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ATTENDS COURT OF CRIMINAL APPEALS.
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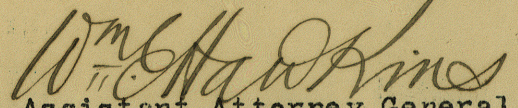
July 12th, 1907.

Hon. J. J. Terrell,
Commissioner of the General Land Office,
A U S T I N, T E X A S.

Dear Sir:

In compliance with your request, I send you herewith a carbon copy of application for re-hearing and protest against issuance of patent which we have prepared on behalf of the State of Texas and sent to the Commissioner of the General Land Office at Washington, D. C. to be filed in the matter involving the boundary line between New Mexico and Texas and particularly affecting the Santa Teresa grant in Donna Ana County, New Mexico and "El Conutillo" in El Paso County, Texas. You will note that the exhibits referred to are not attached to the copy which I am sending you.

Truly yours,



Office Assistant Attorney General.

WEH-c.

Texas State Boundary Line 4

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IN RE PROPOSAL OF COMMISSIONER OF THE GENERAL LAND OFFICE TO
ISSUE PATENT ON THE SANTA TERESA GRANT AS A POR-
TION OF THE TERRITORY OF NEW MEXICO.

To the Honorable Commissioner of the General Land Office.

Now comes the State of Texas by her Attorney General, Robert Vance Davidson, and her Assistant Attorney General, William Edward Hawkins, in response to the written notice of the intention of the Commissioner of the General Land Office to issue a patent to certain lands which have been claimed to be a portion of the Santa Teresa Grant, lying in Dona Ana county, New Mexico, but which are claimed by certain citizens of Texas who are in possession thereof, and by the State of Texas, to be a portion of a grant of land lying in El Paso county, Texas, and known as "El Conutillo", copy of which notice, of date May 1st, 1907, signed by the Honorable R.A. Ballinger, Commissioner of the General Land Office, (copy of which, marked Exhibit "1", is hereto attached), was transmitted through United States Surveyor-General Lewellyn and delivered by registered mail on May 10, 1907, to His Excellency, T.M. Campbell, Governor of Texas, and appearing for the purposes set forth herein, and for no other purpose, respectfully presents this application for a re-hearing in said matter, and hereby protests against the issuance by the United States of America of any patent to any portion of the land in controversy as aforesaid lying East of the most westerly channel of the Rio Grande, and in said behalf respectfully shows:

Texas State Boundary Line 4

First.

All that portion of the land in controversy, which lies East of the most westerly channel of the Rio Grande, is not a portion of said Santa Teresa Grant and forms no part of the territory in New Mexico, but is a portion of said El Comutillo Grant and is wholly within the State of Texas and under its jurisdiction.

Second.

If the portion of the land in controversy, which lies East of the most westerly channel of said Rio Grande be not unquestionably within the State of Texas and subject to its jurisdiction, the true location of the boundary line between the territory of New Mexico and the State of Texas, at least insofar as same affects this controversy, is involved in such doubt and uncertainty as to render it unjust to the State of Texas and its citizen claimants, and wholly inexpedient and inadvisable for the Government of the United States of America to issue patent thereon prior to a proper determination and location of said boundary line under joint action by the United States of America and the State of Texas.

In support of the foregoing propositions, said applicant and protestant respectfully shows:

(a) An act of the Thirty-first Congress, approved September 8th, 1850, and entitled "An Act proposing to the State of Texas the Establishment of her Northern and Western Boundaries, the Relinquishment by the said State of all Territory claimed by her exterior to said Boundaries, and of all her Claims upon the United States, and to establish a territorial Government for New Mexico;" contains the following among other provisions:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following propositions shall be, and the same hereby are, offered to the State of Texas, which, when agreed to by the said State, in an act passed by the general assembly, shall be binding and obligatory upon the United States, and upon the said State of Texas; Provided, The said agreement by the said general assembly shall be given on or before the first day of ~~Dec~~ December, eighteen hundred and fifty:

First. The State of Texas will agree that her boundary on the north shall commence at the point at which the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and shall run from said point due west to the meridian of one hundred and three degrees west from Greenwich; thence her boundary shall run due south to the thirty-second degree of north latitude; thence on the said parallel of thirty-two degrees of north latitude to the Rio Bravo del Norte, and thence with the channel of said river to the Gulf of Mexico." (1X stats., p.446.

(b) Article 5 of the treaty of Guadalupe Hidalgo, of 1848, contains the following:

"The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico;" etc. (9 stats. 926.)

(c) Article 1 of the treaty between the United States of America and the Republic of Mexico, providing for what is commonly known as the Gadsden Purchase, was as follows:

"The Mexican Republic agrees to designate the following as her true limits with the United States for the future: retaining the same dividing line between the two Californias as already defined and established, according to the 5th article of the treaty of Guadalupe Hidalgo, the limits between the two republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, as provided in the 5th article of the treaty of Guadalupe Hidalgo; thence, as defined in the said article, up the middle of that river to the point where the parallel of 31 degrees 47 minutes North latitude crosses the same;" ~~thence~~ etc.

This defines the boundary line further North than the lands in controversy.

It will be noted that by the terms of these two treaties the portion of the boundary line in question ~~was~~ formed by the "deepest channel" of the Rio Grande, as

Texas State Boundary Line

it existed on February 2nd, 1848, the date of the treaty of Guadalupe Hidalgo, and not as it existed on December 30th, 1853, the date of the Gadsden Purchase, as erroneously found by the Court of Private Land Claims and by the Commissioner of the General Land Office in this cause, if, indeed the deepest channel was ^{not} ~~is~~ the same upon dates mentioned.

(d) Subsequent changes in the channel of the Rio Grande would not affect the location of said boundary line as was established. (Mo. vs. Ky. 11 Wall. 395.)

(e) The joint ^{resolution} ~~legislature~~ of Congress for annexing Texas to the United States, adopted March 1st, 1845, provided:

"Said State, when admitted into the union, after ceding to the United States, all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, magazines, arms, armaments, and all other property and means pertaining to the public defence belonging to said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to ~~become~~ be disposed of as said State may direct"; etc. (5th stats. 797)

These conditions were also recognized by the joint resolution of Congress, of December 29, 1845, finally admitting Texas as one of the United States of America. (9 stats. 108)

(f) The act of Congress of June 5th, 1858, authorizing the President of the United States, in conjunction with the State of Texas, to run and ^{mark} ~~make~~ the boundary lines between the United States and the State of Texas, did not contemplate nor provide for the establishment of that boundary line South of the 32nd degree of North latitude, and consequently neither that act nor any proceedings or survey made thereunder directly or conclusively affects the question here presented. (11 stats. 310)

See also report No. 1186 by Mr. Birdsall, from the Committee on Judiciary, 59th Congress, First Session, to

accompany H.R. 443. Also report No. 1788 by Mr. Stephens from the Committee on Indian Affairs, 59th Congress, First Session, to accompany H.R. 15098.

It is believed that no other act of congress and no other act of the Legislature of Texas has any direct or conclusive bearing upon the question here involved; but this proposition is advanced in a merely tentative way, in view of the fact that since receipt of said notice the great pressue of official business in the Department of the Attorney General of Texas has left little opportunity for exhaustive investigation in the premises.

(g) Said El Comutillo Grant was originally made by the Republic of Mexico in 1823. Attached hereto and made part hereof ^{are} ~~is~~ certified copies of the following original papers, which are now on file in the General Land Office of the State of Texas, namely:

(1) Petition ~~to the~~ ^{to the} ~~aguntamiento~~ ^{aguntamiento} by Ponce de Leon et al, for said grant, marked Exhibit "2".

(2) Field notes of the original survey of said "El Comutillo tract" forming part of a Spanish document, purporting to be the testimonio of the title to Juan Ponce de Leon, et al, same being marked Exhibit "3".

(3) Plat of El Comutillo grant and its connections, dated August 27th, 1866, made by Anson Mills, Major, 10th U.S. Cal., same being marked Exhibit "4".

(4) Plat of El Comutillo grant and its connections, dated August 16th, 1866, made by John P. Randolph, Deputy Surveyor of El Paso county, Texas, same being marked Exhibit "5".

(5) Plat and field notes of a survey of said Comutillo El ~~Grant~~ grant of one league and a half, made August 9th, 1860, for Jose Sanchaz, et al, the land to which they were entitled by virtue of an act of the Legislature of Texas, approved February 1868, confirming the Mexican title to said grant, ~~see~~ ~~see~~ said survey being No. 173 in El Paso county,

marked Exhibit "6".

Note the call in these field notes for the S.A. Maverick Survey.

Note also certificate by Anson Mills, Deputy Surveyor; and in this connection see field notes of a survey of said El Comutillo Grant made in August, 1886, by J.P. Randolph, Deputy Surveyor of El Paso county, Texas, and certificate of by him bearing date August 16th, 1886, and supporting affidavit of date August 27th, 1886, made by Anson Mills, Major 10th U.S. Cal., all of which are herein below shown; also above mentioned plat of date August 16th, 1886, made by said John P. Randolph, and the above mentioned plat of date August 27th, 1886, made by Major Anson Mills.

(6) Affidavit by Anson Mills, Major 10th U.S. Cal., dated August 27th, 1886, concerning bearings of said "Le Comutillo" Grant, same being marked Exhibit "7".

(7) Certificate of John P. Randolph, Deputy Surveyor El Paso county, dated August 16th, 1886, concerning the bearings of said El Comutillo Survey No. 173, referring to the bearings of the S.A. Maverick Survey No. 171, etc., and referring to the original survey made by Major Anson Mills, said certificate being marked Exhibit "8".

(8) Plat and field notes of Survey No. 171 in El Paso county, ^{also} made on August 9th, ¹⁸⁶⁰ ~~1886~~, for S.A. Maverick, adjoining said El Comutillo Grant and being a companion survey, also made by Anson Mills, Deputy Surveyor El Paso county and ^Presidio district, Texas; same being marked Exhibit "9".

(9) Patent No. 471, Vol. 24, dated September 6th, 1886, executed by John Ireland, Governor, and W.C. Walsh, Commissioner of the General Land Office of the State of Texas, in favor of Jose Sanchez, et al, for said El Comutillo Grant (Survey No. 173) for one and one-half leagues of land in El Paso county, Texas; said patent being marked Exhibit "10". (Note that this patent was issued upon file No. 2212, Bexar, and in

that connection note the reference to said file in certificates of the Commissioner of the General Land Office to copies of several plats above mentioned.

(10) Sketch of map of El Paso county, dated May 1875, now in use in the General Land Office of Texas ~~as~~ ~~the official map of said county~~, showing said El Comutillo Grant and its connections, said sketch being marked Exhibit "11".

(11) Sketch of map of El Paso county, dated ~~May~~ January 1902 ~~1875~~, now in use in the General Land Office of Texas as the official map of said county, showing said El Comutillo Grant and its connections, said sketch being marked Exhibit "12".

(h) For many years the State of Texas has claimed and exercises unquestioned jurisdiction and control over said entire El Comutillo Grant as shown by the plats, field notes, maps, etc., hereto attached, extending to the western channel of the Rio Grande. For many years the aforesaid Texas claimants in possession thereof have paid taxes upon said lands to the State of Texas, and to El Paso county, one of its political subdivisions, within whose boundaries said lands are situate, and for many years civil and criminal courts of the State of Texas have exercised jurisdiction over said lands to said western channel of the Rio Grande.

On May 12th, 1904, Governor Miguel A. Otero of New Mexico issued a ^{requisition} ~~relinquishment~~ upon the Governor of Texas for two citizens of Texas, claimants of the land in controversy, who stood ~~is~~ charged in Dona Ana county, New Mexico, with the crime of larceny of wood from said lands. On June 3rd, 1904, the Governor of Texas declined to honor the requisition, as is shown by a certified copy of a letter of that date from N.A. Cravens, his private secretary, addressed to Governor Otero, a certified copy of which letter is attached hereto, marked Exhibit "13", and made part hereof, the refusal to grant said requisition being

based upon the ground that the transaction ^{grew} ~~arose~~ out of "a disputed boundary line between two leagues of land, one claimed by complainants and lying in New Mexico and the other occupied and claimed by defendants and being situated in the State of Texas". The two grants here referred to were said Santa Teresa and said El Comutillo grants.

On June 10th, 1904, Governor Otero, in reply to said letter refusing to grant such requisition, declared that "Had I known the facts, I certainly would not have issued the requisition, and I quite approve of the Governor's action in denying the same on hearing, as I am strongly opposed to any abuse of the writ of extradition". A certified copy of said last mentioned letter, marked Exhibit "14" is hereto attached and made a part hereof.

(1) In support of the foregoing proposition No. Second, special attention is called to that portion of the general report of Arthur B. Kidder, Special Examiner of surveys on the boundaries of Texas, Oklahoma and New Mexico, made to the Secretary of the Interior, which reads as follows:

"The boundary line between the State of Texas and the Territory of New Mexico, from the thirty-second parallel south to the international boundary line, is defined in the act of Congress approved September 9, 1850, (Vo. 1X, p.446), as the channel of the Rio Bravo del Norte.

My observation and brief investigation is to the effect that said stream has many channels. During the dry season, as in November, 1903, there is almost no flowing water; during freshet the stream is often several miles wide, and in resuming a normal flow often settles into a channel a considerable distance from its last previous channel. The land along the Rio Grande is valuable for agricultural purposes, and the boundary line between Texas and New Mexico should be definitely marked.

Said applicant and protestant respectfully ask that this application and protest be set down for hearing upon a day certain, and as late as possible, and not earlier than ninety days after the filing hereof and that the issuance

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of patent, as set forth in the above mentioned notice,
be delayed, and that on final hearing, the application
for such patent be finally denied.

Robert Vance Davidson

Attorney General of the
State of Texas.

William C. Hawkins

Assistant Attorney General of the
State of Texas.

July 11-1907.

For said applicant and protestant,
The State of Texas.