Counsel for the prosecution of the case of New Mexico versus Texas." This bill appropriated \$ 50,000 for the expenses of such suits, to be expended under the direction of the Attorney General. It also attempted to retain O. A. Larrazolo as assistant counsel in said suit at a retainer fee of \$ 7,500 and expenses. This bill was introduced in the house, amended in committee in a few particulars and passed. It was sent to the senate, which body substituted a still different sort of a bill which it passed. The senate substitute was then sent to the house and passed by that body. On the next to the last night of the session the house recalled the senate substitute which it had passed and amended the bill to its present form and against passed it. This last substitute was then sent to the senate where it was passed and became a law in its present form, and is printed as Chapter III of the 1917 Session Laws. It will be noted that the title of the bill as finally passed is "An Act to Provide for the Settlement of Boundary Disputes between the State of New Mexico and the States of Texas and Colorado." This title was first given to the bill when presented as a senate substitute on Wednesday March 7th, by a majority of the senate committee on finance.

The boundary bill in its present form is as follows:

"Be It Enacted By the Legislature of the State of New Mexico:

"Section 1. That there is hereby created a board to be known as the State Boundary Commission. Said board shall consist of three members who shall be appointed by the Governor of the State. The duties of said Commission and the period of its existence shall be as hereinafter provided, and any two members thereof shall constitute a quorum for the transaction of business. The members of said Commission shall elect one of their number chairman and another one secretary of said Commission, and all certificates, orders, or documents issued by the Commission shall be signed by such chairman and attested by such secretary.

Sec. 2. There is hereby appropriated the sum of Thirty-five thousand Dollars (\$ 35,000) for the expenses and the payment of attorney's fees in the prosecution of the suit of the State of New Mexico vs. the State of Texas, now pending in the Supreme Court of the United States concerning the boundary line between the State of New Mexico and the State of Texas, and for the investigation and settlement of the dispute between the State of New Mexico and the State of Colorado regarding the proper location of the boundary line between said states.

Sec. 2. The said State Boundary Commission is hereby authorized to employ special counsel to represent the State in the prosecution of said suit, and authorize such special counsel in the name of the State to commence and presecute any and all actions necessary and requisite in the judgment of the Commission for the proper determination of the location of said boundary lines; and out of the money herein appropriated to pay to the attorneys so employed such compensation as may be fixed by the Commission; and to pay the expenses of printing and preparing the record and the briefs in said suit, and such other expenses in connection with said matters, including any and all necessary surveys which the Commission may deem advisable to be made, as the Commission may deem necessary including the hotel and traveling expenses of the attorneys and members of the Commission.

Sec. 4. The compensation of such special attorneys and such costs and expenses shall be paid upon the order of the Commission, and the State Auditor is hereby directed to issue his warrants upon the State Treasurer for the payment of such compensation, upon the certificate of the Commission. All moneys paid out for costs and expenses under the provisions of this act shall be paid upon the filing with the State Boundary Commission of itemized accounts, showing for what said costs and expenses were incurred. Upon presentation of vouchers signed by the Commission, the State Auditor shall issue his warrants upon the State Treasurer for the payment of the same, and the State Treasurer shall pay the warrants issued as provided in this act, upon presentation thereof. The members of said State Boundary Commission shall receive no compensation for their services and said Commission shall cease to exist upon the filing with the Secretary of the State of a certified copy of the final decree or judgment of the Supreme Court of the United States in the suit of the State of New Mexico vs. the State of Texas, and the filing of a decree or judgment or other evidence of the settlement or

determination of the proper location of the boundary line between the State of New Mexico and the State of Colorado.

"Sec. 5. That it is necessary for the preservation of the public peace, health and safety of the inhabitants of the State of New Mexico, that the provisions of this act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect from and after its passage and approval."

The boundary bill had a spectacular career in the legislature and the legislative journals disclose that it was amended, passed in both houses, recalled, reamended, and again repassed all on the next to the last day of the session. It was feverishly drawn, frantically amended, and frenziedly passed, and it seems to me a matter of little surprise that it should turn out a most imperfect piece of legislation.

The settlement of boundary disputes between states of the American union is a matter of the utmost importance and solemnity and ordinarily great care is taken in the preparing of legislation involving such a question. I have taken the trouble to examine very carefully a number of legislative enactments looking toward the settlement of boundary disputes between states. I have also given some attention to historical and legal considerations involved in state boundary disputes, and when I say that the bill in question is so utterly different from anything that has ever been enacted on the subject you will realize my difficulty in trying to determine its validity. It is quite evident that the framers of the bill had no conception of the law respecting boundary disputes between states, and that they drew the bill along extremely novel lines.

In passing upon the constitutionality of this act it must be first understood that courts are always inclined to uphold legislation whenever possible and that if the legislation in controversy can be upheld on any possible theory, it is the duty of the courts to so uphold it. In considering this bill therefore I can only give you my opinion as to its validity and in a way attempt to foretell how the courts of the state would look upon its imperfections. As I read the bill it seems to me it is contrary to the Constitution of the United States in two particulars and violative of the Constitution of New Mexico in five particulars.

The first objection is that the bill attempts to prescribe a settlement of the boundary between New Mexico and Colorado by an *exparte* enactment without an agreement and compact between the said states, to be ratified by the Congress of the United States. The appropriation of \$ 35,000 is made in the words of the bill "For the investigation and settlement of the dispute." There is no further light shed on the matter until we arrive at the end of the fourth paragraph of the bill, where it is provided that the commission shall cease to exist upon the filing of evidence of settlement of the boundary line between New Mexico and Colorado. Under the constitution of the United States there is but one way by which a boundary dispute between states may be determined in the absence of a suit in the Supreme Court of the United States, and that way is by a solemn compact of the states, to be ratified by Congress. It seems to me that this bill attempts to settle

the boundary through its own commission, without any reference whatever to the State of Colorado and the Congress of the United States. The provision in the bill permitting the commission to file evidence of a settlement of the boundary and then terminate its labors is absurd, for the reason that there is no way under the law by which the boundary commission can settle anything. I will again refer to this phase of the matter later on.

The second objection is that the bill attempts to authorize the boundary commission and its attorneys to commence any action necessary and requisite **in the judgment of the commission**, for the proper determination of the boundary line. This provision is so silly that perhaps it might be entirely disregarded by a court and not considered as an objection to the validity of the bill. There is of course but one suit, viz., an original suit in the Supreme Court of the United States, which could be instituted, and an attempt to substitute the judgment of the commission as to the proper suit to be brought for the one suit that possibly could be brought is laughable, if nothing more.

The third objection is that the bill violates the Constitution of New Mexico in attempting to delegate to the commission and its attorneys the power to settle a boundary dispute. Such a power can only be exercised by the legislature itself. Contracts between states are made by the acts of their respective legislatures, and such a power cannot be delegated. Commissions for preliminary considerations are of course essential in every boundary dispute. Indeed I think in every boundary dispute between states in this country commissions have been appointed for preliminary negotiations, but all such commissions are invariably required to report back to the legislature so that the legislature can itself enter into a compact of settlement with the legislature of the disputing state. In our boundary bill the whole matter of settlement is left to the commission. The commission is not required to report back to anyone. In fact under the terms of the bill the commission may itself make a settlement with Colorado, and on the filing of the evidence of such settlement, cease to exist. Such a power was never before delegated by any legislature to a commission in this country. All boundary disputes have been settled by the legislatures of the disputing states as instanced by Florida and Virginia in 1861, New York and New Jersey in 1834, Virginia and Pennsylvania in 1780, and Tennessee and Kentucky in 1820. The most recent instance is the boundary compact between South Dakota and Nebraska. These states appointed commissioners for the purpose of making a basis of settlement. The commissioners reported back the results of their labors and the legislature of each state then adopted, subject to the approval of congress, the boundary line recommended by the commissioners. The governors of the states then signed the compact and congress in 1897 ratified the compact. Our boundary bill, in order to be valid, should have made the boundary commission a mere negotiating body with a like commission from Colorado. It should have required the commission to report back to the legislature, and then the legislatures of New Mexico and Colorado would have settled the boundary. The attempt of our boundary bill to give the commission the power to settle the dispute, file evidence of its settlement and cease to exist is contrary to all historical precedents, to all law, to the Constitution of New Mexico and the Constitution of the United States.

The next objection to the bill is that in practically its present form and under its present title it was introduced after the tenth day prior to the expiration of the session of the legislature, in violation of the Constitution of New Mexico. It is true that the present bill was carried through as a substitute and amendment of the original bill which was seasonably introduced. But the bill which was first introduced was concerned only with the carrying on the case of New Mexico vs. Texas and its title showed that such was its object. The present bill, which was born on next to the last day of the session, is concerned not only with the Texas matter, but with a so-called Colorado dispute, and its title so indicates. It is a familiar rule of law that where the time for the introduction of new bills is limited to a certain number of days after the session of the legislature is commenced the limitation cannot be evaded by engrafting on the original bill foreign and disconnected amendments. I have found a number of authorities identical with the question presented here, which convince me that the present boundary bill as indicated by its title alone, is in truth and in fact a new bill from the first bill introduced, and was therefore passed in violation of our state constitution.

The next objection to the bill is that it excludes the attorney general from exercising any authority whatever in the matter of the Texas case, and possible litigation with Colorado. There is no doubt that the state can employ associate counsel in matters of importance, and, indeed, such has been the universal custom, but the state cannot exclude the attorney general from the control of its litigation.

The next objection which occurs to me is that the bill is wholly unintelligible, indefinite and ambiguous and meaningless and that its provisions cannot possibly be enforced. This objection is explained somewhat by what I have said in other portions of this letter. I cannot comprehend what the boundary commission or its attorneys can possibly do under the terms of the boundary bill. There is no place for them to start and no place to end, and if the commission or its attorneys are going to settle the Colorado boundary without any help from the legislature of this state or any agency of Colorado or the Congress of the United States, it seems to me that they will require more light than is contained in the boundary bill. As I said in the beginning, the bill is so utterly different from anything of like character that has ever been enacted that I do not see how it can be applied successfully for the settlement of our boundary disputes. The only way in which the bill could be made workable, in my opinion, would be to simply construe it by adding all the necessary matters which I have before pointed out, and since no court can put in a bill what it does not contain, I do not believe that the present boundary bill could ever be upheld.

NOTE: -- The views expressed in the above letter were not confirmed in State, ex rel. Clancy vs. Hall, 23 N.M. /--, 168 Pacific, 715.