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YUMA RESERVATION-TITLE TO LANDS

M-28198 January 8, 1936.

The Honorable,
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

You have submitted to me for an opinion two questions propounded by the Commissioner of Indian Affairs in his letter of October 2, 1935. The questions are as follows:

"1. Did the Act of August 15, 1894 (28 Stat. 332), which ratified the agreement with the Indians hereinabove referred to, actually either in law or fact make the non-irrigable lands ceded by the Indians through the provisions of the agreement a part of the public domain so as to extinguish any right, title, or interest therein, legal or equitable, which may have vested in them?

2. Assuming that such legislation did not return the lands to the public domain, or did not extinguish such right, title, or interest, is there any reason why this Office is not entitled to request, for the benefit of the Indians, any or all of the various features set forth in our letter of May 10, 1935 to the Commissioner of the Bureau of Reclamation?"

The dispute which gives rise to these questions is due to the construction by the Bureau of Reclamation of the All-American Canal from the head works at the Imperial Dam across the Colorado River at a point 12 miles upstream from the City of Yuma, Arizona, thence southwesterly on the California side of the Colorado River to the boundary line between California and Mexico. The All American Canal in its course thus described crosses the length of the disputed Yuma Indian Reservation. The right of way for the canal was assumed by the Indian Office to cross Indian Tribal lands for which compensation should be allowed and paid from the appropriation made for the construction of the All-American Canal. The claims for compensation and for guarantee against future damages from the operation of the canal are set forth in a letter dated May 10, 1935, from the Commissioner of Indian Affairs to the Commissioner of the Bureau of Reclamation. The claims are as

follows:
"1. Value of Land

In accordance with the appraisal of October 29, 1934, the value of the lands occupied by the right-of-way through the Fort Yuma Indian Reservation and the cash remuneration due the Yuma Indians therefor is fixed at $2,602.50, on the basis of $1.50 per acre.

2. Damage as a Result of Seepage and Alkali

Provided seepage conditions on the Fort Yuma Reservation are aggravated or intensified by the All-American Canal, the District agrees to prosecute diligently the construction of such intercepting drains, installation of pumping plants including necessary transmission lines, or construction of water affecting the Indian irrigation project. The cost of operation and maintenance of such drainage works, including electrical energy if

required, shall be borne by the District. If prior to the effective operation of such drainage works any Indian land is made unproductive by water logging, from alkali or other causes as a result of operation of the said Canal, the Indian or Indians affected shall be compensated for losses suffered during the time such land is unproductive. Damages, either temporary or permanent, to Indian land as a consequence of the operation of the All-American Canal shall be determined and payment made therefor at such time and in such manner as the Secretary shall prescribe. A bond in the amount of $200,000 shall be furnished by the District to insure installation and operation of drainage works and payment of damages.

3. Damages Resulting from Failure of Canal.

In the event of failure of the All-American Canal from any cause whatsoever resulting in damage or destruction of adjacent Indian lands and property, the Yuma Indians shall be reimbursed by the

District for any and all damages resulting from failure of the canal. Such damage shall be determined and payment made therefor at such time and in such manner as the Secretary shall prescribe.

4. Mineral Deposits.

If during the construction of the All-American Canal or at any time there should be discovered or encountered within the right-of-way any mineral deposits, either placer or ledge, of such value in the opinion of the Commissioner of Indian Affairs as to justify recovery, such mineral deposits shall be and become property of the Yuma Indians, and the Commissioner of Indian Affairs, in be half of the Yuma Indians, shall make such arrangements as he may deem necessary and proper to recover such mineral deposits in such a way as not to impede or hinder the construction of the Canal.

5. Sand and Gravel Deposits.

The Yuma Indians shall be paid at the rate of 10 cents per yard for all sand and gravel taken from the Picacho Wash pit and the Pits in Section 19 and 24, for use on the All American Canal Construction work and for any and all sand and gravel within economic limits of recovery in such pits made non usable as the result of the Canal construction. The extent and value of deposits excavated out of the canal and wasted or covered up, or otherwise made inaccessible shall be determined by a committee appointed by the Secretary one member to be selected by the Yuma Indian Tribal Council, one member to be selected by the District and one to be selected by the other two members and payment therefor shall be made in such manner as the Secretary may prescribe.

6. Bridges Across Canal.

In order that the hill and mesa land of the Indian Reservation, whereon are several extensive sand and gravel deposits of considerable value, may be accessible from the valley it is required that there be constructed, fret of cost to the Yuma Indians, four bridges across the All-American Canal, located approximately as follows: (1) Picacho Wash. (2) NW1/4, Sec. 16, T. 16 S., R. 22 E., (3) Sec. 24, T. 16 S., R. 21 E., and (4) See. 24, T. 16 S., R. 21 E., near Araz Junction. The definite locations for these crossings shall be selected by a representative of the Commissioner of Indian Affairs, when final location of the Canal, including location and types of appurtenant structures in the respective vicinities above mentioned are determined.

7. Hydroelectric Power Development.

The contract of December 1, 1932, between the United States and the Imperial Irrigation District recognized power possibilities on the All-American Canal and reserves to the District, subject to provisions for participation by other agencies, the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal below and not including the Syphon Drop site. Present plans contemplate the development of 20,000 KW at the Pilot Knob site in addition to a possible development of 5,000 KW at the Syphon Drop site, the latter being reserved to the

The All-American Canal right-of-way through the reservation, accordingly is, in fact, a valuable power site. As one of the considerations for granting of the said right of-way, it is believed the District should pay as rental for the use of all power sites along said canal within the reservation below Syphon Drop, annual charges in the amount of one dollar ($1) per horsepower of installed generator capacity, such payments for any power unit to be made for each calendar year from and after the first of January next following the date of which the unit is placed in commercial operation. It is believed the Yuma Indians are likewise entitled to rental for the site at Syphon Drop. Since the power generated at this site is reserved to the United States the agreement will be necessarily between the Bureau

of Reclamation and the Office of Indian Affairs and should contain the same provision for rental per horsepower per year of all generator capacity in addition to the present installed capacity of 1,000 KW."

After some negotiations between the bureaus, on July 15, 1935, the Commissioner of the Bureau of Reclamation advised the Commissioner of Indian Affairs that the land taken for right of way for the All-American Canal was not susceptible to irrigation, that title to non-irrigable land was vested in the United States by virtue of the act of August 15, 1894 (28 Stat. 332), that the land constituted a part of the public domain, and that, therefore, the Yuma Indians had no interest in the land.

On July 6, 1883, President Arthur by Executive order set aside a tract of country in the Territory of Arizona described by metes and bounds as beginning at a point in the channel of the Colorado River, opposite the mouth of the Gila River, thence up the channel of the Gila River to the range line between ranges 19 and 20 of the Gila and Salt River meridian, thence north on the range line to the first standard parallel south, thence west on the parallel to the Colorado River, thence down the channel of Colorado River to the place of beginning to be used as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon.

On the following January 9, 1884, by Executive order the President canceled the reservation in Arizona and created a reservation for the same Indians in California. This Executive order reservation on the California side of the river comprises the area which is the subject of this opinion.

The new reservation is described in the Executive order as beginning at a point in the middle of the Colorado River, due east of the meander corner to Sets. 19 and 30, T. 15 S., R. E., S. B. M., thence west on the line between Sets. 19 and 30 to the range line between Tps. 23 and 24 E., thence continuing west on the section line to a point, which, when surveyed, will be the corner of Sets. 22, 23, 26 and 27 in T. 15 S., R. 21 E., thence south on the line between Sets. 26 and 27 in said Township to the intersection of the international boundary, thence easterly on the international boundary to the middle of the channel of the Colorado River, thence up said River in the middle of the channel to the point of beginning.

The area of the reservation was not changed until an agreement made December 4, 1893, at Fort Yuma, Arizona, between the Indians and three Commissioners representing the United States. These Commissioners were the representatives of the Office of Indian Affairs and the agreement made with the Indians was supposed to be for their benefit. The first paragraph of Article I of the Agreement is as follows:

"The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim ,and interest in and to and over the following-described tract of country in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows: * * *" (Describes entire Yuma Reservation established January 9, 1884)

Article I I of the agreement provides, among other things, that

"Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and all adjoining sections five acres of land, which shall be allotted to such Indian in severalty. * * *"

(The area in the irrigable allotment was increased to ten acres of irrigable lancl by the act of March 3, 1911 (36 Stat. 1063).)

Article III of the agreement provides for the allotments by a special agent appointed by the Secretary of the Interior and after all of such allotments have been made and approved "then all of the residue of said reservation which may be subject to irrigation" shall be disposed of by the Secretary of the Interior by sale to white settlers at the appraised value of the land. (Emphasis supplied)

Article VI of the agreement provides that

"All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States."

Article VII provides

"There shall be excepted from the operation of this agreement a tract of land, including the

buildings, situate on the hill on the north side of the Colorado River, formerly Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm

not to exceed in all one-half section, or three hundred and twenty acres."

By the Act of August 15, 1894 (28 Stat. 332), Congress accepted, ratified and confirmed the agreement made with the Indians on December 4, 1893. The act also provided for expenditure of funds to carry out the terms of the agreement. It directed the Secretary of the Interior to allot the lands susceptible to irrigation until each and every Indian had received an allotment and to appraise and sell the remaining irrigable lands to white settlers. The following language of the act refers to the disposition of the non-irrigable lands:

"That all the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws."

Pursuant to the act of June 17, 1902 (32 Stat. 388), the Bureau of Reclamation has constructed the Yuma Irrigation project. The diversion of water from the Colorado River was accomplished by the construction of the Lahuna Dam located about eight miles upstream from the City of Yuma. The main canal carries the water from the California end of the dam to a point near Yuma where it passes under the river in a conduit. The position of the canal in California made it possible to irrigate about 8,000 acres of land in the Yuma Indian Reservation. Approximately half of the area was used for Indian allotments and the remainder sold after appraisal to white settlers. This area, considerably reduced by seepage and other causes, now constituted the Reservation Division of the Yuma project. After investigation and after topographical and subdivision surveys of the reservation were made, an administrative determination fixed and designated the irrigable area and fixed and designated the area not susceptible of irrigation. Each of the Indians on the Yuma Reservation Was allotted as directed by the act of Congress of August 15, 1894, and March 3, 1911, supra, and the remaining irrigable lands were appraised and sold at public sale. However, at no time have the non-irrigable lands been opened

to settlement and sale by proclamation of the President as provided in the above-quoted paragraph of the act of August 15, 1894.

It is reasonably evident, I think, that the non-irrigable lands did not become a part of the public domain at the time of execution and ratification of the agreement with the Indians. Article VI of the agreement merely says that all lands upon said reservation that cannot be irrigated "are to be open to settlement under the general land laws of the United States." The time of opening the lands to settlement is not specified, but some future date was apparently in contemplation, because no classification of the lands into irrigable and non-irrigable had then been made and until there was such a classification the particular lands which were to be subject to settlement under the general land laws could not be identified. The ratifying act is more specific. It provides that the non-irrigable lands "shall become a part of the public domain, and shall be open to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws." The emphatic use of the future tense in this declaration is inconsistent with the view that the lands became a part of the public domain immediately, and bearing in mind that the words "public domain" or "public lands" are habitually used in Federal legislation to describe such lands as are subject to sale or disposal under the general land laws, (Newhall v. Sanger, 92 U.S. 761, 763; 10 L. D. 367) it seems that Congress intended that the non-irrigable lands should become a part of the public domain on the same date that they are made subject to settlement and disposition under said general land laws by presidential proclamation. In this view, the non-irrigable lands will not become a part of the public domain until such proclamation issues.

The fact that the non-irrigable lands have not yet become part of the public domain is not, however, decisive of the question at hand. The question is one of ownership as between the United States and the Indians and this depends primarily upon the provisions of the agreement of 1893 as ratified by Congress. It is argued by the Indian Office that the non-irrigable lands have been continuously administered as a part of the Indian Reservation since execution and ratification of the agreement; that the lands have been leased for grazing and mining purposes; and that the proceeds from such leases have been covered into the Federal Treasury for the benefit of the Yuma Indians. But this administrative recognition of Indian ownership is not controlling (Harris v. Bell, 254 U.S. 103, 109; Tapp v. Stuart, 9 Fed. Supp. 23), and must give way if in conflict with the plain terms of the agreement and ratifying act. The provisions of the agreement and act received consideration in two cases decided August 2, 1935, in the district court of the United States in and for the Southern District of California. See United States v. Sid Johnson and Mrs. Sid Johnson; United

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States v. M. C. Walker and Mr. M. C. Walker (unreported). These were ejectment suits brought by the United States against squatters on lands within the reservation which were susceptible of irrigation. While non-irrigable lands were not involved, the decisions interpreted the agreement and act as vesting full title in the United States immediately subject only to the rights specifically reserved in the Indians, which reserved rights, as will hereafter be shown, extend to the irrigable lands only. The inference to be drawn from those decisions in so far as the non-irrigable lands are concerned is that the relinquishment by the Indians became effective immediately rather than at some future date, and this, I think is the correct view.

Article I of the agreement declares that the "Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim and interest in and to" all of the lands within the reservation boundaries. This language imports in clear and precise terms a present relinquishment or cession of all of the interest of the Indians in the reservation land. The relinquishment or cession is made subject to the conditions thereinafter stated, but those conditions in no way qualify the absolute nature of the relinquishment or cession with respect to the nonirrigable lands. The conditions materially affecting the relinquishment or cession have to do only with the irrigable lands, subjecting them to allotments in severalty to the individual Indians and sale for the benefit of the Indians as a whole. As to the irrigable lands, therefore, the cession or relinquishment was not absolute, but in trust for the use and benefit of the Indians. The beneficial ownership of the Indians in the irrigable lands thus continued notwithstanding the relinquishment or cession. See Ash Sheep Company v. United States, 252 U.S. 159. Neither the agreement nor the ratifying act, however, contains any word or clause qualifying or limiting the absolute cession made of the non-irrigable lands by Article I of the agreement. Both recognize that those lands are to become a part of the public domain and be disposed of under the general land laws The words "hereby surrender and relinquish", as applied to the non-irrigable lands, coupled with the declaration that such lands shall become a "part of the public domain" and "be opened to settlement and sale", without the reservation of any interest in the Indians and unaccompanied by any condition in the nature of a trust, express or implied, obviously import an absolute extinguish ment of all the interest of the Indians in and to that class of lands. In such a situation, there is no authority to depart from the plain words of the agreement and act. In United States v. Choctaw Nation,179 U.S. 494, the contention was made that a treaty, the terms of which made an absolute cession, should be interpreted to create a trust for the benefit of the Indians. The Court rejected the contention, saying among other things (page 535):

"But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the land in question to the United States free from any trust, then

the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependent upon the other, or because in the judgment of the court the Indians may have been, overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment, of the Indians which it is the function alone of the legislative branch of the Government to determine."

While the irrigable or non-irrigable character of the lands within the reservation had not been determined on the date of the agreement of relinquishment or cession, it is clear that the taking effect of the relinquishment or cession was not postponed until classification of the lands as non-irrigable. In this respect, the situation is closely analogous to that involved in the grants of swamp lands made to the States by the act of September 28, 1850 (9 Stat. 519). That act, like the agreement under consideration, was in the usual terms of a grant in praesenti, and there, as here, the character of the lands was determined at a subsequent date. The courts have uniformly ruled that the States became immediately invested with an inchoate title which became perfect, as of the date of the act, when the land was identified and the patent issued (see United States v. Minnesota, 270 U.S. 181, 203, 205). Applying a like rule here, the relinquishment of the Indians, as and when the non-irrigable character of the land was determined, became fully effective as of the date of the agreement.

The case of United States v. La Chappelle (81 Fed. 152), which has been called to my attention as supporting the claim of Indian ownership of the non-irrigable lands, is not in point. In that case, an agreement had been entered into between the Secretary of the Interior and Chief Moses, pur-

porting to represent the Indians of the Columbia Reservation. Under the provisions of the agreement, the Indians, in consideration of a sum of money, agreed to remove to another reservation and that the Columbia Reservation should be opened to settlement, except that any Indian who desired to remain might do so in which event lands not exceeding 640 acres to each family should be selected for them. The lands were thrown open to settlement before allotment selections had been made. The Indians who remained on the lands did not acknowledge the authority of Chief Moses to represent them. White men attempted to settle on the lands and were resisted by the Indians, where upon the Indians were forcibly removed by the United States troops and imprisoned. During their imprisonment, the white settlers seized their improvements, settled on the land and filed homestead declarations which were

first accepted and later canceled. Suits were then brought by the United States to oust the settlers from possession. The court ruled that the President was without authority to open the lands to settlement under the homestead laws until after allotment selections had been made for the Indians; that the opening of the lands was premature; that the lands had not become a part of the public domain; and that the Indians who remained on the lands were not bound by the agreement entered into with Chief Moses "for the reason that they never gave their assent, and Moses had no authority to represent them". This ruling is without application here for the reason, first, that there has been no premature opening of the lands in the Yuma Reservation to settlement under the general land laws; second, no question is raised as to the validity of the agreement with the Yuma Indians; and third the stipulations of the agreement have been carried out by the United States and the Indians have received and accepted the allotments and other benefits promised them. In this situation, the question and it is one upon which the decision in the La Chappelle case has no bearing-is whether the Indian title to the remaining lands classed as non irrigable has been extinguished. The plain terms of the Yuma agreement requires that that question be answered in the affirmative.

It follows from what has been said that the claims asserted on behalf of the Indians and listed above under Nos. 1, 4, 5, 6 and 7, all of which depend for recognition upon the establishment of the Indian title to the non-irrigable lands, cannot be sustained.

Regarding the liability of the United States or that of the Imperial Irrigation District for damages caused by seepage, percolation, or breaks in the canal (see claim listed above as Nos. 2, and 3) , the law does not make the concern engaged in the carriage of irrigation water an insurer of others against damage from breaking, overflow, seepage or other escape of the water. The famous English case of Rylands v. Fletcher (1. R. 3 H. L. 330), declared that a man builds a reservoir or other works to hold water at his peril. This is not the law in the West. The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence. Weidekind v. Tuolumnem etc., Company (12 Pac. 387); Walley v. Platt County (26 Pac. 129). In the operation of a canal the ordinary rule of negligence applies, namely, that there must be a failure to use the care which an ordinary prudent man would have taken under the circumstances. Parker v. Gregg, (136 Cal. 413, 69 Pac. 22). Until the All-American Canal is completed and used, it will be impossible to tell whether seepage will result. A break in the canal might occur if unprecedented conditions arise. If actionable damages occur for any reason while the canal is being operated and maintained by the Imperial Irrigation District, a judgment against the District could be satisfied under the California laws. In the meantime, I do not think the Secretary of the Interior has any authority to require the District to give bond in the amount of $200,000 or in any other amount guaranteeing the contingent liability of the District. No statutory provision of which I am aware empowers the Secretary to exact such a bond. In the absence of such a statutory provision. the District cannot be compelled to give bond unless the obligation so to do is imposed by its existing contract with the United States under which the United States is constructing the All-American Canal for the District at the expense of the District. That contract, which fixed in detail the rights and obligations of the parties both before and after the District takes over the operation and maintenance of the canal, contains no provision requiring the District to give bond, nor does it contain any reservation of power in the Secretary which may be invoked as authorizing him to

exact a bond. The obligation to give bond, therefore, is one which the District has not agreed to assume and which cannot now, in view of the existing contract, be enforced without its consent.

NATHAN R. MARGOLD,

Solicitor.
Approved: January 8, 1936.
T. A. WALTERS, First Assistant Secretary.