

Opinion No. 23-3669

February 12, 1923

BY: MILTON J. HELMICK, Attorney General

TO: Requested by: Fred H. Ayres, Member of the Senate and George S. Alter, Member of House of Representatives, Santa Fe, New Mexico.

Chapter 40 of the Laws of 1923, Appropriating Money from the Water Reservoirs for Irrigation Purposes Income Fund for the Purpose of Investigating the Feasibility of Reclaiming and Irrigating Lands in the Estancia Valley by Means of Artesian Wells, Reservoirs, etc., is Valid Legislation and is a Proper Expenditure of the Monies of said Fund.

The Appropriation does not Violate the Enabling Act but Appropriately Carries out the Intention of Congress in Making a Grant of Land to New Mexico for Permanent Reservoir Purposes.

See Also Opinion No. 3763.

OPINION

{*14} This inquiry arises upon the legality of House Bill No. 60 introduced at the present session of the Legislature. The bill appropriates \$ 25,000.00 from the Water Reservoirs for Irrigation Purposes Income Fund "for the purpose of investigating and reporting on the feasibility of reclaiming and irrigating the lands in said vicinity (Estancia Valley) by means of artesian wells, pumping plants, dams and reservoirs or by any of said means." The bill directs that the investigations and development shall be made under the direction of the State Engineer or with his permission under Federal authority and that the State Engineer is authorized to cooperate with the United States Reclamation Service. The bill is not greatly different from Chapter 142 of the Laws of 1921 which made an appropriation for very similar purposes for the benefit of the Mimbres Valley which, in fact, served as a model for House Bill No. 60. However, House Bill No. 60 mentions wells and pumping plants in addition to dams and reservoirs and the question arises whether money from the Water Reservoirs for Irrigation Purposes Income Fund can be lawfully expended for the purposes embraced in the bill.

By the act of June 21st, 1898, the Congress of the United States made a number of land grants to the Territory of New Mexico for various purposes. Among these was a grant of 500,000 acres "for the establishment of permanent water reservoirs for irrigating purposes" contained in Section 6 of the act.

Under the terms of the Enabling Act this grant constitutes a permanent fund which may not be expended and the proceeds of the sale of such lands were intended by Congress to constitute permanent funds. However, the Supreme Court of this State in the case of

State v. Llewellyn, held that the rentals derived from such lands are available for current use for the purposes for which the grant of lands was made. I think that the income from this 500,000 acre land grant may be appropriated by the Legislature for appropriate objects and the Water Reservoirs for Irrigation Purposes Income Fund is a fund derived wholly from the rentals and income of said land grant and is not a permanent fund.

{*15} Since the Water Reservoirs for Irrigation Purposes Income Fund may be expended for appropriate objects, it becomes necessary to determine whether the objects specified in House bill No. 60 are proper objects. It has been suggested that there may be some doubt on this score because the objects of House Bill No. 60 are not exclusively concerned with reservoirs and the fear has been expressed that the appropriation of money from this income fund for anything but the actual construction of reservoirs would be a use forbidden by the Enabling Act as contrary to the purpose of the original grant made by Congress. In this connection it might be noted that the United States Department of Justice has the power to enjoin in the Federal Courts any misappropriation by the state of funds derived from Congressional land grants, but that no such action was ever taken in the case of Chapter 142 of the Laws of 1921. I communicated with the office of the United States District Attorney of New Mexico and learned that there have never been any suggestions that the appropriation in the Mimbres Valley bill was improper and that although the United States District Attorney's office knew about the act and the appropriation thereunder, no question as to its validity was ever considered.

I think that the intention of Congress in making the grant "for the establishment of permanent water reservoirs for irrigating purposes" should be construed in a reasonable and liberal spirit because as was said in State v. Llewellyn, supra, "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or injustice; to favor public convenience, and to oppose all prejudice to public interests." I think it was manifestly the intention of Congress in making this grant to assist in the development of New Mexico by fostering irrigation on our arid lands. I think it is obvious that Congress intended to promote the development of waters for irrigation purposes and that it was never intended that the grant should be narrowly and exclusively for the mere building of reservoirs. The grant was essentially for irrigation purposes. It would be absurd to contend that Congress merely intended to provide for the construction of reservoirs without providing for means of filling the reservoirs with water. It would be hard to conceive of any irrigation system or project which would not include reservoirs of some sort and since House Bill No. 60 provides for reservoirs I think it is clearly a proper bill. I think it would be absurd to say that the donation of Congress did not cover the construction of ditches to fill reservoirs or the damming of streams or the development of water in whatever means it could be done, to fill reservoirs and create an irrigation system. Under House Bill No. 60 it is proposed to employ wells and pumping plants to develop water which, it must be assumed, will be conducted over the land in ditches and impounded in reservoirs -- in fact, the irrigating is contemplated with water derived from under ground sources instead of from surface streams. It seems to me that the source of the water is immaterial so long as the project

is in fact one for irrigation purposes and I think that the proposed appropriation is a proper use of monies derived from the income of the Congressional Grant.