

4 Copies

CONDEMNATION OF LAND FOR PUBLIC PURPOSES IN TERRITORIES.

COMMITTEE ON THE TERRITORIES,
January 31, 1906.

STATEMENT OF MR. HENRY E. ASP, ATTORNEY, OF GUTHRIE, OKLA.

Mr. McGUIRE. I want Mr. Asp to present this matter, as he is more familiar with the details.

The CHAIRMAN. To what bill does he wish to address himself?

Mr. McGUIRE. To bill No. 10706.

Mr. ASP. The matter which I desire to present to the committee is a very short one. The bill No. 10706 is a bill in respect to the condemnation of land for public purposes in Territories in the United States. It refers specifically to the Territories of Oklahoma, New Mexico, and Arizona. My information in regard to the Territories of New Mexico and Arizona is merely general statements as to the condition that prevails in those Territories, which is to a limited extent the same as that which prevails in the Territory of Oklahoma.

The Territorial legislature of Oklahoma has provided by various laws for the condemnation for public purposes, by railroads and other corporations, of land reserved for common school and other educational purposes in Oklahoma, and also for public buildings. All of the railroads and some other corporations have condemned lands for these public purposes under the Territorial statutes. The general condemnation law for the Territory of Oklahoma I have here. Section 1040, article 9, chapter 18, Wilson's Revised and Annotated Statutes of 1903, gives the general condemnation law to which I have referred. In 1895, about the time that the railroads commenced to be built in Oklahoma, the legislative assembly passed an act, chapter 24 of the laws of Oklahoma for 1895, being chapter 34 of Wilson's Revised and Annotated Statutes, page 720, and in 1903 passed an act, article 2, Session Laws, Oklahoma, 1903, providing for the condemnation of lands for impounding surface water for a water supply by cities, towns, and villages, or any mining, manufacturing, railway, or other corporation. That constitutes the condemnation laws of the Territory. The title of these lands is in the Government of the United States. They are held by the Government of the United States and are merely reservations. The law says that these lands shall be held for certain public purposes. These condemnation proceedings provide that compensation shall be made, and in each case compensation has been made and the money paid to the Territorial treasurer and is held for the purposes for which the reservations were originally made by Congress.

The CHAIRMAN. You propose condemnation of public lands the same as private lands?

Mr. ASP. Yes, sir. If Oklahoma was a State we would have no question, under the trend of numerous decisions, that the railroads and municipalities which have taken these lands would have a good title to them. In 6 McLean, in the case of the United States v. Bridge Company, a case arising at Rock Island, Ill., the court held that where lands were held by the United States as an individual proprietor they were subject to condemnation by the laws of the State, and it has been so held by numerous Federal decisions that where lands were so held as an individual proprietor—

Mr. MOON. It is held that the State may condemn lands of the United States not held by the United States for governmental purposes.

Mr. ASP. Yes, sir. No State could condemn lands held by the United States for its governmental purposes.

Mr. MOON. This land is not held for governmental purposes?

Mr. ASP. No, sir. I think the act specifically excepts such land, and if it does not it would be ineffective in that respect.

Mr. MOON. Are any of the lands held for specific purposes by the National Government?

Mr. ASP. No, sir. The only thing I am after is to clear the titles of doubt. The lands were reserved for specific purposes, for the benefit of the future State.

Mr. MOON. You want to ratify proceedings already held?

Mr. ASP. Yes, sir. These condemnation proceedings are full and complete. The Territorial governor has the right of appeal and so have the other parties. The acts constitute due process.

Mr. HIGGINS. Would it not be well to leave the matter until you have a constitution of your own in Oklahoma?

Mr. ASP. We have already purchased the lands and paid the money for the lands taken and damages to lands not taken.

Mr. HIGGINS. You have been doing that for some years.

Mr. ASP. Ever since 1895. We were figuring on statehood then. To tell the truth, no one questioned the right of the Territory to legislate on the subject, but the Supreme Court has cast doubt on the question of title by criticising this case in 6 McLean, notwithstanding it had been cited with approval in various cases. It is merely a matter of ratifying what has been done by virtue of acts of the legislature in due and proper course.

The CHAIRMAN. Will you state in your remarks the criticism of the Supreme Court in the McLean case?

Mr. ASP. It is found in 117 U. S. Report, pages 161 and 162. This case, however, was a taxation case.

Reasoning from the situation that the Territory is a creature of Congress, unless such power has been actually delegated by Congress, there is some question about the title which has been acquired under these condemnation acts of the Territory, and I think inasmuch as compensation has been made, and inasmuch as these condemnation proceedings have been had in good faith, that it affects not only the railroads, but the municipalities as well, and it seems to me that this remedial legislation is not out of place, and I therefore hope you may make a favorable report on this bill.

public lands the

we would have no
that the railroads
ould have a good
United States v.
l., the court held
as an individual
the laws of the
al decisions that

mn lands of the
vernmental pur-

lds held by the

purposes?
cepts such land,
it.

purposes by the

o clear the titles
rposes, for the

held?

gs are full and
appeal and so
s.

atter until you

and paid the
ken.

rs.
statehood then.

erritory to leg-

t doubt on the

notwithstand-

It is merely a
cts of the leg-

the criticism of
161 and 162.

a creature of
ated by Con-

been acquired
I think inas-

as these con-

hat it affects
nd it seems to
d I therefore

Mr. WEBB. You knew of this decision of the Supreme Court when you acquired title?

Mr. ASP. As a matter of fact I did not, but the legislation has been acquiesced in by the railroads, municipalities, and officers of the Territory. Nearly all the railroads have been built since 1895 under Territorial charter.

Mr. LLOYD. For whom do you appear?

Mr. ASP. I appear on behalf of one of the railroads.

Mr. LLOYD. Which one?

Mr. ASP. The Atchison, Topeka and Santa Fe. That road has built several hundred miles and other roads have built several hundred miles there during that time.

Mr. MOON. Is that the only decision you can find?

Mr. ASP. It is.

Mr. MOON. I think you will find at least three decisions in which the court has held that the State may condemn property of the United States not held for governmental purposes and under the decision that the United States may condemn property of the State not held for State purposes.

Mr. ASP. We only question the right of the Territory to do that, and we have no question of the right of a State to do it. There are numerous decisions on that point, and I regard it as settled that a State may condemn land held by the United States as an individual proprietor and not used for governmental purposes, and that the United States could do the same with State property so held.

Mr. KLEPPER. In case this question is not settled the railroads, as well as the municipalities, would lose title to the lands.

Mr. ASP. Yes, sir; they might if some person questions such condemnation proceedings.

Mr. MOON. Has that been the general method by which rights of way are obtained?

Mr. ASP. It has only been used as to these reserved lands. There is no question as to the validity of these Territorial condemnation laws as to property of private individuals. As to the Indian lands, Congress has provided the methods, as well as to the public lands of the United States.

Mr. MOON. Under condemnation laws of the United States or under Territorial laws?

Mr. ASP. There is a general grant under the act of March 3, 1875, granting to railroads a right of way through public lands, but when reservations have been made, as was done here, I think the act does not apply.

The CHAIRMAN. You refer particularly to school lands?

Mr. ASP. Yes, sir; lands reserved for purposes of common schools and higher education and public buildings.

Mr. MOON. How are they held by the Government for school purposes?

Mr. ASP. I think the reservations of sections 13 and 33 were first made by President Cleveland under the act opening the Cherokee Outlet. By act of May 4, 1894, Congress ratified the reservation made by the President. It has been the general custom of Congress to reserve sections 16 and 36 for common schools.

Mr. MOON. It is on those you have located?

Mr. ASP. Yes, sir.

Mr. MOON. This is intended to legalize the appropriation of school lands?

Mr. ASP. Yes, sir.

Mr. REID. But giving compensation?

Mr. ASP. Yes, sir; the money is in the hands of the treasurer of the Territory, held for the benefit of and to be given to the fund for which the particular land was reserved.

Mr. MCGUIRE. I want to make a supplemental remark so as to have the committee understand that this does not apply alone to the railroads interested. A great number of towns in Oklahoma are interested in this bill. In that country there has been considerable attention given to the building of artificial lakes or tanks. The towns and the railroads have them. They have spent considerable money in building artificial tanks. In my own county there are three, and my own town has in contemplation a large artificial tank. It must condemn land, and the question of transfer of title has been raised by some decisions referred to in Mr. Asp's argument. This is the first I have heard of it beyond a mere mention.

Mr. WEBB. This decision which Mr. Asp read was made ten years before the railroads were built in Oklahoma. Why is it they did not investigate the matter?

Mr. MCGUIRE. I am not up on that proposition and am not prepared to go into a discussion of it, but it does not make any difference when it was made or how many subsequent decisions have been made, unless the decisions were to the effect that the parties condemning these lands have a title. The fact remains that under the law and the decisions the people have the lands condemned, but have no title to them, and equity would suggest that some title be given.

Mr. MOON. Equity would suggest that their money be returned.

Mr. MCGUIRE. No; they have other equities there.

Mr. MOON. You do not mean that a man can take possession of land and if possession be not given legally that the money paid can be returned and the matter settled?

Mr. MCGUIRE. I mean to say that under the condemnation laws of the Territory of Oklahoma when there was understood to be no question, or even if there was a question as to whether this gave them a title in the interest of the country, in the interest of the railroads which have been built, and in the interest of the general public of the Territory, that all the proceedings under which these lands have been taken and paid for, either by the city or the railroad or any incorporated power, there can be no wrong in giving those people a title for which they have paid.

Mr. MOON. Unless the land is worth more to the Government now than it was then. Ignorance of the law does not excuse them at all.

Mr. MCGUIRE. We are not pleading ignorance of the law. It might or it might not be more valuable.

Mr. DOYLE. A great many municipalities have taken advantage of this act making reservation for lands for public schools, colleges, etc. The only question that might arise as to the tentative grant given to the Territories is that they have not been confirmed. All those lands are condemned and confirmation completed. The title passes to the State. The organic act does not affect primarily the disposition of the soil. There is a question as to whether this grant which the Ter-

ritory expects to be confirmed, according to the statute, has passed such title that the Territory can legislate upon it. It is a serious question whether or not it can. As a matter of justice and right, everything has been done that should have been done.

Mr. MOON. What was the price paid for these lands?

Mr. DOYLE. A good price was paid to the lessees, and all damages have been paid. I am against railroads, as a rule, but in that matter I think that proper titles should be given, not only in the interest of the railroads, but in the interest of the whole people.

Mr. MOON. What is the procedure for taking the lands for public uses?

Mr. DOYLE. There is a board composed of the governor, secretary, and the auditor of the Territory. Whenever a railroad seeks to take land, or a municipality, as provided by this act, the surveyor makes a plat and files it with the governor. The governor then appoints three freeholders to appraise the land so described, wherever this application covers, and they make a report, and that is certified from the governor. The attorney-general then, in behalf of the Territory, has a right to appeal to the district court, the same as any freeholder has, and have the case reviewed by a jury. In fact, they both have the right of an appeal in our courts; both the Territory and the railroad, for instance, have an appeal to a jury trial in the district court.

Mr. MOON. I would like to know whether any of those roads have taken land under the State laws.

Mr. ASP. Most of those roads that have built new lines have taken those lands under the law of the Territory—those roads organized under the law of the Territory.

Mr. MOON. Were any organized under the State law?

Mr. ASP. None were organized under the State law; no.

Mr. WEBB. The Santa Fe did, did it not?

Mr. ASP. The Santa Fe road proper has taken none of these lands except by subcorporations that have built new roads, and the corporations being domestic corporations.

Mr. MOON. Do you think it makes any difference whether a road is chartered under the State or Territory?

Mr. ASP. I think the State might possibly have the right to ratify after it becomes a State and the title passing.

Mr. MOON. The point I was trying to get at is this: Have you any more power—do you think you have got any more power under a charter granted to you by a State than under a charter granted to you by a Territory?

Mr. ASP. Not a bit; I do not. I think that this is purely a question of the power of the legislature to pass these acts, and in that connection I desire to make one suggestion, that these lands were taken several years ago, and we paid the actual value of the lands at the time. They were taken, and under the act the incidental damages to the remaining portion of the land were paid.

Mr. WEBB. Have you any idea how much actual cash your road has paid into the Treasury for these condemned lands?

Mr. ASP. I have not made any estimate of it.

Mr. WEBB. I mean an idea.

Mr. ASP. We have run through a good many pieces of school lands, sometimes paying \$25 or \$30 an acre and incidental damages and sometimes we have not paid so much, and each time under the gen-

eral condemnation laws we have had to take the leasehold estate of the lessee.

Mr. MOON. How much land do you take?

Mr. ASP. One hundred feet for right of way, or so much more as may be necessary in the case of heavy cuts or fills. Then in the case of impounding surface water, which we have done frequently, we take so much as may be necessary to impound the surface water. That is a very important public purpose, not only for the railways but for the cities, and when this bill was pending in the legislature authorizing the condemnation of lands for impounding surface water—I don't remember just how many, but I know that the legislature was bombarded with letters from numerous cities requesting them to pass that law.

Mr. MOON. Will you tell us how much land is involved in this bill?

Mr. ASP. The amount of land involved is not quite as important as the question. Of course we have built our railroads, and our railroads are on these lands. I looked this morning to see if I could find a tabulated statement of the amount of money paid in.

Mr. MOON. I suggest that it would be well to furnish the subcommittee a statement of facts about this.

The CHAIRMAN. The gentleman can extend his remarks.

Mr. ASP. I will file here the acts of the legislature which affect these lands.

The CHAIRMAN. Without objection, Mr. Asp will be directed to extend his remarks so he may fully instruct the committee in regard to this bill, and, without objection, the Chair will appoint a subcommittee to take charge of this bill.

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 6, 1906.

Mr. McGUIRE introduced the following bill; which was referred to the Committee on the Territories and ordered to be printed.

A BILL

In respect to condemnation of land for public purposes in the Territories of the United States.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That in respect of all condemnation proceedings heretofore or
4 hereafter brought under the laws of the several Territories of
5 the United States in the exercise of the power of eminent do-
6 main when the land may have been theretofore reserved
7 from sale or disposal for the purpose of being granted to the
8 future State or States to be erected therein or made subject by
9 any law of the United States to disposal for the benefit of
10 any municipality the proceedings shall not be affected by
11 reason of the ultimate title to such lands remaining in the
12 United States, but each such case shall be determined accord-
13 ing to such Territorial law, and the compensation awarded for
14 such taking shall be paid to the Territorial authorities or mu-
15 nicipality and any lessee or occupant thereof in such propor-

1 tions as the judgment of the court or courts having original
 2 or appellate jurisdiction in such cases may finally determine
 3 and all condemnation proceedings heretofore had under section
 4 Territorial laws are hereby ratified and confirmed, but this
 5 Act shall not apply to any lands held or reserved by the United
 6 States for any specific public purpose in the administration
 7 of the National Government.

DEPARTMENT OF THE INTERIOR,
 RECEIVED
 MAR 27 1906
 P. & M. DIVISION
 1156
 MISCELL.

59TH CONGRESS,
 1st Session.

H. R. 10706.

A BILL

In respect to condemnation of land for public purposes in the Territories of the United States.

By Mr. McGuire.

JANUARY 9, 1906.—Referred to the Committee on the Territories and ordered to be printed.