DECISIONS OF THE DEPARTMENT OF THE INTERIOR

Act of Aug. 15, 1894—Indian Lands: Ceded Lands—Withdrawals and Reservations: Generally

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in sec. 17 of the Act of Aug. 15, 1894, was an absolute, present cession of any and all interests of the Indians to the nonirrigable lands in the Fort Yuma Indian Reservation created by Executive Order of Jan. 9, 1884.

Act of Apr. 21, 1904—Indian Lands: Ceded Lands—Reclamation Lands: Generally—Statutory Construction: Implied Repeals

Sec. 25 of the Act of Apr. 21, 1904, which authorized the application of the Reclamation Act of 1902 to the Yuma Indian Reservation, did not repeal by implication sec. 17 of the Act of Aug. 15, 1894, which provided for the cession, reclamation and allotment of the Reservation, and is in no way inconsistent with the 1894 Act.

Act of Aug. 15, 1894—Indian Lands: Ceded Lands—Withdrawals and Reservations: Generally

Assuming that the Act of Aug. 15, 1894, was a conditional rather than an absolute cession by the Yuma (now Quechan) Indians of their rights to the nonirrigable lands in the Fort Yuma Indian Reservation, all material conditions on the part of the United States were met, and the cession has occurred.

Indian Lands: Ceded Lands—Public Lands: Administration—Statutory Construction: Administrative Construction

The administrative treatment of land as reservation land under the jurisdiction of the Bureau of Indian Affairs for many purposes is not dispositive of the status of the land in the face of clear legislation demonstrating that it was absolutely ceded, even without conflicting administrative treatment of the lands as public domain or under the jurisdiction of the Reclamation Service. The Department has the authority to resolve disputes and correct errors in the status of lands within its jurisdiction.

M–36886 *January 18, 1977*

OPINION BY SOLICITOR AUSTIN

OFFICE OF THE SOLICITOR

To: Secretary of the Interior

SUBJECT: Title to Certain Lands Within the Boundaries of the Ft. Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1884

LEGAL CONCLUSION: *Solicitor's Opinion* M–28198, dated January 8, 1936, finding, *inter alia*, that the Indian title to certain

lands within the Fort Yuma Indian Reservation has been extinguished, is well founded and is affirmed.

INTRODUCTION

This opinion considers the title to some 25,000 acres of land within the boundaries of the original Fort Yuma Indian Reservation. A 1936 unpublished opinion by Solicitor Margold concluded that the Quechan Tribe holds no interest in the lands. In 1973 the Tribe advanced to the Department a claim that the Margold Opinion is incorrect as a matter of law, and asked this office to re-examine Solicitor Margold's conclusion. After lengthy and careful investigation of the legal question and underlying facts, we concluded, in Jan. 1976, that the Opinion of Solicitor Margold is well-founded and should be affirmed. The President of the Quechan Tribal Council was promptly advised of this conclusion. Since the announcement of our decision, numerous inquiries have been made, culminating with oversight hearings by the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, as to the factual and legal justification for our decision. This opinion will respond to those inquiries.

STATEMENTS OF FACTS

1884 Executive Order Reservation

By Executive Order of Jan. 9, 1884,[1] President Arthur established the Fort Yuma Indian Reservation in California[2] for the Yuma (now called Quechan) Indians. The reservation consisted of seventy-two square miles, with its eastern boundary beginning at "a point in the channel of the Colorado River."[3]

[1] *I. C. Kappler, Indian Affairs-Laws and Treaties* 832 (1904) (hereinafter "*Kappler*").

This order canceled an Executive Order, dated July 6, 1883, that had set aside a different tract of land in Arizona as a reservation for these Indians. *Id.* at 831.

The 1884 Executive Order provided that the reservation was to be "for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon." The Secretary has never settled any other group of Indians on this reservation.

[2] The Fort Yuma Indian Reservation, as established by the Executive Order of Jan. 9, 1884, will be referred to in this Memorandum as the "Yuma Reservation."

[3] The full boundary described in the Executive Order of Jan. 9, 1884, is as follows: "Beginning at a point in the channel of the Colorado River due east of the meander corner to sections nineteen and thirty, township fifteen south, range twenty-four east, San Bernardino meridian; thence west on the line between sections nineteen and thirty to the range line between townships twenty-three and twenty-four east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections twenty-two, twenty-three, twenty-six, and twenty-seven, in township fifteen south, range twenty-one east; thence south on the line between sections twenty-six and twenty-seven, in township fifteen south, range twenty-one east; and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections thirty-four and thirty-five, in township sixteen south, range twenty-one east; 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 thereof, to the place of beginning * * *." *Id.* at 832.

The portion of the Fort Yuma Military Reservation in California was excepted from the described tract of land. However, the final paragraph of the Executive Order transferred the entire Fort Yuma Military Reservation, above and below the Colorado River, in California and Arizona respectively, "to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order." *Id.* On Feb. 11, 1892, the Assistant Attorney General for the Department of the Interior rendered a decision (approved by the Secretary on Mar. 5, 1892) in which it was

Some lands located within the exterior boundaries of the Yuma Reservation were in private ownership in 1884. For example, in 1871 Congress granted a right-of-way to the Southern Pacific Railroad Company for the purpose of constructing a railroad,[4] and in 1877 the lands which comprise the present city of Winterhaven had been patented in fee. These pre-existing private rights are expressly protected by the Executive Order, are unquestionably valid, and are not placed in dispute by the Tribe's claim.

Nature and Historical Use of Reservation Lands

Geographically, the Yuma Reservation consisted of two sharply contrasting areas separated by a diagonal divider which consisted of a cliff or bluff about 150 feet in height running from the northeast point of the reservation to the southwest point. To the north of this scarp lay the desert or upland or mesa, which comprises the bulk of the nonirrigable land on the Yuma Reservation. This is a desolate area of harsh desert character. Below the scarp lies the flood plain of the Colorado River, a relatively lush vegetated area.

The Quechans had historically been an agricultural tribe, deriving most of their food from the Colorado River flood plain. An anthropologist's report submitted to the Indian Claims Commission states:

> The Yumas, dependent upon agriculture, the mesquite and other wild plants which grow exclusively or almost exclusively on the bottomlands, hunting, and fishing appear to have derived less than two percent of their subsistence from the desert.[5]

While there is evidence that the Quechans made use of the non-

held that the lands in the Fort Yuma Military Reservation, both north and south of the Colorado River, "became a part of the Yuma Indian Reservation by virtue of the order of President Arthur dated Jan. 9, 1884." The decision of the Assistant Attorney General was implicitly endorsed by Congress one year later when, by the Act of Jan. 20, 1893, 27 Stat. 420, it granted the Yuma Pumping Irrigation Company two irrigation ditch rights-of-way across "the Yuma Indian Reservation, in Arizona (formerly the Fort Yuma military reservation) . . . ." On December 19, 1900, upon the recommendation of the Department, President McKinley issued an Executive Order revoking the Executive Order of Jan. 9, 1884, "as to that part of said military reservation lying south of the Colorado River" and placing the lands thereby withdrawn from the Indian reservation under the control of the Secretary of the Interior for disposition under the public land laws. The net result of all these actions was to make the detailed boundary described in the 1884 Executive Order a complete description of the Indian reservation, in effect striking out all references to the Fort Yuma Military Reservation in the 1884 Order.

[4] Act of March 3, 1871, 16 Stat. 573, 576 (1871). The right-of-way grant was reaffirmed by section 17 of the Act of August 17, 1894, 28 Stat. 282, 332, 333 (1894), and in three other grants of rights-of-way under the Act of March 2, 1899, 30 Stat. 990, *as amended*, approved by the Department of the Interior. This grant was authorized by Congress and its validity has not been questioned. Southern Pacific Pipelines, Inc., has constructed and presently operates an oil products pipeline on this railroad right-of-way. The claim of the Tribe would not, in any event, affect the validity of the use of these lands by Southern Pacific Pipelines, Inc.

[5] Indian Claims Commission Docket No. 320, filed Aug. 10, 1951, Def. Ex. H–74, at 54 (hereinafter referred to as "Docket No. 320").

irrigable lands, particularly in times of flood or famine,[6] that use was very limited.

The Indian Claims Commission found:

The Yuma and other tribes along the lower Colorado and Gila Rivers practiced a crude form of agriculture. Annual floods occurred as a rule. After the floods subsided the Indians would plant seeds and the moisture from the flooding lasted long enough for them to grow crops of corn, beans, pumpkins and melons. Another staple article of diet was the mesquite bean harvested from the trees which grew along the mesa and generally within about 5 miles of the river, but some mesquite grew as far as the foot of the mountains [citations omitted].

The two sources of both food and nonfood needs of the Yuma tribe were the river and the desert. Dr. A. L. Kroeber, former head of the Department of Anthropogy at the University of California, petitioner's expert, and Dr. Harold E. Driver, associate professor of anthropology, University of Indiana, defendant's expert, both estimated the Yuma obtained about one-half their food from the above described methods of agriculture [citations omitted]. Dr. Driver's estimate was 40% plus 10% dependence on "semi-cultivated" plants which grew wild but were also sown, especially the screw bean. [citation omitted].

The prime source of wild plant life food was the mesquite bean gathered from the mesquite trees which grew back from the flood plain with roots which extended 50 to 70 feet into the ground [citation omitted].

Construction of modern dams have greatly modified flood conditions of the lower Colorado River country. In aboriginal time Anza reported inundation was very extensive and the waters at flood stage spread over a distance of half a league (about 1.32 miles) on either side of the main stream [citation omitted]. Forde also states a few deer strayed along the cottonwood groves near the river and rabbits burrowed in its sandy banks but that game, both large and small, were relatively scarce in this arid country of the lower Colorado and Gila River bottoms.

Special Agent J. Ross Browne of the Interior Department wrote to Commissioner William P. Dole of Indian Affairs from Fort Yuma, Colorado River, Dec. 27, 1863, and is quoted as follows [citation omitted] with reference to Yuma subsistence on rats, frogs, mice and lizards:

"Under ordinary circumstances, when the usual overflow of the Colorado takes place, they cultivate the lowlands in their rude way, and generally succeed in raising considerable crops of grain and vegetables. These bottomlands are light, rich and easily worked, and afford ample means of subsistence to tribes bordering on the River. During the past year, however, there has been no overflow and consequently no crops have been put in by the Indians. To add to their misfortune, it has been a season of such unusual drought that the mesquite beans, berries and other wild crops upon which they are accustomed to depend in seasons of scarcity, have entirely failed so that they are left utterly destitute. Their seed, wheat and beans stored for planting have long since given out; and for sometime past, they have been compelled to subsist on rats, mice, frogs, lizards as they can gather on the deserts and the banks of the River."[7]

The Indian Claims Commission has found that the land in the area of the Yuma Reservation was worth approximately 25 cents per acre in

[6] *See* Docket No. 320, *supra* note 5, Pet. Proposed Findings of Fact, at 20–22.

[7] *The Quechan Tribe of the Fort Yuma Reservation* v. *United States*, 8 Ind. Cl. Comm'n. 111–a. 118–20 (1959) (hereinafter referred to as "Docket No. 319").

1853, and in 1884 was worth approximately 40 cents per acre.[8]

Origin of 1893 Agreement

Early in the 1890s, a number of private companies were constructing or planning to construct irrigation projects along the Colorado River. Without irrigation and some control over the flooding of the river, lands in the area had limited value.[9] By 1893, non-Indian farmers had moved into a region adjoining the Yuma Reservation and were practicing irrigated farming. In Jan. and Feb., 1893, the Congress enacted legislation enabling private companies to construct irrigation ditches to serve lands in the vicinity of the Yuma Reservation and included a provision requiring the companies to serve "the occupants" of the Yuma Reservation.[10]

In July 1893 the Quechans sent a petition [11] to the President and Congress in which they expressed the desire to have their lands irrigated and offered to cede their rights in the Yuma Reservation so that it might be opened for settlement and an irrigation ditch might be built, provided they be given individual allotments of land which could be irrigated. They pointed out that they had seen how much more productive and valuable the lands of the white settlers in the vicinity had become through irrigation; that they had heard of the possibility of the construction of an irrigation ditch which would serve them if part of the reservation were opened for settlement; [12] that "we want the ditch built so that we can get water and have early and large crops like our white friends;" and that for this purpose they were "willing to give up a large part of our reservation because as it is it is worthless to us."

The petition was critical of the government for not aiding members of the Tribe in any way except for maintaining a school among them. Mention was made that the Tribe considered that it was being dealt with "less liberally than almost any other Indian tribe," that nature provided very little for the members and that "we have never received any assistance in helping ourselves." The petition noted that the greater part of the Yuma Reservation was desert land, that the remainder lay on the low bottomland of the Colorado, and that the water from the

[8] *The Quechan Tribe of the Fort Yuma Reservation* v. *United States,* 15 Ind. Cl. Comm'n. 489, 490 (1965), Judgment on Joint Stipulation in Settlement.

[9] S. Exec. Doc. No. 68, 53d Cong., 2d Sess. 14–15 (1894).

[10] Act of Jan. 20, 1893, 27 Stat. 420; Act of Feb. 15, 1893, 27 Stat. 456, 457.

[11] S. Exec. Doc. No. 68, *supra* note 9, at 14–16. The material in this and the next five paragraphs is taken from this source.

[12] This was most likely the ditch referred to in the Act of Feb. 15, 1893, *supra,* whereby Congress had granted the Colorado River Irrigation Company a right-of-way for an irrigation canal which would run through the Yuma Reservation, subject to the proviso that the Company furnish water to the Indians on terms to be prescribed by the Secretary of the Interior.

annual overflow usually did not subside from the bottomland before July 15th. Thereafter, the petition continued, "we plant small crops of melons, corn, squash, and the like, when we secure the seed for the same, and thus obtain a meager supply of food for the winter and spring." The petition remarked upon the scarcity of game due to the desert character of the land, and noted there was no forest to supply food as was the case with many other tribes. It stated that the money the Quechans got was used to piece out crops and secure food and clothing.

The petitioners set out their belief that "if furnished with a small tract of land, with water to irrigate it and with the means of cultivating we could improve our fortunes to the extent of securing at least all the necessaries of life." The petition continued: if a portion of the land could be thrown open to settlement, an irrigating ditch would be built through the reservation which would give them work and, after completion, give them water for their land. With water the land would be fertile and produce "all sorts of vegetables and melons as well as fine fruits." The petition summed up the situation:

> Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, if we can have small tracts set apart for our use. We do not want a great deal of land, for we have noticed that the white man who in this country has small holdings, 5 and 10 acres, and cultivates his land well, is the most successful and the most certain to have what he wants and have it when he wants it.[13]

The five captains of the Tribe signed the petition as well as about one-half the male adults. The petition was signed on July 24, 1893, before a notary public who certified that the signatories were members of the Tribe, that their signatures appeared by their authority, and that "they were anxious to take lands in severalty." On the same day, the same five captains and about one-half the male adults of the tribe signed a proposed agreement. The same notary public certified to the signatures and again stated "they are anxious to take lands in severalty."

It has been suggested by parties representing the Quechan interests that the Commissioners who ultimately engaged in negotiations with the tribe drafted the petition. However, the Commissioners were not appointed until several months after signing of the petition,[14] and the petition was critical of the past conduct of the Government toward the Tribe.[15]

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[13] S. Exec. Doc. No. 68, *supra* note 9, at 15.

[14] The appointment was made under date of Oct. 19, 1893. See note 17 *infra*. The petition was signed in July 1893. S. Exec. Doc. No. 68, *supra* note 9, at 16.

[15] The petition states in part: "It is a fact probably known to your honorable selves, or, if not known, easy of verification, that the Government of the United States does not aid the Yumas in anyway except by maintaining a school among them, of which they try to show their appreciation by sending their children to it. We have been assured by those in a position to know that in the matter of Government aid we have been dealt with less liberally than almost any other Indian tribe." S. Exec. Doc. No. 68, *supra* note 9, at 14.

January 18, 1977

Negotiation of 1893 Agreement

By the Act of Mar. 3, 1893,[16] Congress enacted provisions, "[t]o enable the Secretary of the Interior, in his discretion, to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress * * *." By a letter dated Oct. 19, 1893, the Secretary of the Interior appointed a three-man Commission to "negotiate with the [Quechans] in California for the cession to the United States of such portions of their reservation as they might be willing to cede." [17] The course of these negotiations, and the circumstances surrounding them, as reported by the three Commissioners [18] and as reported in the minutes of the Councils of the Commissioners and the Indians,[19] maintained by the Commissioners, is summarized as follows.

In November 1893 the three Commissioners went to meet with the Quechans at Yuma. Shortly after their arrival, they met and talked with the Chief of the Tribe, Chief Palma, and some of his captains. At the chief's request, the date of the council was fixed for Nov. 24, 1893. On that day, over half the adult Indians met in council with the Commissioners, but the Indians' official interpreter was not present due to his attendance in court in Phoenix. As a consequence, little progress was made that day. Indian Agent Estudillo said that some of the Indians spoke and understood Spanish, and as he spoke both English and Spanish he would interpret the conversations through an Indian, Hutelome.

The petition, which had been signed by many of the Indians and addressed to the President and Congress in July 1893, was exhibited and translated to the Indians. They were asked if it was their petition, to which they answered in the affirmative. They understood it, it was their petition, and they were glad the Commissioners had come. The Quechans were informed of the grant of a right-of-way to the Colorado River Irrigation Company.[20] They stated that they knew of the proposed canal and were happy it was being built, because it would furnish them with water the year around and they would not have to rely on the overflow of the Colorado. The Commissioners felt that it was obvious that the Indians had observed irrigated lands across the river and were aware of the benefits

[16] 27 Stat. 612, 633 (1893).

[17] Letter to Secretary of the Interior from Acting Commissioner of Indian Affairs, dated Feb. 28, 1894. S. Exec. Doc. No. 68, *supra* note 9, at 2.

[18] Letter to Secretary of the Interior from Commissioners Houston, Gorman and Brady, dated Jan. 24, 1894. S. Exec. Doc. No. 68, *supra* note 9, at 6–13.

[19] S. Exec. Doc. No. 68, *supra* note 9, at 17–18.

[20] Act of Feb. 15, 1893, 27 Stat. 456.

of such a canal, and had often discussed such a canal.

The matter of acreage then came up. The Commissioners felt that the Quechans might not understand the quantity of land contained in an acre, so they measured off an acre and pointed it out to them. The Commissioners asked how many acres each head of family and each of the single Indians, both old and young, should have, and adjured them to careful consideration. The Quechans conferred among themselves for some time and seemed unable to reach a conclusion. The Commissioners asked them if 10 acres for each head of a family and five acres for each child under 18 years of age would be sufficient. Chief Palma said the Indians wanted more time to think this over and that they wanted their interpreter, Bill Mojave, present when they answered. The Quechans were told to take ample time to consider the question as it was "all-important" to them, and the council would adjourn to await the return of Bill Mojave. Since it appeared to be uncertain when Bill Mojave would return, the Commissioners asked the Chief and a committee of Indians to accompany them on a trip over the reservation, so the Indians could point out to them that portion of the reservation which would come under the water of the proposed canal and where they would prefer to have their allotments.

The greater part of the ensuing week was spent in conferences with the chiefs and Indian delegations and in traversing and inspecting the reservation. The Commissioners learned that there was a possibility of the interpreter's being kept at Phoenix for a considerable time so they wired the United States District Attorney who agreed to let him return to Yuma on condition that his expenses be paid. The Commission agreed to do this and advised the chief, who thereupon sent out runners to tell the Indians to meet the following Monday morning, December 4.

At this second council, the Commissioners learned that this was the largest meeting ever held by the Quechans. Bill Mojave, their interpreter, was present. The proceedings of the former council were referred to, as were the talks at the various conferences, and the interpreter was instructed to inform the Indians that the ideas, terms and conditions of both Indians and Commissioners had been incorporated into an agreement. The agreement was then read and its provisions discussed. The interpreter told the Indians that the agreement was ready for their signatures and each who was in favor should step up to the table and sign his name or make his mark. As this proceeded, the chief announced that the Quechans would like the Sisters of St. Joseph to get a particular half-section of land to make their homes, because of their help in teaching the children.[21]

[21] The Government maintained a school in the charge of the Sisters of St. Joseph in an old barracks on the Fort Yuma Military Reservation. *See* S. Exec. Doc. No. 68, *supra* note 9, at 11.

The Commissioners called the Indians' attention to Article VII of the proposed agreement which took care of this matter, and assured the Quechans that they would respect their wishes. Chief Palma was the first to make his mark, followed by the captains and other male adult Indians, totaling 203.

Of the missing adults, ex-chief Miguel and eight other Quechans were in the Los Angeles jail, and since Miguel was a former chief and a faction leader, the Commission thought it proper to visit him and obtain his views. His interpreter, Walter Averspun, also in jail, advised Miguel and the others of the object of the Commission's visit and asked them their wishes in regard to taking their land in allotments. They were all in favor, said they knew of the proposed canal and hoped it would soon be built.

Of the total number of 251 adult male members of the tribe, 203 signed the agreement and those in jail expressed their satisfaction with its terms. Of the remaining 40, many were at work off the reservation but nearly all, according to the Commissioners, would have signed if present.

Thus, under date of Dec. 4, 1893, an agreement [22] (the "1893 Agreement") was concluded between the Quechans and the Commissioners. It is the construction of the language and effect of the 1893 Agreement which is the primary subject of this Memorandum.

Allotment Policy

Through the earlier part of the Nineteenth Century the United States had followed a policy of working out accommodations with the Indian tribes on the basis of treaties by which the various Indian nations ceded to the United States vast expanses of their territory in return for settlement upon designated reservations. In the late 1800's, however, Congress decided to abandon its policy of segregating Indians from the mainstream of American life.

The 1893 Agreement reflected the then newly adopted national Indian policy. That policy was designed to reduce the size of Indian reservations, break down the pattern of communal tribal ownership, and direct individual Indians into agricultural pursuits in the manner of the non-Indian community. To that end it embodied a basic approach involving "allotments" of subsistence-size parcels of tribal reservation lands to individual tribal members. Unallotted lands were to be opened to settlement and sale, and the proceeds devoted to the Indians' benefit. The integration of non-Indian settlers with the Indian allottees was intended not only to

[22] The 1893 Agreement is set forth in full in S. Exec. Doc. No. 68, *supra* note 9, at 19–22, and, as ratified by Congress, in sec. 17 of the Act of Aug. 15, 1894, 28 Stat. 286, 332, and in I *Kappler, supra* note 1, at 542.

promote western development but also to foster a "civilizing" process among the Indians.[23]

The 1893 Agreement

The 1893 Agreement can be summarized as follows. By Article I, the Quechans relinquished all right, title, claim or interest in the Yuma Reservation. (Whether or not the relinquishment was conditional is one of the subjects of this Memorandum.) Specific language of the Article reads:

> Article 1. The said Yuma Indians, upon the conditions hereinafter expressed to 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, California, established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows: * * *.[24]

Article II provided for the allotment of five acres for each individual Indian.

Article III provided for the selection of allotments and the disposition of the residue of the reservation which was subject to irrigation. The unallotted irrigable lands were to be surveyed and subdivided into 10-acre tracts. The tracts were to be appraised subject to the approval of the Secretary of the Interior and sold at public sale for not less than the appraised value. After a second public offering, the Secretary of the Interior was empowered to sell the tracts at private sale for not less than the appraised value.

Article IV provided that the proceeds from such sales would be placed in the Treasury to the credit of the Quechans with interest at 5 percent per annum, subject to appropriation by Congress or application by the President for the payment of water rents, the building of levees, irrigation ditches and laterals, the construction and repair of buildings, the purchase of tools, farm implements and seeds, and the education of the Quechans.

Article V authorized the Secretary to issue 25-year trust patents to the allottees.

Article VI provided that all lands not subject to irrigation were to be opened to settlement under the general land laws.

Article VII excepted from the operation of the agreement a tract of land, with buildings, located on the hill on the north or California side of the Colorado River within the former Fort Yuma Military Reservation so long as it would be used as an Indian school, for religious, educational and hospital purposes for the benefit of the Indians. A tract of land adjacent to the hill was set aside for use as a farm for the school, the tract for the school site and school farm, not to exceed 320 acres.

The 1893 Agreement was followed by the certificate of the Indian interpreter:

> I, Bill Mojave, hereby certify that I am the official interpreter of the Yuma Indians, in the State of California; that I am an adopted member of said tribe, and

[23] *See* generally, *M. Price, Law and the American Indian* 531–51 (1973); *S. Tyler, A History of Indian Policy* 95–106 (1973).

[24] Sec. 17 of the Act of Aug. 15, 1894, 28 Stat. 286, 332.

speak and understand both the Yuma and English languages; that the foregoing contract was by me fully interpreted to said Indians, and they were made to fully understand the same before it was signed by them; and I further certify that I was personally present when each and every person's name was signed thereto, and witnessed the same, and that those whose signatures appear to said contract signed same understandingly, and when signed by mark or otherwise I attest the same.

Given under my hand at Fort Yuma, Cal., this 5th day of Dec. A.D. 1893.

BILL MOJAVE,
Interpreter.[25]

Under the authority of the Allotment Act enacted in 1887[26] a number of tribes entered into arrangements similar to that resulting under the 1893 Agreement.[27] While the allotments to different tribes varied in acreage, they were designed to provide agricultural self-sufficiency.[28]

Alleged Coercion, Misrepresentation and Fraud.

During the course of recent meetings with the Department,[29] representatives of the Quechans have stated that the Indian signatures on the 1893 Agreement were coerced and obtained by misrepresentations as to the effect of the agreement. Previously, in one of their petitions to the Indian Claims Commission, the Tribe alleged:

> In order to accomplish this purpose, agents of the Defendant threatened the members of the Petitioner that, unless they agreed to accept 5 acres of irrigable land per person and to relinquish the remainder of the Reservation, they would be entirely deprived of their lands. The agents of the Defendant carried out this threat by striking from the rolls of the Quechan Tribe numerous individuals who refused to sign such agreement.
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> * * * * *
>
> [T]he signatures of most or all of the signers of said Agreement were either (1) forged, or (2) coerced by force or the threat of physical violence, including the imprisonment of one of the principal opponents of the measure, or (3) coerced under the threat of deprivation of land rights, or (4) secured by misrepresentation as to the effect of the Agreement and also concealment by the agents of the Defendant of the fact that without any agreement any allotments made to the members of the Petitioner would have been in substantially larger amounts than said Agreement provided.
>
> * * * Said Agreement of 1893 was further nugatory because, at all times during the negotiation and conclusion thereof, the following conditions existed: (a) the agents of the Defendants misled the Quechan Indians into believing that they would have free water for their lands in perpetuity, and otherwise failed or refused to inform or misled the Petitioner as to the meaning of the provisions of the Agreement; (b) the inter-

[25] S. Exec. Doc. No. 68, *supra* note 9, at 22.

[26] Act of Feb. 8, 1887, 25 U.S.C. §§ 331–348 (1970).

[27] *E.g.*, sec. 13 of the Act of Aug. 15, 1894, 28 Stat. 286, 320–21; sec. 15 of the Act of Aug. 15, 1894, 28 Stat. 286, 323.

[28] *See* text accompanying notes 183–85 *infra*. *See also* the Act of Jan. 12, 1891, 26 Stat. 712, providing for allotments to the Mission Indians of California; sec. 25 of the Act of Apr. 21, 1904, 33 Stat. 189, 224–25, providing for allotments on the Colorado River Indian Reservation.

[29] *E.g.*, meeting with Secretary Thomas S. Kleppe on Jan. 8, 1976. *See* text following note 119 *infra*, "Re-examination and Reconsideration."

preter for the Indians was an employee of the agents of the Defendant and was incompetent to explain the proceedings to the Petitioner; (c) the members of the Petitioner were ignorant of the English language and said Agreement contained words for which no comparable term or concept existed in the Quechan tongue * * *.[30]

No contemporaneous documentation of forgery, coercion or misrepresentation, such as correspondence, Bureau of Indian Affairs or Departmental reports, or legislative history of the 1894 Ratification Act, has been entered in the Indian Claims Commission actions or offered to the Department in connection with the reconsideration of the 1936 opinion of Solicitor Margold.[31] However, in Indian Claims Commission actions the depositions of four Quechans taken in 1951 were offered on this point.[32] One or more to sign were escorted by Quechan members of the tribe who hesitated to sign were escorted by Quechan Indian policemen to the signing table and forced to sign; [33] that signatures were "witnessed" although the witness was not present at the time of execution; [34] that the names and marks of some signatories were written by a local school physician in their presence; [35] that only one Indian signed voluntarily; [36] that the Commissioners, through the interpreter, misrepresented that the Indian allottees would receive water without cost; [37] that the tribe was given no notice that it would be ceding the unallotted portions of the reservation; [38] and that the interpreting was inadequate.[39]

It has also been alleged that eight members of the Tribe who were opposed to the 1893 Agreement were imprisoned in Los Angeles at the time it was signed, and that five of the dissidents were whipped and one died in jail.[40]

It should be noted that the four Quechans whose depositions were taken in 1951 did not state that physical force was used. The principal witness stated:

> Bill Mojave [the interpreter] called out an Indian who came from Algondones, Mexico. His name is Som ah sent and this Indian did not move. He called him again and the Indian says "I am not going to sign anything until I know what

[30] Docket No. 320, *supra* note 5, Petition for Loss of Reservation, filed Aug. 10, 1951, at 5–7.

[31] The Indian Claims Commission did not reach Docket No. 320. On Dec. 15, 1976, pursuant to P.L. 94–465, 90 Stat. 1990, the Commission transferred the case to the Court of Claims, where it is now pending under the same docket number. The Indian Claims Commission's findings in Docket No. 319, *supra* note 7, do not touch this issue.

[32] Docket No. 320, *supra* note 5. Deposition of Patrick Miguel taken Nov. 28, 1951, and depositions of Jack Kelly, John Cash and Steven Kelly, taken through Quechan Indian interpreter on Nov. 29, 1951. The four depositions are bound in a single document, and immediately following references will be to the pages in this document.

[33] *Id.* at 9, 22, 24, 25.

[34] *Id.* at 5.

[35] *Id.* at 9, 11–12.

[36] *Id.* at 10, 17. *But see id.* at 21.

[37] *Id.* at 6–7.

[38] *Id.* at 17–18.

[39] *Id.* at 6, 18–21.

[40] Memorandum, dated Apr. 15, 1970, from William H. Veeder, Water Conservation and Utilization Specialist, Bureau of Indian Affairs, to W. Wade Head, Bureau of Indian Affairs Area Director, Phoenix, Arizona, citing a report in "in the files of the Bureau of Indian Affairs" entitled "Yuma Indian Reservation Re: Agreement of 1893 and how it was made," signed by Walter Scott. The report cannot be located either in the BIA files or in Archives as of this time.

is what" so the policemen went out and brought him in to the table, over to the table, and Bill Mojave told the Commissioners what the Indian had said, that he was not going to sign until he knows what the paper contained, and one of the Commissioners (I do not know which one it was) but he was at the head of the table—near the head of the table) [*sic*] said "Well that is proper, that is right, he has a right to know what he is signing" and then he said "Well I do not think I will sign anyway even if I am told what is in it" and he left and nothing happened to him. If the police had their own way about it they would have slammed him in jail but they didn't.[41]

There is no record of any statement to the effect that the eight or nine dissidents incarcerated in Los Angeles were imprisoned because of their opposition to the 1893 Agreement.

The report of the Commissioners states that nine Quechans in jail in Los Angeles were consulted, through an interpreter, and indicated their desire to take allotments and have the irrigation canal built.[42]

One of the Quechans deposed testified, on cross examination, that except for the presence of the Quechan Indian policemen, the method of signing the 1894 Agreement by the Indians was the usual one:

Q. Mr. Miguel, what was the custom aside from the signing of this Agreement when an Indian who could not write was to make his mark, how was that usually done?

A. Well, it is usually done by making those crosses, that is holding the pen by the one who can write and making the Indian touch the tip of the pen but just recently they put a thumb mark on it.

Q. The signatures on this Agreement then were made in the same way by the Indian touching the tip of the pen as all other agreements were signed back in those earlier days?

A. Yes.

Q. There was nothing unusual about someone making the "X" and the Indian touching the tip of the pen?

A. Yes but the unusual part was that an Indian policeman was on each side of him.[43]

1894 Ratification Act

The 1893 Agreement was "accepted, ratified, and confirmed" by the Congress by sec. 17 of the Act of Aug. 15, 1894[44] (the "1894 Act"), which also provided for other matters with respect to the reservation. The 1894 Act confirmed a right-of-way through the Yuma Reservation to the Southern Pacific Railroad Company for its railroad, which had already been constructed. The Colorado River Irrigation Company, to which a right-of-way had previously been granted,[45] was required to begin the construction of the canal within 3 years or its right was to be forfeited. The Secretary of the Interior was

[41] Docket No. 320, *supra* note 5, Deposition of Patrick Miguel, at 10.

[42] Letter to Secretary of the Interior from Commissioners, dated Jan. 24, 1894, S. Exec. Doc. No. 68, *supra* note 9, at 8.

[43] Docket No. 320, *supra* note 5. Deposition of Patrick Miguel, at 14.

[44] 28 Stat. 286, 335 (1894).

[45] Act of Feb. 15, 1893, 27 Stat. 456.

authorized to fix the rate of water rents to be paid by the Quechans and each male adult Indian was to be granted water for one acre of allotted land free of all rent charges for 10 years, if he used the same for growing crops. The 1894 Act specifically provided:

> That all of 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.[46]

Early Irrigation History

The 1893 Agreement itself did not promise the delivery of irrigation water to the Quechan lands, and did not specify the means by which water would be carried to the irrigable lands. It was apparently contemplated that the Colorado River Irrigation Company would provide the vehicle for this accomplishment. This is evident from the right-of-way granted in Feb. 1893,[47] the terms of the 1894 Act, which imposed a 3-year limitation on the company for the commencement of construction, and the committee report which accompanied the 1893 Act in the House.[48] However, there is no evidence which reflects any action on the part of the Colorado River Irrigation Company. It is probable that the company found that it had insufficient financial resources to undertake the project. It was generally being discovered at that time that private irrigating companies lacked the resources for projects of the size or character needed in the arid West.

In its study of the bill which became the Reclamation Act of 1902[49] (the "Reclamation Act"), the House Committee on Irrigation of Arid Lands took cognizance of this deep and underlying problem facing the Government when it officially stated:

> We have now reached a condition of affairs, at least in some portions of the arid region, where it is necessary to undertake enterprises of considerable magnitude and of such character as to clearly place them beyond the reach of private enterprise under the American system of land laws.
>
> * * * * *
>
> Further, the Government may profitably enter upon certain classes of work of this character which private enterprise could not, as private capital would lay upon the enterprise not only the cost of construction but interest charges as well, which would, in the course of a few years and before the works were finally in successful operation, impose so great a burden as to jeopardize the success of the project.[50]

Confronted by the inability of private irrigation resources to meet the need for irrigation on the arid public lands of many western states, Congress faced the responsibility squarely by legislating the Reclamation Act.[51] The Act applied generally to certain western states, and

[46] Act of Aug. 15, 1894, 28 Stat. 286, 336.
[47] Act of Feb. 15, 1893, 27 Stat. 456.
[48] H.R. Rep. No. 1145, 53d Cong., 2d Sess. (1894).
[49] Act of June 17, 1902, 32 Stat. 388, *as amended*, 43 U.S.C. § 371 *et seq.* (1970).
[50] H.R. Rep. No. 1468, 57th Cong., 1st Sess. 3 (1902).
[51] Act of June 17, 1902, 32 Stat. 388, *as amended*, 43 U.S.C. § 371 *et seq.* (1970).

made no mention of particular projects or specified areas such as the Quechan lands. Under this law, all moneys received from the sale of public lands in the affected states, with certain exceptions, were to be set aside in a special fund in the Treasury to be known as the "reclamation fund." This fund was to be used for the construction and maintenance of irrigation works in arid and semi-arid lands under the supervision of the Secretary of the Interior. Entries of the public lands to be irrigated were to be not less than 40 and not more than 160 acres, and the precise extent of land and amount of charges were to be determined by the Secretary of the Interior on an equitable basis, so as to return to the reclamation fund the estimated costs of construction.

The Geological Survey proceeded with investigations and surveys for reclamation projects on the Colorado River which would have included, in the early construction phases, the Yuma Reservation lands.[52] However, they could not be included under the authority of the Reclamation Act because it required that construction costs be returned to the reclamation fund,[53] and that the proceeds from sale of the lands not be held for the benefit of the Indians, as required under the 1893 Agreement.

[52] Letter to Secretary of the Interior from Director, Geological Survey, Jan. 23, 1904. S. Rep. No. 1660, 58th Cong., 2d Sess. 28 (1904).

[53] *Id.*

The 1904 Act

The Secretary of the Interior thereupon proposed to the Congress legislation which would extend to the Quechan lands the benefits of the Reclamation Act.[54] This provision was incorporated into the Indian Appropriations Act of 1904 (the "1904 Act").[55] Nothing in the legislative history indicates that the provision was intended to accomplish any purpose other than to apply the Reclamation Act to these lands, and remedy the failure of the private companies to develop their proposed canals.[56]

The relevant portion of the 1904 Act reads as follows:

> *Sec. 25.* That in carrying out any irrigation enterprise which may be undertaken under the provisions of the Reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the said reservations

[54] Letter from Secretary of the Interior to the Chairman, House Committee on Indian Affairs, Feb. 9, 1904. S. Rep. No. 1660, *supra* note 52, at 30.

[55] Act of Apr. 21, 1904, 33 Stat. 189, 224.

[56] S. Rep. No. 1660, *supra* note 52, at 27–30.

five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the Reclamation Act: *Provided further*, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservations before reclamation; said sum to be paid in annual installments in the same manner as the charges under the Reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit.[57]

The effect of the 1904 Act was to change significantly the financial terms under which the Quechans were to receive irrigation water and under which unallotted irrigable lands were to be sold, so as to comply with the Reclamation Act. It appears, that while the financial terms of the 1893 Agreement together with the 1894 Act were more favorable to the Quechans than those of the 1904 Act, as actually administered the 1904 Act may have worked to their advantage.

[57] Sec. 25 of the Act of Apr. 21, 1904, 33 Stat. 189, 224–25. The fact that the provision treated the Colorado River Indian Reservation as well as the Quechan lands does not mean the two areas were identical in status, or so regarded by Congress. The Colorado River Indians had signed no cession agreement; the irrigable Quechan lands had been ceded with the right to allotments and to the proceeds of sales of the surplus irrigable lands. Both cases required legislation to authorize the application of the Reclamation Act, but that does not nullify the difference between the status of the lands.

In specific, the 1893 Agreement and the 1894 Act [58] provided for the full proceeds from the sale of the unallotted irrigable land to be placed in a fund, with interest at 5% per annum, for the benefit of the Tribe. However, the principal and interest of said fund was subject to appropriation by Congress or to application by the President for the payment of water rents or the building of levees, irrigating ditches and laterals, the purchase of tools, farming implements, and seeds, and for the education and civilization of the Tribe. The full amount of such fund could have been expended for those purposes.

In comparison, the 1904 Act required that there be added to the charges required to be paid under the Reclamation Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary fairly represented the value of the unallotted lands in the reservation before reclamation. The "value of the unallotted lands * * * before reclamation" under the 1904 Act cannot be distinguished from "not less than the appraised value" under the 1894 Act. Furthermore, the 1904 Act provided that this additional sum, representing the value of the unallotted lands before reclamation, was "to be used to pay into the reclamation fund the charges for the reclamation of said allotted lands and the remainder thereof shall be placed to credit of said Indians and shall be expended

[58] Act of Aug. 15, 1894, 28 Stat. 286, 336 (Article IV).

from time to time under the direction of the Secretary, for their benefit." [59]

Further, the 1894 Act (but not the 1893 Agreement) provides that the private canal company must for 10 years provide free water for one acre for each male adult Indian utilizing that water for growing crops. In contrast, under the 1904 Act, the Indians pay nothing for the water for their full allotments. While operation and maintenance charges are assessed, the Bureau of Indian Affairs gets annual appropriations for payment of the operation and maintenance charges which, if the Indians cannot afford to pay, are not repayable by the Indians so long as they own the lands.[60] In addition, the repayment of construction charges for the reclamation works has been deferred and, if beyond the financial ability or capacity of the Indian allottees, the construction charges have been declared nonreimbursable.[61]

There are other differences between the financial arrangements provided in the 1893 Agreement as ratified by the 1894 Act and those provided in the 1904 Act, but they are not substantial.[62]

In 1911, the Congress amended the 1904 Act to increase the 5-acre per capita allotment for the Quechans to 10 acres per capita.[63] The increase in the size of allotments had been under favorable consideration within the Bureau of Indian Affairs since at least 1904.[64]

Construction of Early Irrigation Works

The background work that formed the basis for the irrigation system that ultimately served the irrigable lands contained in the

[59] Act of Apr. 21, 1904, 33 Stat. 189, 224–25.

[60] Docket No. 320, *supra* note 5, Pet. Ex. 6 (GAO report), at 143, 36, 27. *See also id.*, Transcript Vol. I, 131–32; *id.*, Pet. Ex. 17 (referenced at note 70 *infra*). Adjustment or elimination of reimbursable charges is authorized by the Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. § 386a (1970).

[61] Memorandum dated June 10, 1974, from Field Solicitor, Riverside, to Associate Solicitor, Indian Affairs, at 11. *See also* Docket No. 320, *supra* note 5, Transcript Vol. I, 131–32; *id.*, Pet. Ex. 17 (referenced at note 70 *infra*). Deferral and cancellation of construction cost charges are authorized by the Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. § 386a (1970).

[62] The 1894 Act (not the 1893 Agreement) provided that the United States would bear the costs of surveying and appraising the surplus irrigable lands up to $3,000. While the 1904 Act contained no such provision, the full costs were borne by the United States.

The 1893 Agreement provided that unallotted lands that were subject to irrigation would be disposed of by public sale, and if no bids were received, then by private sale. The Act of 1904 provided that the lands would be disposed of under the terms of the Reclamation Act, which called for the lands to be disposed of by entry and cultivation under the homestead laws, with the addition of a charge for the value of the unallotted land before reclamation.

The 1893 Agreement provided for the unallotted irrigable lands to be appraised by a three-member board, their findings to be approved by the Secretary of the Interior. Under the 1904 Act, the Secretary was given sole responsibility for establishing the value.

[63] Act of Mar. 3, 1911, 36 Stat. 1058, 1063.

[64] Letter to Secretary of the Interior from Acting Commissioner of Indian Affairs of Feb. 3, 1904, recommending that the 1904 Act grant the Secretary the discretion to allot up to 10 acres per Indian. S. Rep. No. 1660, *supra* note 52, at 29.

Yuma Reservation commenced in 1902.[65] The Reclamation Service conducted surveys and general investigations along the Colorado River commencing in the Fall of 1902. The Department of Agriculture conducted a survey of the area to determine which lands were irrigable between 1902 and 1904. This was followed by a feasibility study by engineers, economists and soil scientists in Apr. 1904. The first project upon which work was started was the Laguna Dam on the Colorado River around July 1905. This was completed in 1909. Next, the distribution system was installed, the first unit being the Yuma Main Canal around 1909. The first water was delivered to the unallotted irrigable lands in 1910.

The laterals and distribution system serving the allotted lands were largely completed by 1915, but work continued on the drains for some years. Indian water rights applications were taken out from 1917 to 1921, to the extent of about 8,000 acres. Around 1922, the irrigation project insofar as it affected the Yuma Reservation was almost complete and the acreage was cropped.

The Reservation Division of the Yuma Irrigation Project consists of about 15,000 acres. The Project also includes a Valley Division in Arizona extending south from Yuma, Arizona, to the Mexican border, consisting of about 55,000 acres. By 1922, about 70 miles of laterals and canals had been constructed. Of this, the old Yuma Main Canal, on the subject land, made up about 13 miles, and there were about 13 miles of drains. The Picacho division dike was built to hold big flash floods, with outlets into drains which, in turn, carried these waters back to the Colorado River under controlled outlet conditions.

The Imperial Dam was completed in 1938 and is located about 5 miles upstream on the Colorado from Laguna Dam. The All-American Canal was eventually built, as well as a siphon to carry water which had been diverted by Imperial Dam into the All-American Canal. In 1948, the old Yuma Main Canal was closed off, and deliveries were thereafter made to the Reservation Division from the turnouts on the All-American Canal or at the siphon. The old Yuma Main Canal then started to serve as a toe drain for the All-American Canal.

In 1907–08, a levee was constructed as close to the channel of the Colorado River as safety permitted, and all the unallotted lands up to this levee were surveyed and eventually sold in accordance with the 1904 Act.

The great dams, Laguna, Im-

[65] The information concerning the development of irrigation and flood control projects contained in this and the succeeding five paragraphs is taken from uncontroverted testimony of Maurice N. Langley, a Government witness, in Docket No. 320, *supra* note 5, Transcript Vol. I, 123–136. Material on the surveys commencing in 1902 and the construction of the early levees, as well as the history to which Langley testified, is contained in the Annual Reports of the Reclamation Service. See, *e.g.*, Thirteenth Annual Report of the Reclamation Service 1913–14 (1915), at 73; Fifteenth Annual Report of the Reclamation Service 1915–16 (1916), at 73.

perial, Parker and Hoover, have, over the years, regulated the flow of the river and, by reducing the number and intensity of floods, have been a substantial factor in causing the channel of the river to move to the south, with a concomitant accretion to the north bank of the river.

In 1952, the United States constructed another levee, and an additional area has since come into being between the 1952 levee and the new river channel.

In 1912, 8,110 acres in the western part of the irrigable area were allotted to the Quechans. Twenty-five year trust patents were issued for 7,884 acres on Feb. 5, 1914. The eastern portion, known as the Bard Area, contained 7,756.54 acres and was opened to non-Indian settlers.[66]

Disposal of the nonallotted irrigable lands was promptly commenced in the same year as the first water was delivered to the area and continued unabated until the irrigable lands were fully disposed of in 1949. The Quechans' account was credited with $73,117.31 in net sales;[67] interest as of 1951 amounted to $5,349.96.[68] The charges against the allotments were eventually canceled by congressional action.[69] As of Sept. 20, 1963, of the aggregate expenditure of $499,319.53 for construction charges in the allotment area, all but $2,110.12 had been canceled.[70] Of the aggregate expenditure of $966,845.95 for operation and maintenance charges, all but $83,586.33 had been canceled.[71]

At no time have the non-irrigable lands been opened to settlement and sale by proclamation of the President, as provided in the 1894 Act. Withdrawal of the lands for reclamation purposes,[72] which took place in 1902, was for both the construction of irrigation works and for agricultural entry under the Reclamation Act,[73] which is one of the "general land laws."

[66] Docket No. 320, *supra* note 5, Ex. G–1, memorandum entitled "History of Reservation," transmitted in a letter to Director of Irrigation, Bureau of Indian Affairs, from Assistant Director of Irrigation (July 25, 1939).

[67] Docket No. 320, *supra* note 5, Pet. Ex. 6, at 143. Exhibit 6 is the report of the General Accounting Office dated Aug. 20, 1956, entitled "Re: Petitions of the Quechan Tribe of the Fort Yuma Reservation, California, Indian Claims Commission Nos. 86, 319, and 320."

[68] *Id.* at 137–38.

[69] *E.g.*, S. Doc. No. 207, 74th Cong., 2d Sess. (1935). Cancellation occurred pursuant to the Act of July 1, 1932, 47 Stat. 564, 25 U.S.C. § 386a (1970).

[70] Docket No. 320, *supra* note 5, Pet. Ex. 17. Exhibit 17 is a letter to Fulton W. Hoge, Attorney for Quechan Tribe, from Acting Superintendent, Colorado River Agency, Bureau of Indian Affairs, dated Sept. 20, 1963.

[71] *Id.*

[72] Sec. 3 of the Act of June 17, 1902, 43 U.S.C. § 416 (1970), requires the Secretary to withdraw lands "required for any irrigation works" under the Act (a "first form withdrawal"). Sec. 3 also authorized the Secretary to withdraw lands believed to be susceptible of irrigation under the Act (a "second form withdrawal"). The Bureau of Land Management's Historical Indices for these areas show that a Secretarial Order of July 2, 1902, imposed a first-form withdrawal on these lands. A Secretarial Order of Aug. 26, 1902, changed the first form to a second form withdrawal.

[73] Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. § 371 *et seq.* See text accompanying note 51 *supra*.

Administrative Treatment of the Yuma Reservation Lands

During the period between the congressional ratification in 1894 and the issuance of the Margold opinion in 1936, there were substantial inconsistencies in the administrative treatment of ownership of the Yuma Reservation lands, and substantial defects in land title records that were maintained.

During that period, there was frequent recognition by the senior officials of the Department of the Interior that the nonirrigable lands had been ceded by the Quechans to the United States by action of the 1893 Agreement and the 1894 Act. The specific question of the status of the nonirrigable lands was addressed in a chain of correspondence involving officers of the Reclamation Service (in June of 1923, the name of the Reclamation Service was changed to the Bureau of Reclamation), Geological Survey, the Commissioner of Indian Affairs and the Secretary. In 1903 J. B. Lippincott, Supervising Engineer, U.S. Geological Survey, wrote to F. H. Newell, Chief Engineer, Reclamation Service, stating, "The Reservation is included within the general boundary of the land withdrawals along the Lower Colorado River for irrigation," and wanting to know if the "approximately 25,000 acres of high grade agricultural land there" would "be thrown open to entry during the year 1904." [74] In turn, the Director of the Geological Survey forwarded the question of the status of these lands to the Secretary, specifically stating:

> This Indian reservation is within the area withdrawn by order of the Secretary of the Interior dated July 2, 1902, and information is desired as to whether or not, in the event of the Indian Reservation being abolished, these lands would become subject to this order.[75]

The Secretary replied by forwarding to the Director a response prepared by the Commissioner of Indian Affairs. As to the status of the nonirrigable lands, the Commissioner stated:

> Reporting upon this matter the office has to state that by an agreement concluded December 4, 1893, ratified by the act of Congress of Aug. 15, 1894 (28 Stats. 286), the Indians of said reservation ceded to the United States, in fact, only the portion to become a part of the public domain and be subject to disposal under the provisions of the general land laws.[76]

Likewise, a 1904 memorandum to the Secretary stated that the 1893

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[74] Letter dated Oct. 2, 1903, from J. B. Lippincott to F. H. Newell, Yuma Project, "Indian Lands," File 154–A (hereinafter File 154–A), Document A609522. These references are to Bureau of Reclamation files on the Yuma Project.

[75] Letter dated Oct. 12, 1903, from Director, Geological Survey, to Secretary, File 154–A, *supra* note 74, A609523.

[76] Letter dated Oct. 27, 1903, from Commissioner, Bureau of Indian Affairs, to Secretary, at 2, File 154–A, *supra* note 74, A609543. The Commissioner went on to say, "only the lands not subject to irrigation can be thrown open to public settlement. In the opinion of this office no definite steps should be taken looking to the disposition of any of the surplus lands of that reservation, either irrigable or nonirrigable, until provision shall have been made to furnish the Indians with allotments of irrigated lands * * *." *Id.* at A609546.

Agreement provided "also for opening, under the general land laws of the United States, all lands on said reservation 'that cannot be irrigated.'"[77] Again, some years later, Samuel Adams, First Assistant Secretary, forwarded a memorandum dated May 21, 1912, to the United States Senate, which included the following statement:

> By agreement concluded Dec. 4, 1893, and ratified by Act of Congress Aug. 15, 1894, the Indians ceded to the United States all of their lands not susceptible to irrigation.[78]

Lastly, in 1928 the Acting Commissioner of Reclamation informed the Commissioner of Indian Affairs that the latter was wrong in informing Superintendent Jolley that the nonirrigable lands were to be disposed of for the benefit of the Indians. In interpreting the Act, the Acting Commissioner said as follows:

> All lands that can not be irrigated shall become a part of the public domain and shall be opened to settlement under the general land laws of the United States.[79]

The foregoing administrative interpretations of the effect of the 1893 Agreement and the 1894 Act were implemented in administrative action. The Public Survey Office's Special Instructions, Group 152, to John L. Warboys, Surveyor, stated:

> By letter dated Dec. 19, 1927, the Commissioner of Indian Affairs transmitted to the General Land Office a copy of a letter addressed to him from the Superintendent of the Fort Yuma Indian Agency, requesting to be informed of the status of a considerable area of land between the old channel of the Colorado River as shown upon a map made in 1912 and the present channel. The situation in this locality was subsequently brought to the attention of the General Land Office by Inspector Hanna who investigated the area in question, as a result of inquiries regarding the status of the lands immediately east of the Indian Reservation. A number of squatters have located on the area and have made some improvements with a view to acquiring title under the homestead laws, alleging that these lands are unsurveyed public lands in the State of Arizona. The Indians are objecting to these activities, claiming that the lands are a part of the Fort Yuma Reservation and that no one but the Indians has a right to settle thereon or to cut the timber.[80]

Acting upon the foregoing instructions, which squarely addressed the Reservation boundary question, Warboys made a determination of the Reservation boundary. The field notes accompanying his survey state:

> All of the land in T.16S., R.23E., S.B.M., has been eliminated from the Yuma Indian Reservation, leaving the range line

[77] Memorandum Jan. 1904 to Secretary, Yuma Project, "Lands—General," File 154 (hereinafter File 154), A608929.

[78] Memorandum dated May 21, 1912, from First Assistant Secretary to U.S. Senate, File 154–A, *supra* note 74, A609322 and A622596.

[79] Letter dated Aug. 23, 1928, from Acting Commissioner, Bureau of Reclamation, to Commissioner, Bureau of Indian Affairs, at 1. (BIA files Phoenix.)

[80] Special Instructions, Group 152, dated May 14, 1928, at 1–2.

on the West boundary of the township as the East Boundary of the Reservation.[81]

This determination defines the eastern boundary of the reservation as the line bounding the lands allotted to the Quechans. This excluded the irrigable Bard Area and the other lands between the reclamation levee and the river from the reservation.[82] The resulting survey map prepared by Warboys reflected this boundary line, which was in keeping with the foregoing administrative interpretation of the 1893 Agreement and the 1894 Act, that the Quechans ceded all but the lands to be allotted to them.

However, there is a great deal of administrative material that indicates that the subject nonirrigable lands were administered as Indian lands or were, at least, considered to be a part of the Yuma Reservation subsequent to 1894. In some cases, it will be noted that some of the same officers who determined that the Indians had ceded the subject lands also dealt with administrative details pertaining to those lands as though they were Indian lands.

There are numerous maps prepared or published between 1894 and 1936 showing the nonirrigable land as part of the "Yuma Indian Reservation." [83] Rights-of-way,[84]

[81] Field Notes of Survey executed by John L. Warboys, under Special Instructions of May 14, 1928, Group No. 152, at 4.

[82] The Warboys survey was also designed to determine the status of a large block of land on the right bank of the river which was asserted to be part of Arizona formed by an avulsive change in the river. Subsequent surveys did not uniformly follow this 1928 boundary, but referred to Executive Order reservation boundaries. *See* note 83 *infra*.

[83] *E.g.*, U.S.G.S. map, "Colorado River from Black Canyon, Ariz.-Nev. to Arizona-Sonora Boundary," surveyed in 1902 and 1903 (Docket No. 320, *supra* note 5, Ex. RO–13); U.S.G.S. map "Yuma Quadrangle, California-Arizona" edition of Apr. 1905 (BIA Files, Phoenix); 1936 reprint of Apr. 1905 U.S.G.S. map (Docket No. 320, *supra* note 5, Ex. RO–13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (*e.g.*, Third Annual Report of the Reclamation Service 1903–04, at 192–93 (2d ed. 1905); Fifth Annual Report of the Reclamation Service 1906, at 100–01 (1907)); U.S. Reclamation Service Map No. 16774 (Jan. 1916) (Yuma Project, "Correspondence re Survey of Lands," File 154–D, A610158; File 154, *supra* note 77, A609223); U.S. Reclamation Service Map No. 17471 (1917) (*Id.*, A609224). The latter two maps, which were produced after issuance of the Indian allotment trust patents on Feb. 5, 1914, show the Indian Allotments (or Indian Unit) and continue to depict the entire area encompassed by the 1884 Executive Order as the Yuma Indian Reservation. The field notes, reports and official plats of survey prepared by General Land Office surveyor John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions, Group 264, California) refer to and adopt the "West Boundary of the Yuma Indian Reservation" as described in the 1884 Executive Order and fixed by the Ingalls survey in 1895 (Docket No. 320, *supra* note 5, Ex. RO–9), and relating to T. 16 S., R. 23 E., S.B.M., dated Apr. 15, 1932, refer to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River." Additional maps recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 84 *infra*.

[84] "Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, California," G.L.O. No. 506131–1915, surveyed Dec. 1906, submitted to the Indian Agent, Yuma Indian Reservation, Mar. 13, 1907, and approved by Acting Secretary of the Interior George W. Woodruff on June 18, 1907, subject to the provisions of the Act of Mar. 2, 1899 (30 Stat. 990, *as amended*, 25 U.S.C. §§ 312–18 (1970)) (BIA Files, Phoenix) (the BLM master title plat for section 36, T. 16 S., R. 22 E., records issuance of another right-of-way to the railroad under the 1899 Act, with jurisdiction in the BIA, on July 29, 1926 (R 1359, S 3492)); "Map of the Definite Location of the Inter California Railway in Yuma Indian Reservation, California," received by Superintendent

trader's licenses,[85] and sand and gravel leases[86] were also granted with respect to the nonirrigable lands by reference to the "Yuma Indian Reservation."

A letter from the senior official of

Egan, Yuma Indian Reservation, Sept. 30, 1909, and approved by the Department Feb. 10, 1910, under the Act of Mar. 2, 1899, with the schedule of compensation to the Indians required by that Act being approved by First Assistant Secretary Frank Pierce on May 14, 1910, pursuant to the recommendation of Superintendent Egan and Commissioner of Indian Affairs Valentine (BIA Files, Phoenix); "Proposed Telephone and Telegraph Line Crossing the Yuma Indian Reservation," Pacific Telephone and Telegraph Company, Right of Way Map LA 011977, approved on July 3, 1913, pursuant to the Act of Mar. 4, 1911 (36 Stat. 1253, *as amended,* 43 U.S.C. § 961 (1970)), with the requisite finding for Indian reservation lands of compatibility with the public interest being made by the First Assistant Secretary by notation on the July 2, 1913, memorandum from the Second Assistant Commissioner of Indian Affairs to the Secretary recommending approval, and with rental, payable to the account of the Quechan Tribe, being set at $8.66 for the first year (Docket No. 320, *supra* note 5, Ex. RO–3) (related documents show the rental fee was collected on behalf of the Tribe for the full 50 year term of the right-of-way); "Center Line Location Map of Proposed Highline Canal from Laguna Dam to Imperial Valley and Location of Power Plant," dated June, 1915, showing the reservation boundaries as established in 1884, submitted for the approval of the Secretary of the Interior pursuant to secs. 18–21 of the Act of March 3, 1891 (26 Stat. 1095, 1101–02, *as amended,* 43 U.S.C. §§ 946–949 (1970)), sec. 2 of the Act of May 11, 1898 (30 Stat. 404, *as amended,* 43 U.S.C. § 951 (1970)), and the Act of Feb. 15, 1901 (31 Stat. 790, *as amended,* 43 U.S.C. § 959 (1970)), all of which authorize rights-of-way through Indian reservations as well as public lands (BIA Files, Phoenix) (no indication as to whether the right-of-way was approved); Memorandum dated June 6, 1917, from Assistant Commissioner of Indian Affairs Meritt to Commissioner Tallman of the General Land Office, responding to the latter's request for a report on the application of the Coachella Valley Ice and Electric Company for a right-of-way for an electrical transmission line across Yuma Indian lands (all in the nonirrigable western portion of the 1884 reservation), advising that "the proposed right of way involves no Indian allotments but crosses a portion of the Yuma Indian Reservation which is absolutely waste desert land and upon which no Indians reside," and recommending approval of the application with an annual charge of $5 per mile as compensation for damage to the Yuma Indian Reservation lands involved (BIA Files, Phoenix); "Proposed State Highway Through Yuma Indian Reservation," California Highway Commission, dated July 16, 1923, as amended by maps of changes "A" through "D", dated Sept. 28, 1923, through May 1924, approved by Assistant Secretary of the Interior John H. Edwards on Oct. 10, 1927, subject to the provisions of the Act of Mar. 3, 1901 (31 Stat. 1058, 1084, 25 U.S.C. § 311 (1970)), and amending the right-of-way as originally approved under the same Act on Nov. 9, 1917 (Docket No. 320, *supra* note 5, Exhibit RO–8; BLM Plat Records); Order of withdrawal and reservation of a right-of-way for a proposed Reclamation Service "power canal from siphon drop to Araz" across the Yuma Indian Reservation, withdrawing and reserving 236.05 acres of reservation land, of which approximately 3.5 acres were allotted lands, recommended by Director and Chief Engineer Davis of the U.S. Reclamation Service on Apr. 15, 1918, concurred in by Assistant Commissioner of Indian Affairs Meritt on the "understanding that adequate compensation be assessed and paid for damage to Indian lands involved," concurred in by Commissioner Tallman of the General Land Office, and approved on June 17, 1918, by Assistant Secretary of the Interior S. G. Hopkins under secs. 13 and 14 of the Act of June 25, 1910 (36 Stat. 855, 43 U.S.C. § 148 (1970)), 25 U.S.C. § 352 (1970) (Yuma Project, "Purchase of Lands-General, 1909 thru June 1919," File 150, A606156, A606163 and A606167–68); "Southern Pacific Railroad Station Grounds" map, received by the Superintendent of the Yuma India Reservation June 30, 1928, and approved by the Department on Dec. 18, 1928, pursuant to the Act of Mar. 2, 1899, *supra* (Docket No. 320, *supra* note 5, Ex. RO–11; BLM Master Title Plats, Sacramento). The Bureau of Land Management master title plats in Sacramento, California, show three additional rights-of-way issued under statutes governing Indian reservation lands and noted as being under the jurisdiction of the Bureau of Indian Affairs: a highway right-of-way, R 2704, issued Oct. 24, 1930, under the Act of Mar. 3, 1901, *supra;*

the Bureau of Indian Affairs to the Director of the Geological Survey described a portion of the nonirrigable lands as "Indian country

a telephone and telegraph line right-of-way, S 3489, issued June 14, 1927, under the Act of Mar. 3, 1901, *supra*; and a transmission and telephone line right-of-way, LA040525, issued Mar. 23, 1927, under the Act of Feb. 15, 1901, *supra*.

[85] Trader's License covering 80 acres in the N½NW¼ section 25, T. 16 S., R. 21 E., S.B.M., issued to Robert M. Goebel Jan. 1, 1928, to James H. Maxey Aug. 6, 1929, and thereafter to Maxey and later his widow, Mary A. Maxey, through various renewals (BIA Files, Phoenix).

[86] Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency (BIA Files, Phoenix); Letters dated Dec. 13, 1939, and Apr. 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guaranty Company (Docket No. 320, *supra* note 5, Ex. RO–15); Letter dated Mar. 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler (BIA Files, Phoenix); Letter dated Nov. 16, 1934, from H. L. Gardner to the Quechan Tribal Council (Docket No. 320, *supra* note 5, Ex. RO–4); Letter dated Aug. 3, 1934, from H. L. Gardner to Superintendent Jolley, Fort Yuma Indian Agency (*id.*); Notices of location of placer mining claims by Rosa Lee Black and Patsy Black on Feb. 26, 1935, filed with the Fort Yuma Indian Agency on Mar. 18 and Apr. 2, 1935, within 60 days of location as required by sec. 26 of the Act of June 30, 1919, *as amended*, 25 U.S.C. § 399 (1970) (Docket No. 320, *supra* note 5, Ex. RO–12).

One document hints at management by the Bureau of Reclamation. On Oct. 28, 1953, an "Analysis of G.L. Account 271.22—Rental of Farming and Grazing Lands" was prepared to ascertain the portion of "Miscellaneous Non-operating Income—Other" attributable to the rental of grazing and farming lands covered into such account between 1910 and 1953. The entries are jumbled and clearly inaccurate in places. The covering memorandum states that "some of the income * * * was from Mining and Gravel Leases, and still a larger portion from lands lying outside both irrigation divisions. Probably all of the Mining and Gravel leases, as well as a sizeable portion of the Grazing and Farming leases, lie outside the two irrigation divisions." An inspection of the entries confirms that all of the leases listed in the "Gravel and Mining" column were on non-irrigable reservation lands, except perhaps Lease I24r–358 issued to Emil Frank. But all of them are entered in the ledgers after 1940, and most, if not all of them, are almost surely the same sand and gravel leases that were administered by the Bureau of Indian Affairs prior to 1936. *See, e.g.*, leases I24r–417 and I24r–504 issued to H. L. Gardner and the leases issued to C. H. Trigg and Emil Frank and compare them with the BIA leases issued to the same persons as described in the documents referred to in the preceding paragraph of this note. Similarly, all the leases except for one listed in the "Outside Area" column, although covering non-irrigable portions of the reservation, were entered in the ledgers after 1936. *See, e.g.*, lease I24r–415 issued to Mary E. Maxey for a gas station and lease I24r–456 issued to Callahan Construction Company for a "Piece of Ground at Pot Holes" (a site in section 25, T. 15 S., R. 23 E.). The Mary E. Maxey lease, inaccurately placed in T. 15 S. rather than T. 16 S. of R. 21 E., is undoubtedly a lease for the same ground that was utilized by Mrs. Maxey under a BIA trader's license prior to 1936. See note 85 *supra*. The one exception is lease L–30 issued to R. E. Whitmore and S. H. Flood and listed as an "Outside Area" between 1918 and 1924. However, the land description (sec. 19, T. 16 S., R. 23 E., and sec. 35, T. 15 S., R. 23 E.) includes both irrigable and non-irrigable lands, and the lease is actually listed (under Whitmore's name) for the period from 1925 to 1927 and again in 1928 in the "Reservation" Division column, which covers the irrigable lands in the Reservation Division of the Yuma Project. The "Outside Area" listing was, therefore, probably an error. The term "Reservation Division" described the irrigable lands and project works of the Yuma Project on the California side of the Colorado River (see text following note 65 *supra*). It did *not* cover the non-irrigable reservation lands not used for project works. Hence the use of the "Outside Area" column in the account analysis. A study of all of the entries in the "Reservation [Division]" column shows that all of them included irrigable as well as non-irrigable lands, and the leases were no doubt for a portion of the irrigable lands. The land descriptions in the analysis ordinarily give at most the section in which the lease was contained, without providing any more precise description. Where more precise descriptions are given, they refer to specific lots or farming units in the Bard area open to non-Indian settlement in 1910. *See, e.g.*, leases I1r–372, L–14, and 4–11. Other leases are in sections which are entirely, or almost entirely irrigable. *See, e.g.*, leases I24r–202, I24r–305, I24r–307, I24r–354. Lease I24r–409 was for a "track on levee in Cal. in Res. Div." One lease whose land description defies accurate interpretation is the lease originally issued to E. F. Sanguinetti under lease number 124r–169 and

within the meaning of the law." [87] However, the letter dealt with the limited subject of police jurisdiction and not the question of land ownership. The author pointed out that police jurisdiction for the Reclamation Service over these lands under the 1904 Act was the same as its police jurisdiction for public domain lands on other projects, indicating that no position on land ownership was necessary to the conclusion.

A letter from the Director of the Reclamation Service described lands in the project area as lands the disposal of which "is primarily within the control of the Indian Office." [88] Subsequently, a memorandum between two senior officials of the Bureau of Reclamation described the nonirrigable lands as "Indian lands * * * [which] are not public lands in the ordinary sense of the word." [89]

In 1906 District Engineer Homer Hamlin advised the Director of the Reclamation Service that "[t]he jurisdiction over [the non-irrigable land between the reservation levee and the Colorado River] will probably always remain with the Indian Bureau, as it will not be reclaimed or sold as a part of the cultivable area of the Yuma Project." [90] The letter, however, dealt chiefly with the subject of the Indians' right to cut timber, rather than the subject of ownership. The letter also stated that after allotment and disposal of the irrigable lands, "[t]he statement that the Indians will have no land from which they can cut timber is true." The latter statement indicates that the author believed that the nonirrigable lands were not owned by the Indians. It must also be noted that, on the question of jurisdiction, Hamlin was overruled by the Director of the Reclamation Service, who wrote in a memorandum, dated July 23, 1906, to the Secretary that the lands were under

described as sections 31, 36, 1, 6 in townships 15, 15, 16 and ranges 23, 22E. It is not clear which sections are to be matched with which townships and which ranges. Some of the probable combinations would include sections which contain only nonirrigable lands, but all of these would also contain substantial project works, except for section 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for farming or grazing.

[87] Letter dated Oct. 6, 1905, from Acting Commissioner of Indian Affairs Larabee to the Director, U.S. Geological Survey (in which the Reclamation Service was located), concerning police jurisdiction over the nonirrigable lands on the California side of the Colorado River being used for construction of the Laguna Dam, File 154–A, *supra* note 74, A609664–65.

[88] Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden, File 154–A, *supra* note 74, A609414.

[89] Memorandum dated Mar. 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierra Power Company for a right-of-way "west of the east line of Sec. 19, T. 16 E., R. 22 E., S.B.M.," which would be "across Indian lands over which the Bureau of Reclamation has proposed to construct certain works in connection with the All-American Canal to Imperial Valley," Yuma Project, File 430, "Acquisition of Lands, Indian Lands through 1929."

[90] Letter dated May 28, 1906, from District Engineer to Director, Reclamation Service, File 154–A, *supra* note at 74, A609709–11. *Id.* at A609702–08 is related Secretarial level correspondence on the jurisdictional dispute between Indian Affairs and the Reclamation Service. See note 88 *supra*.

the jurisdiction of the Reclamation Service by reason of the 1904 Act.

In 1907, the Superintendent of the Yuma Reservation raised the question of the status of the nonirrigable land between the levee and the river, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purpose," in light of the failure of Congress, in the Act of Apr. 21, 1904, to "provide for the disposition of the balance of the reservation that is not irrigable." [91]

The letter requested that a legal determination be made as to whether the nonirrigable lands were part of the public domain. The Secretary of the Interior subsequently directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters. On April 6, 1907, Inspector Chubbuck reported to the Secretary, suggesting that the strip of land between the levee and the river "be formally reserved by the Indian Office" and that a parallel strip inside the levee which was not to be allotted to Indians or disposed of to non-Indians, as well as "other available places on the Yuma Reservation," be planted with fruit bearing trees, "subject to such regulations as the Reclamation Service desires to impose for the protection of the levees and ditches, the Indians' rights to the income from the products being recognized in consideration of the fact that the reservation as a whole is theirs." [92] Inspector Chubbuck's report simply contained his recommendations, and did not represent his view of the status of the ownership of the subject lands. The report did state that he understood that "the remainder of the land—unreclaimed bottom land and mesa land" was to be disposed of. Inspector Chubbuck also stated that "title to the remainder of the reservation will be extinguished;" but that this would leave the Indians without a fuel supply.

This may be the reason why he made the recommendations quoted above. Inspector Chubbuck's recommendations were not accepted and that same subject was at issue in later correspondence. [93]

In 1919, the Director of the Reclamation Service implicity recognized the right of the Indian office to irrigate certain lands which "lie outside of our levee and consequently are not included within the proposed Yuma Project," [94] but this

[91] Letter dated Apr. 11, 1907, from Superintendent Deaver, Yuma Reservation, to the Commissioner of Indian Affairs, referred by the latter to the Director of the Reclamation Service on May 7, 1907, File 154–A, *supra* note 74, A609721–28. Superintendent Deaver continued, "The question arises in my mind whether this non-irrigable land [the mesa and strip between the levee and the river] will not revert back to the public domain as soon as the Indians are allotted * * *." *Id.* at A609725.

[92] Letter dated Apr. 6, 1907, from Special Inspector Chubbuck to Secretary of the Interior, File 154–A, *supra* note 74, A609734–39.

[93] See letters referred to in note 90 *supra*. Inspector Chubbuck's remarks, and other correspondence (*e.g.*, A609725, quoted in note 91, *supra*), can be explained as based on the assumption that the cession of the nonirrigable lands would be effective upon issuance of allotments to the Indians.

[94] Letter dated Oct. 2, 1919, from Director Davis, U.S. Reclamation Service, to the Commissioner of Indian Affairs. Yuma Project, File 150, "Acquisition of Lands, Southern Pacific Ry. Co."

letter seems only to express a willingness to sell water from the Cocopah Canal for use on lands outside the Yuma Project, rather than a determination as to the ownership of those lands.

In a letter dated Oct. 26, 1929, the General Land office advised the Commissioner of Indian Affairs that:

> It is the opinion of this office that the reservation boundary is defined by the center of the abandoned channel [as it existed prior to the avulsive change of 1920] * * *. The area between the levee and the abandoned channel, constituting the present Yuma Indian Reservation boundary, appears therefore to be still in public ownership and a part of the Indian Reservation.[95]

Advocates of the Quechan point of view have suggested that Indian ownership of the nonirrigable lands was only challenged by the Bureau of Reclamation in order to avoid substantial claims for compensation and consideration on behalf of the Quechans by reason of the construction of the All-American Canal. The canal was originally proposed as a private project, passing through the 1884 reservation from the southwest corner to the northeast corner, crossing allotted and unallotted lands, mostly the latter. The entire right-of-way was to be within the reservation. The appraisal report prepared on this proposed canal route indicated that compensation would have to be paid to the Indians for both the allotted and unallotted lands.[96] When the Bureau of Reclamation decided to construct the canal itself, its shifted the right-of-way slightly north so that only nonirrigable lands would be involved and, in June 1934, requested the General Land Office to submit the proposed right-of-way for the canal, which would involve no Indian allotments but rather "exceedingly rough territory along the edge of the Yuma mesa, * * * to the Secretary of the Interior (through the Commissioner of Indian Affairs) for approval under Section 13 of the Act approved June 25, 1910 (36 Stat. 855)."[97] The cited Act, 43 U.S.C. § 148 (1970), applies to "lands within any Indian Reservation" and hence, as the Commissioner of the General Land Office noted in his transmittal letter to the Commissioner of Indian Affairs, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands."[98]

[95] Bureau of Indian Affairs files, Phoenix.

[96] *E.g.*, "Right of Way Plats of the All-American Canal through Tribal and Allotted Indian Lands of the Yuma Indian Reservation," dated Jan. 1928 (Docket No. 320, *supra* note 5, Ex. RO–10); "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed Apr. 27, 1928 (Docket No. 320, *supra* note 5, Ex. RO–7).

[97] Docket No. 320, *supra* note 5, Ex. RO–7, Letter from Acting Commissioner, Bureau of Reclamation, to Commissioner, General Land Office (June 27, 1934).

[98] Docket No. 320, *supra* note 5, Ex. RO–7, Letter from Commissioner, General Land Office, to Commissioner, Bureau of Indian Affairs (July 5, 1934).

The Bureau of Reclamation subsequently received a report dated Mar. 12, 1934, making substantial claims on behalf of the Quechans. On July 15, 1934, the Bureau of Reclamation advised the Bureau of Indian Affairs that the right-of-way was a part of the public domain, and that no compensation would be paid. In 1933 and 1935 two cases were decided in the United States District Court for the Southern District of California [99] to the effect that full title to the irrigable land vested immediately in the United States, upon passage of the 1894 Act. The available materials do not make clear whether the position taken by the Bureau of Reclamation in its reply to the Bureau of Indian Affairs was based upon questions of ownership raised as early as 1903,[100] upon issues raised in the two law suits, or upon certain costs.

Although Congress did not deal with these lands between 1894 and 1936 in any manner which would reveal its understanding of their status, there is a statement in the Congressional Record by Representative Stephens of Texas on Dec. 16, 1912, approximately two years after Congress enlarged the allotments to 10 acres, and near the time when the canal constructed through the reservation was completed, implying that the "large amount of land up on the mesa" (that is, nonirrigable land) was in Indian ownership at that time.[101]

And, during hearings in San Diego, California, on June 29, 1934, Chairman Wheeler of the Senate Committee on Indian Affairs referred to "the All-American Canal constructed in connection with the Boulder Dam Project and running across in lands of the Indians down there [in the Yuma Reservation]" and told John Curran, a Quechan concerned about compensation for the right-of-way, "They will have to pay you for it, if they take your land." [102] The Congressman's statement cannot, of course, be construed as a determination that the land to be taken actually belonged to Curran or his Tribe.

While the foregoing examples of administrative treatment of and comment on, the nonirrigable lands are by no means all-inclusive, they are representative of the conflicting views and uncertainty reflected in Departmental documents at that time.

The Department has regularly corrected errors and confusion over the mapping of and agency jurisdiction over lands within its jurisdiction, by finding lands thought to be public domain lands to be Indian lands, and by finding lands thought to be Indian lands to the public domain.[103]

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[99] *United States* v. *Johnson*, Civil No. 118–C (S.D. Cal., Aug. 2, 1935); *United States* v. *Walker*, Civil No. 126–J (S.D. Cal., Oct. 10, 1933).

[100] *See* note 74 *supra*, A609522.

[101] 49 Cong. Rec. 748.

[102] *See* note 74 *supra*.

[103] In *Solicitor's Opinion*, 54 I.D. 71, 76–78 (1932), Solicitor Finney ruled that lands thought for twenty years to have been unallotted tribal lands were in fact public domain lands, and that receipts from timber sale contracts should be paid into the Treasury as

Part of the confusion as to ownership of the land or jurisdiction over it undoubtedly resulted from delays in entering title transactions in the tract books originally maintained in the General Land Office, now the Bureau of Land Management. For example, our review of the records indicates that creation of the Yuma Reservation by the 1884 Executive Order was noted in the appropriate tract books no earlier than 1897, which was unquestionably after the cession of a portion of the lands had been effected. The 1893 Agreement, the 1894 Act, and the 1936 Margold Opinion notwithstanding, the cession of the nonirrigable lands was not actually entered in the tract books until the 1960's. Numerous other entries in these records made long after the fact indicate that these records have not accurately reflected the current status of title to the lands on a continuing basis.

A partial explanation for the delay in entering into the tract books the legal description of the ceded nonirrigable lands would be the uncertainty as to their area and location. As previously noted, early Reclamation estimates indicated that there were 25,000 irrigable acres on the Yuma Reservation, but by 1913–14, it had been determined that there were only some 15,000 irrigable acres.[104] The initial uncertainty as to the number of acres that might be irrigable would have made it impossible to develop accurate legal descriptions of the new boundary of the Reservation. In addition, the twenty-five year trust patents were not issued on the lands allotted to the Quechans until 1914.[105]

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miscellaneous receipts, rather than into a separate account for the benefit of the Georgetown Band of Indians. The Solicitor found that the reserve was abandoned by the Band's earlier acceptance of allotments on another reservation.

In *Navajo Indian Reservation,* 30 L.D. 515 (1901), an 1884 extension of the Navajo Reservation excepted any tracts "to which valid rights have attached." Although some mining claimants thought the extension order terminated their rights, and the Bureau of Indian Affairs had assumed that only the rights of original locators were protected, the Secretary ruled that the tracts so claimed in 1884 were not included in the reservation, by the terms of the order, even if subsequently abandoned and relocated. *Id.* at 520. The lands were surveyed, and are now shown as "segregated from Navajo Reservation, presumed public land" (Map of Survey approved Aug. 13, 1909, BLM files, Phoenix).

In *Solicitor's Opinion,* M–36770 (Jan. 17, 1969), the Solicitor ruled that the south boundary of the Salt River Indian Reservation was the south channel of the Salt River, not the north channel. Although the island formed by the river's braiding had been treated as public land, the Department recognized Indian ownership.

In a Memorandum dated Apr. 12, 1974, from the Associate Solicitor, Indian Affairs (concurred in by the Solicitor June 3, 1974), the Department defined the boundary of the Fort Mohave Hay and Wood Reserve to resolve a long-standing dispute between the Bureaus of Indian Affairs and Land Management over the administration of the lands thought to be in the reserve. Lands surveyed in 1928 and administered under the public land laws by the Bureau of Land Management were recognized as Indian reservation lands.

[104] Thirteenth Annual Report of Reclamation Service 1913–1914 (1915), at 75–76.

[105] The trust patents by date and parcel, are set out in the Historical Indices for the rele-

The administrative treatment of lands was certainly not uniform. The confusion over the status of these lands disclosed by the earlier documents can also be attributed to uncertainty over the effect of the 1894 Act prior to the granting of allotments and the opening of the remaining lands. These conditions alone, or in conjunction with the failure to note the cession on the tract books, help explain why some of those who administered the nonirrigable lands were uncertain as to the status of the lands.

Issuance of Margold Opinion

In 1928 Congress authorized construction of the All-American Canal, one of the largest irrigation canals in the United States.[106] The canal runs from the headworks of the Imperial Dam on 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 crossed the nonirrigable portion of the original Yuma Reservation.

On May 10, 1935, the Commissioner of Indian Affairs wrote to the Commissioner of the Bureau of Reclamation setting forth seven claims emanating from the projected construction of the canal, several of which were based upon the assumption that the canal right-of-way crossed Indian tribal lands for which compensation should be paid.[107]

On July 15, 1935, the Bureau of Reclamation advised the Bureau of Indian Affairs that the right-of-way in question was a part of the public domain, and that no compensation would be paid. The Bureau of Indian Affairs then requested an opinion on the matter from the Secretary of the Interior who, in turn, referred the question to Solicitor Margold.

Solicitor Margold, on Jan. 8, 1936, issued the opinion which is the subject of this Memorandum, holding, *inter alia*, that the 1893 Agreement as ratified by the 1894 Act extinguished the Quechans' title to the nonirrigable lands of the 1884 reservation.[108]

Indian Claims Commission Actions

In 1950 the Quechan Tribe filed a petition with the Indian Claims

vant townships, *e.g.*, T. 16 S., R. 22 E., S.B.M., in the Bureau of Land Management.

[106] Sec. 1 of the Boulder Canyon Project Act of Dec. 21, 1928, 43 U.S.C. § 671 (1970).

[107] The claims and the correspondence surrounding them are detailed in *Solicitor's Opinion*, M–28198 (Jan. 8, 1936), at 2–5. The claims included total compensation of $2,602.50 for right-of-way, Indian ownership of mineral deposits discovered, compensation for sand and gravel, reimbursement for damages from canal seepage or failure, compensation for a power site, and a request for construction of four bridges.

[108] *Id.* at 10–12. The opinion also held that liability for canal seepage, breaks, etc. would depend upon ordinary rules of negligence, and denied all other claims. *Id.* at 16–17. In addition, the opinion held that the fact that the lands had not been opened to disposition under the general land laws by Presidential Proclamation did not mean that the Quechans retained any interest in the lands. *Id.* at 10–11.

Commission, Docket No. 86, asking for a general accounting of transactions involving the Tribe. In 1951, two additional companion claims were filed with the Commission. The first, Docket No. 319, asserted a taking by the Government without compensation of aboriginal lands of the Tribe adjoining what became the Yuma Reservation. The second, Docket No. 320, was based upon Government treatment of the Executive Order reservation lands.

In 1958, the Commission in effect transferred certain claims advanced by the Tribe in Docket No. 86 to Docket No. 320, and dismissed the earlier case.[109]

An interlocutory judgment of liability was entered against the government in Docket No. 319 on September 30, 1959. Both parties appealed the judgment to the Court of Claims. The appeal was dismissed without prejudice by the Court of Claims on Mar. 23, 1962. In 1965 the Indian Claims Commission issued its final order, in response to a joint settlement, assessing liability of $520,000, of which $167,000 was ascribed to the taking of Indian lands in California.[110]

In Docket No. 320, the Tribe's case was initially an action to set aside the cession of the nonirrigable lands and to recover the value of the reservation lands on the basis that the 1893 Agreement was induced by fraud, coercion, and misrepresentation. By the time of oral argument in 1965, the Tribe's counsel changed its main case to an action for breach of contract with respect to the 1893 Agreement, asking the Commission to enforce the 1893 Agreement.[111] The validity of the 1893 Agreement and the cession of lands were taken out of contention. Late in 1971, the Commission issued an Order staying the pro-

[109] Docket No. 320, *supra* note 5, Order Consolidating Causes of Action (Apr. 24, 1958). This Order transferred from Docket No. 86 to Docket No. 320 claims for the Government's failure to make allotments to members of the Tribe as required in 1893 Agreement and 1894 Act; failure to realize adequate price for irrigable land sold and account for same; and failure to hold allotments in trust and convey patents in fee as required by the 1893 Agreement.

[110] *Quechan Tribe of the Fort Yuma Reservation v. United States*, 15 Ind. Cl. Comm'n 489, 490 (1965). The judgment expressly excluded the lands within the 1884 reservation boundary. *Id.* at 492.

[111] In oral argument in Docket No. 320, *supra* note 5 (July 8, 1965, Tr. at 2), Fulton W. Hoge, attorney for the Quechans stated: "May it please the Commission, this case started out as a cause of action to set aside a cession of a reservation and to recover the value of the reservation lands. That's the main cause of action in the original petition. Since then it has developed into a breach of contract case and instead of trying to set aside the agreement on the ground of fraud, duress and unconscionable consideration we ask that the Commission enforce it and give us—we affirm it. We ask the Commission to affirm it and give us damages for its breach in two respects, although we have part of our original cause of action in that we ask that as to some of the land, the Mesa land which was included in the cession that the Commission exercise its power to revise the contract and to hold that there was no reason for including that land that it was unconscionable and that there should be an award of its value."

ceedings because of "legislation pending in the United States Congress to clarify the [Quechans'] title to certain land areas involved in this case * * *."[112] No such legislation was passed, and in 1971 counsel for the Quechans moved to vacate the order.

The Tribe's counsel in the proceedings through 1968 died, and his successor petitioned the Commission to, among other things, reopen the record to permit admission of further evidence and to permit the Commission to consider declaring the 1893 Agreement invalid. The Commission conditionally granted permission for introduction of further evidence,[113] but refused to consider the validity of the 1893 Agreement on the grounds that a treaty ratified by Congress is not subject to judicial revision or review.[114]

In the hearing held in connection with the Tribe's motion to reopen the record and introduce further exhibits, the Tribe's attorney expressed a willingness to dismiss the action without prejudice if a return of the 1884 Reservation lands could be effectuated under 25 U.S.C. § 463 (a) (1970),[115] which provides, in relevant part:

> The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or to any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States * * *.[116]

Subsequently, the Tribe passed a resolution[117] stating that a claim for damages under the Indians Claims Commission Act "is not proper" and authorizing counsel to file a motion for dismissal without prejudice. A motion to that effect was filed on behalf of the Tribe in July of 1972, again suggesting that the land could be returned under 25 U.S.C. § 463(a) (1970). The Government filed a response objecting solely to such a dismissal being granted without prejudice. Since July of 1972, Docket No. 320 has been held in suspense pending further administrative review within the Department of the Interior on the cession question.

[112] Docket No. 320, *supra* note 5, Order Staying Further Proceedings (Nov. 25, 1970).

[113] Docket No. 320, *supra* note 5, Order Granting Plaintiff's Motion to Vacate Order Staying Further Proceedings (July 21, 1971).

[114] Docket No. 320, *supra* note 5, Opinion on Motion to Reopen the Record (July 21, 1971), citing *Sac and Fox Tribe* v. *United States*, 7 Ind. Cl. Comm'n 675, 710–12 (1959), *aff'd on other grounds*, 161 Ct. Cl. 189, 198, *cert. denied*, 375 U.S. 921 (1963).

[115] Docket No. 320, *supra* note 5, Oral Argument (May 9, 1972), Trp. at 3, 16.

[116] Sec. 3 of the Act of June 18, 1934, 25 U.S.C. § 463(a) (1970). It is unclear whether the lands in question could be subject to this Act. *See Solicitor's Opinion*, 69 I.D. 195, 199 (1962); *Solicitor's Opinion*, 56 I.D. 330, 334 (1938). Were a portion of the lands in question to be restored to the Quechans *under this section*, the impacts on non-Indian interests would be insubstantial, since, although the question is unsettled, we think that the water-use priority date for the restored land would be as of this restoration date and subsequent to present water uses. Present non-Indian uses of the lands could be preserved, and impacts on Colorado salinity would be negligible.

[117] Docket No. 320, *supra* note 5, Quechan Tribal Resolution dated July 13, 1972, attached to Petitioner's Motion to Dismiss (July 26, 1972).

1968 Weinberg Opinion

In 1968, Solicitor Weinberg issued an opinion approving a Bureau of Land Management proposal to issue a lease to Yuma County, Arizona, of a portion of the non-irrigable lands within the boundaries of the Yuma Reservation.[118] Citing Solicitor Margold, Solicitor Weinberg held:

> The 1904 act left unaffected the stipulation of the 1894 act that extinguished the Indian interest in any non-irrigable lands.[119]

The Weinberg opinion implicitly endorsed the validity of the Margold Opinion but did not expand upon the analysis in the 1936 opinion.

Re-examination and Reconsideration

The Quechan Tribe's claim to the land in question—as distinguished from its claim for compensation—was first presented to the Department of the Interior during a meeting held between Solicitor Frizzell and the Tribe's attorney in July 1973. In the course of that meeting, Solicitor Frizzell agreed to initiate an examination of the legal question and the underlying facts. Solicitor Frizzell assigned the question to the Division of Indian Affairs with instructions that the Division develop the strongest case possible to support the Quechans' claim.

The Division of Indian Affairs in the Solicitor's Office, with the help of other lawyers in the Solicitor's Office, did exhaustive research into the factual and legal background of the matter, including: the history of the 1893 Agreement and the 1894 Act; a review of the files, many of which were stored at the Indian Claims Commission, relating to the Department's treatment of the lands in question between 1894 and 1936; a review of the files relating to every third-party interest created in the lands after 1936; extensive research into all of the legal aspects of the Tribe's claim; and preparation of a number of drafts of an opinion stating the strongest possible case for the Quechans' claims.

One of the drafts prepared by the Indian Affairs Division was circulated to all persons who might be affected, Indian and non-Indian alike, for legal suggestions, comment and criticism.

In Jan. 1976, two separate meetings were held by the Secretary of the Interior, the Under Secretary, the Solicitor and a number of other Departmental officials, first with representatives of the non-Indian interests, and then with the Quechan tribal leaders and their lawyers. During these meetings, the legal issues and factual background were discussed in detail.

The Secretary determined that the issues involved were exclusively legal in nature, and therefore in-

[118] Memorandum from Solicitor to the Secretary of the Interior, dated June 12, 1968.
[119] *Id.* at 2.

structed the Solicitor to decide the matter on its legal merits. After careful analysis of the draft opinion, consideration of the oral statements made during the meetings mentioned above, review of voluminous briefs on both sides of the issue which had previously been submitted to the Department, and personal study of source materials, the Solicitor was unable to accept the arguments which had been advanced on behalf of the Quechan Tribe by the Indian Affairs Division in its draft opinion.

On Jan. 30, 1976, the Solicitor advised the Secretary that he had concluded that the Margold Opinion was correct and should be affirmed. The Secretary acquiesced in this decision and ordered that the Chairman of the Quechan Tribal Council be advised of this decision. The Chairman was so advised by telephone, with a confirming letter sent to him by the Solicitor on Feb. 2, 1976.

DISCUSSION AND LEGAL ANALYSIS

Summary

In order to find that the Quechans hold title to the nonirrigable lands in question, we must determine: that the cession or relinquishment of reservation lands under the 1893 Agreement and 1894 Act was not absolute and immediate but, rather, was conditioned upon the occurrence of one or more subsequent events; that material conditions precedent to the relinquishment were not fulfilled prior to the enactment of the 1904 Act; and that the 1904 Act established an independent scheme for the allotment and sale of the irrigable reservation lands which completely replaced the scheme provided for under the 1893 Agreement and 1894 Act, rather than simply implementing the scheme called for under the 1893 Agreement and 1894 Act.

In interpreting the 1893 Agreement and the 1894 Act, together with the 1904 Act, we have taken into account, among other things: the special rules of construction which apply to Indian treaties and laws; the contemporaneous treatment of the lands in question by Departmental officials subsequent to 1894, as shown by correspondence, memoranda, testimony, maps, reports and other documents; and the policies underlying the General Allotment Act, and other congressional policies toward Indians in effect at the time.

As set forth in greater detail below, we have concluded that the 1893 Agreement as ratified by the 1894 Act effected an immediate relinquishment and cession of Yuma Reservation lands, including the nonirrigable lands in question, and that the 1904 Act, insofar as it pertained to the Yuma Reservation, concerned only the irrigable lands of the reservation and was intended solely to provide an arrangement under the 1902 Reclamation Act for irrigation of the lands as an alternative to irrigation which would have been provided by the private company which failed. The 1904

Act neither repealed the earlier Agreement and Act nor abandoned the underlying plan.

We have also concluded that even if there were convincing evidence that the 1893 Agreement and 1894 Act were grossly inequitable and unfair to the Quechan Indians, involving unconscionable consideration, or even if there were convincing evidence that the 1893 Agreement was entered into as a result of fraud, misrepresentation or duress (none of which convincing evidence we have found) neither the Secretary of the Interior nor the Solicitor would have authority to modify or set aside the ratified agreement.

Was Cession of Land Conditional?

Article I of the 1893 Agreement provides that "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" [120] the Yuma Reservation. The question presented by this language is whether the language of present cession, "do hereby surrender and relinquish," is absolute, or whether the words "upon the conditions hereinafter expressed" cause the language to be conditioned.

The "conditions" which are referred to in Article I are found in Articles II through VI. Among the provisions of these articles are the allotment of five-acre tracts to individual Indians in Article II; the disposal of surplus irrigable lands in Article III; the issuance of trust patents to Indian allottees in Article V; and the opening of nonirrigable lands to settlement under the general land laws in Article VI.

We have concluded that the plain language of present grant contained in Article I of the 1893 Agreement is not modified, or made conditional, by the reference to the obligations undertaken by the United States as "conditions." We conclude that the so-called "conditions" are promises to perform certain acts in the future, and the 1893 Agreement is a typical example of a contract formed by the performance of an act by one party, here the Quechan's cession of their lands, in return for a promise by the other, here the Government's promise to make allotments, provide irrigation for them, and sell surplus irrigable lands for the Indian's benefit. We reach this conclusion on the following four principal bases.

First, it would not have been possible for the Government to make allotments to individual Indians, to issue trust patents to the Indians, to sell surplus irrigable lands to non-Indians, or to open the nonirrigable lands to settlement by non-Indians under the public land laws unless the lands had been ceded and the Government had first obtained

[120] S. Exec. Doc. No. 68, *supra* note 9, at 19.

full title to the lands. The Agreement would have been impossible of performance on the part of the Government if the cession of the lands by the Indians only took place after performance of the obligations by the Government.[121]

Second, general principles of contract law favor construing the provisions of contracts as promises rather than as conditions,[122] and general principles of real estate law favor covenants over conditions.[123]

Third, those cases which we have been able to find dealing with "conditional" language in cession agreements support our conclusion that cession is immediate and absolute when such agreements are ratified by Congress.

There are more than 200 treaties and agreement involving cessions of Indian lands to the United States in return for promises to perform certain acts in the future, other than making a single lump-sum cash payment. The kinds of consideration promised by the United States are of a wide variety and include promises: (1) to expend funds for construction of various projects, such as agricultural or educational facilities; (2) to allot ceded lands to individual Indians; (3) to provide certain services, such as teachers, farmers, craftsmen, and physicians, as well as necessary supplies and facilities incident to such services; and (4) to survey and sell ceded lands under the public land laws and devote the proceeds to the benefit of the Indians. However, a relatively small number of these agreements contain the "conditional" language[124] and an even smaller number of these agreements have been subject to interpretation by the courts. The following are all of the cases of which we are aware.

In *United States* v. *Myers*,[125] the Eighth Circuit Court of Appeals had before it the 1900 congressional ratification[126] of an agreement, entered into in 1892, shortly before the 1893 Agreement, between the United States and the Kiowa, Comanche and Apache Tribes in Oklahoma. At issue was the effect of a tribal land cession to the United States in return for allotments of land to individual tribal members, the setting aside of certain grazing lands for the tribes' use, and the payment of $2 million. The effect of this agreement and the ratifying legislation was described by the Court as follows:

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[121] To hold that cession was conditional, and never took place, would also invalidate all sales of the irrigable lands to the non-Indians and the Indian trust patents.

[122] 3A *A. Corbin, Contracts*, § 635 (rev. ed. 1960); 5 *S. Williston, A Treatise on the Law of Contracts* § 644 (W. H. E. Jaeger ed. 1961).

[123] *See* 2 R. Powell, *The Law of Real Property* §§ 187, 188 (ed. 1976); *cf.* 1 *American Law of Property* § 2.8 (1952); 5 *id.* § 21.3(a).

[124] *E.g.*, Treaty with the Chippewa dated Oct. 18, 1864, 14 Stat. 657, II *Kappler, supra* note 1, at 868; Agreement with the Cheyenne and Arapahoe Tribes, Oct. 1890, sec. 13 of the Act of Mar. 3, 1891, 26 Stat. 989, 1022, I *Kappler, supra* note 1, at 415; Agreement with the Iowas, May 20, 1890, Act of Feb. 18, 1891, 26 Stat. 749, 753, I *Kappler, supra* note 1, at 393; Agreement with the Comanche, Kiowa and Apache, Oct. 21, 1892, section 6 of the Act of June 6, 1900, 31 Stat. 672, 676, I *Kappler, supra* note 1, at 708.

[125] 206 F. 387 (8th Cir. 1913).

[126] Sec. 6 of the Act of June 6, 1900, 31 Stat. 672, 676.

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The act of June 6, 1900, c. 813, 31 Stat. 676, was passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into October 21, 1892, whereby, in return for the allotment of land in severalty to the individual members of these tribes, and other good and valuable consideration specified, all these tribal lands, including that in question, were relinquished to the United States. The comprehensiveness of the grant made is disclosed by the following quotations from the act:

"*Subject to* the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and *subject to* the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and *subject to the conditions hereinafter imposed,* and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians *hereby cede, convey, transfer, relinquish, and surrender,* forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to wit: [Here follows the specific description.] * * *

"As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, the sum of two million (2,000,000) dollars.* * * "

* * * * *

* * * When the Kiowa, Comanche, and Apache tribes ceded this land to the United States, it ceased to be Indian country, unless by the treaty by which the Indians parted with their title, or by some act of authority, a different rule was made applicable to the case.

Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed should be devoted to these purposes? We can find none. The treaty of Oct. 31, 1892, confirmed by act of Congress of June 6, 1900, specifies explicitly the *conditions* and considerations *subject to which* the conveyance and cession was made. They are the allotment of land in severalty, the setting apart of 480,000 acres of grazing land, and the payment of $2,000,000 in the manner provided. For these considerations the Indians "ceded, conveyed, transferred, relinquished and surrendered forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest of any kind and character." It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal. * * *[127] (Italics added.)

The same agreement with the Comanches, Kiowas and Apaches was interpreted in *Ex Parte Moran*[128] where the court ignored the "conditional" language of the agreement and stated that "the Indian title to the reservation was extinguished on June 6, 1900, when the Agreement of Oct. 1892, was ratified by the United States."[129]

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[127] 206 F. 387, 389–392 (8th Cir. 1913); *see also Kickapoo Tribe of Kansas* v. *United States,* 372 F.2d 980, 984–85 (Ct. Cl. 1967).

[128] 144 F. 594 (8th Cir. 1906).

[129] *Id.* at 602. *Accord, In re Moran,* 203 U.S. 96, 105 (1906).

The statutory agreement with the Quechans is from the same mold as the agreement with the tribes involved in *Myers*, and should be similarly construed to have effected an immediate cession of the tribal lands in 1894 in return for the Government's promise to perform the specified acts.

The 1892 agreement and the 1900 Act involving the Kiowas, Comanches and Apaches were also considered in *United States* v. *Kiowa, Comanche and Apache Tribes*.[130] This case was an appeal from an Indian Claims Commission decision awarding the Indians the difference between the amount paid for the Indian lands and what they were actually worth. The court upheld the Commission's award of damages and made no comment with respect to restoring the land to the Indians, even though it found that "there appears to have been no contract executed by the parties" because "the Government was liable under a contract implied in fact (there having been no valid ratification by Congress of the 1892 Jerome Agreement)." [131] The Court of Claims found that there had been no ratification because the agreement contained a provision that it would become effective only when ratified by the Congress. As the court noted, the 1900 Act of Congress purportedly ratifying the 1892 agreement "made a number of changes in the terms agreed to by the Indians and the Commissioners in the Jerome Agreement and such changes were never resubmitted to the Indians for acceptance or rejection as required by Article XII of the Treaty of Oct. 21, 1867." [132]

Despite finding that the agreement had never been consummated, the Court held that title to the land in question had passed to the United States and only awarded money damages to the Indians. This case is of particular interest in that it held that a "conditional" cession was effected even though the agreement was not properly ratified by Congress.

By the Act of Mar. 3, 1891,[133] the Congress ratified a number of Indian agreements. One of these agreements contained language very similar to that of the 1893 Agreement. The agreement of Oct. 1890 between the United States and the Cheyenne and Arapahoe Tribes provided as follows:

> Subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapahoe tribes of Indians, as hereinafter provided for and *subject to the conditions hereinafter imposed*, for the considerations hereinafter mentioned, the said Cheyenne and Arapahoe Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied all their claim, title and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory * * *. (Italics added).[134]

[130] 163 F. Supp. 602 (Ct. Cl. 1958), *reconsideration denied*, 166 F. Supp. 939 (Ct. Cl. 1958), *cert. denied*, 359 U.S. 934 (1959).

[131] *Id.* at 606.

[132] *Id.* at 607.

[133] 26 Stat. 989.

[134] Sec. 13 of the Act of Mar. 3, 1891, 26 Stat. at 1022; I *Kappler*, *supra* note 1, at 415.

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The Act of Mar. 3, 1891, was considered by the Supreme Court in *DeCoteau* v. *District County Court*,[135] wherein the Court construed the Sisseton-Wahpeton Agreement,[136] one of the other agreements ratified by that Act. This agreement contained no language of "condition." The Court compared the agreement with the other agreements, like that quoted above, ratified by the Act, and pronounced them to be "indistinguishable" and "virtually identical." The Court made no comment concerning the "conditional" language or any effect it might have on the cession:

> * * * the Congress included the Sisseton-Wahpeton Agreement in a comprehensive Act which also ratified several other agreements providing for the outright cession of surplus reservation lands to the Government. The other agreements employed cession language *virtually identical* to that in the Sisseton-Wahpeton Agreement, but in these other cases the Indians sold only a described portion of their lands, rather than all "unallotted" portions, the result being merely a reduction in the size of the affected reservations. The intended effect of all of these ratification agreements was made clear by the sponsors of the comprehensive legislation:
>
> "All the pending agreements or treaties for the purchase of Indian lands are ratified and confirmed by the provisions of this bill * * *
>
> "The bill carries the largest appropriation ever carried by an Indian appropriation bill, but it extinguishes the Indian title to a great domain and opens it to settlement by the hardy and progressive pioneers * * *."
>
> * * * * *
>
> * * * This language [of cession in the Sisseton-Wahpeton Agreement] is *virtually indistiguishable* from that used in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. * * * That the lands ceded in the other agreements were returned to the public domain, stripped of reservation status, can hardly be questioned, and every party here acknowledges as much. The sponsors of the legislation stated repeatedly that the ratified agreements would return the ceded lands to the "public domain."[137] (Italics added, footnotes and citations omitted.)

While the Supreme Court in *DeCoteau* did not deal directly and specifically with the "conditional" language of the Cheyenne and Arapahoe Agreement, the inference to be drawn from the case supports our interpretation of similar language.

Fourth, and finally the United States District Court for the Southern District of California decided two similar cases[138] in which it specifically found that the effect of the 1893 Agreement and the 1894 Act was to vest title to the irrigable

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[135] 420 U.S. 425, *rehearing denied*, 421 U.S. 939 (1975).

[136] Agreement of Dec. 12, 1889, sec. 26 of the Act of Mar. 3, 1891, 26 Stat. 989, 1035; I *Kappler, supra* note 1, at 429. Article I of this Agreement states that the "Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands * * * remaining after the allotments * * * provided for in article four of this agreement shall have been made." *Id.*

[137] 420 U.S. 425, 439–40, 446 (1975).

[138] *United States* v. *Johnson*, Civil No. 118–C (S.D. Cal., Aug. 2, 1935); *United States* v. *Walker*, Civil No. 126–J (S.D. Cal., Oct. 10, 1933).

lands of the Yuma Reservation in the Government effective immediately upon ratification of the Agreement, rather than at some future date. If the 1893 Agreement and 1894 Act resulted in cession of the unallotted irrigable lands to the United States, we infer that it must also have resulted in immediate cession of title to the nonirrigable lands; since the Agreement and Act provided for relinquishment of "all" of the reservation lands without distinction as to irrigability.

The two cases were ejectment actions brought by the United States against squatters on lands within the reservation which were susceptible of irrigation. The decisions interpreted the 1893 Agreement and 1894 Act as vesting full title in the United States immediately, subject only to the rights specifically reserved in the Indians, which reserved rights extended to the irrigable lands only. These opinions were cited and relied upon in the Margold Opinion.[139]

The Margold Opinion noted that, while the irrigable or nonirrigable character of the lands in question was not determined as of the time of the 1893 Agreement or the 1894 Act, "it is clear that the taking effect of the relinquishment or cession was not postponed until classification of the lands as nonirrigable." Solicitor Margold based his conclusion in this regard on a doctrine of widespread application for which he cited *United States* v. *Minnesota*.[140] The doctrine is well illustrated in *St. Paul & Pacific R.R. Co.* v. *Northern Pacific R.R. Co.*, where the Supreme Court stated:

> As seen by the terms of the third section of the Act, the grant is one *in praesenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, preemption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is "that there be, and hereby is, granted" to the Company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.
>
> The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the

[139] Our analysis, and that of Solicitor Margold, is reinforced by the brief of the United States in the *Johnson* case, in which the Government argued that the 1904 Act "superseded and amended the Act of Aug. 15, 1894, *supra*, insofar as those lands that may be susceptible of irrigation were or are included in the Yuma reclamation project [and as to] the unallotted lands susceptible of irrigation that are included within that project, changed the method of their disposal as though they were public domain lands within a reclamation project." Plaintiff's Opening Brief, at 5, in *United States* v. *Johnson, supra* note 138. The land in question in *Johnson* was deemed irrigable, but we note that it is described as lying "between the levee and the river." This is the same area, presumably rendered irrigable by the avulsive change of 1920, about which much of the correspondence detailed above was concerned.

[140] 270 U.S. 181, 206 (1926). Solicitor Margold also found that the situation was closely analogous to that involved in the grant of swamplands made to the states by the Act of Sept. 28, 1850, *as amended*, 43 U.S.C. §§ 981–994, where the character of lands was to be determined at a subsequent date, although rights vested on the date of statutory enactment.

date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti;* that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route. [141]

It has been argued on behalf of the Quechans that *United States* v. *Brindle*, [142] stands for the proposition that both the irrigable and the nonirrigable lands of the Yuma Reservation became trust lands following the 1893 Agreement and the 1894 Act. *Brindle* dealt with a treaty the United States had entered into with the Delaware Tribe,[143] and a treaty with the Kaskaskia and Peoria Indians,[144] providing for the cession of lands by the Tribes. The *Brindle* case is not in point, since the two treaties provided clearly by their terms that both the ceded lands and the proceeds of sale thereof were to be held in trust. The 1893 Agreement, on the other hand, provided that the nonirrigable part of the land was ceded directly to the United States and that the irrigable part was to be resold for the benefit of the Quechans.

Effect of 1904 Act

It has been argued by advocates of the Quechan point of view that the 1904 Act was intended to replace completely, and to supersede the 1894 Act, thereby eliminating the requirement of cession by the Quechans of their ownership of the nonirrigable lands. We have concluded to the contrary. We find that the legislative history clearly indicates that the 1904 Act was seen as being necessary because of the provisions of the Reclamation Act, which required that funds expended for irrigation projects be returned to the Reclamation Fund. Since the 1894 Act had provided that the money from the sale of the surplus irrigable lands would basically be placed in the Treasury of the United States for the benefit of the Indians, the revisions of the 1904 Act were necessary to allow some of those funds to be used to repay to the Reclamation Fund the cost of reclaiming the irrigable lands. We have concluded that the 1904 Act was intended merely to amend the 1894 Act to the extent necessary to provide for irrigation of the lands to be allotted to the Quechans under the Reclamation Act.

We have found that, with the exception of modifications made to bring the arrangement within the Reclamation Act, the terms of the 1904 Act are compatible with, and may be read together with, those of the 1893 Agreement and 1894 Act.[145] While it is not clear whether the irrigation provisions of the 1904 Act

[141] 139 U.S. 1, 5 (1891); *see also Schulenberg* v. *Harriman,* 88 U.S. (21 Wall.) 44, 60 (1875).

[142] 110 U.S. 688 (1884).

[143] Treaty of July 17, 1854, 10 Stat. 1048, 1049.

[144] Treaty of Aug. 10, 1854, 10 Stat. 1082, 1083.

[145] *See* text accompanying notes 54–56 *supra.*

were more or less favorable to the Quechans than the arrangement provided under the earlier Act and Agreement,[146] the Congress did have authority to vary the terms upon which irrigation was to be provided. In that the 1893 Agreement did not deal with the financial terms, or other terms, upon which irrigation was to be provided to the Quechan lands, and all such provisions appeared only in the 1894 Act, the Government had no obligation to deliver water on any particular basis.

Upon a review of the legislative history of the 1904 Act, and particularly upon analysis of Senate Report 1660, [147] it is clear that the Congress did not intend to abandon completely the scheme of the 1893 Agreement and 1894 Act. First in the report appears a letter by Charles D. Walcott, dated Jan. 23, 1904. Initially, Mr. Walcott mentions the Reclamation Act [148] and the reasons why special authority from Congress was required to utilize the Indian Reservation to accomplish the goals of the 1902 Reclamation Act. He then cites the 1893 Agreement with respect to the disposition of the surplus lands on the Reservation. The tenor of his words clearly and unequivocally conveys the concept that the irrigation, allotment, and sale of surplus lands had not come about, and therefore, should be done through the proposed 1904 Act. It is significant that he did not mention the nonirrigable lands in the very same letter wherein he shows that he had read and understood the 1894 Act and that he knew that Congress has the ultimate power to dispose of Indian lands, citing the *Cherokee Nation* and *Lone Wolf* cases.[149] The natural deduction from all that Mr. Walcott wrote is that the United States had no further obligations with respect to the nonirrigable reservation lands, which had already been disposed of by Congress.

Also in Senate Report 1660 is a letter from A. C. Tonner, Acting Commissioner of Indian Affairs, dated Feb. 3, 1904. He reinterates Walcott's words, but refers specifically to the Quechans' consent to the allotments of five acres each. At that time the only agreement on record was the 1893 Agreement. Tonner further stated:

> The problem of providing these two reservations with irrigation systems is one which this Office has thus far been unable to solve, and it therefore gives its hearty assent to the proposition of the Director of the Geological Survey, and earnestly recommends its adoption, believing that it promises relief to these Indians.[150]

The 1893 Agreement and 1894 Act were expressly mentioned in the Senate Report, and thus were expressly brought to the attention of Congress. It seems that Congress would have mentioned and/or restored the nonirrigable lands, and

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[146] *See* text accompanying notes 57–62 *supra*.
[147] S. Rep. No. 1660, *supra* note 52.
[148] *Id.* at 28.
[149] *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902), and *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).
[150] S. Rep. No. 1660, *supra* note 52, at 29.

specifically provided for the abandonment of the scheme of the 1894 enactment, if it so intended. This is particularly so in view of the negative attitude manifested by the courts about deciding that statutes have been repealed by implication, as discussed *infra*.

Finally, it would be difficult to understand how the Congress could provide in the 1904 Act that the Secretary of the Interior should dispose of the surplus irrigable lands "as though the same were part of the public domain" [151] if those lands had not been ceded to the United States under the 1893 Agreement and the 1894 Act.

Advocates of the Quechan point of view have argued that if one interprets the 1904 Act as a complete departure from the scheme of the 1893 Agreement and the 1894 Act, one is led to a permissible construction that there was a repeal by implication of the 1894 Act. For the proposition that answers this argument we cite *Posadas* v. *National City Bank*.[152] That case concerned the power of the Philippines by local law to impose capital and deposit taxes not permitted under United States law. The Philippine Supreme Court on appeal ordered a refund to the National City Bank of New York, a branch of which was taxed by the Philippine Government. The Philippine Government then appealed to the Supreme Court of the United States. The petitioner argued that section 25 of the Federal Reserve Act, which authorized branches of national banks to exist in dependencies of the United States, was repealed impliedly by an amendment to the Federal Reserve Act of Sept. 7, 1916. The Supreme Court held that the amendment did not impliedly repeal that portion of the Federal Reserve Act authorizing national banks to maintain branches in dependencies. In reaching that conclusion, the Supreme Court applied a well-established principle:

> The amending act just described contains no words of repeal; and if it effected a repeal of § 25 of the 1913 act, it did so by implication only. The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. There are two well-settled categories of repeals by implication—(1) where provisions in the two acts are in irreconcilable conflict, the later one to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts

[151] Sec. 25 of the Act of Apr. 21, 1904, 33 Stat. 189, 224.

[152] 296 U.S. 497 (1936). United States Rev. Stat. § 5219 prohibited the types of taxes imposed by the Philippine law.

are the same, from the time of the first enactment.

The law on the subject as we have just stated it finds abundant support in the decisions of this court, as well as in those of lower federal and state courts. * * *[153]

Therefore, implied revocation or implied repeal of statutes is not favored in the law.[154]

Neither the 1904 nor any other congressional enactment of which we are aware contains language expressly repealing the 1894 Act. Nor does either contain material treating every provision of the 1894 Act, such as the Southern Pacific Railroad Company railroad right-of-way, the nonirrigable lands ceded in the 1894 Act, or the Indian school lands, to name a few of the more important items.

We find the congressional silence in the 1904 Act with respect to the nonirrigable lands to be more consistent with the conclusion that the Congress considered that the nonirrigable lands and other lands had been ceded to the United States, than with the conclusion that the 1904 Act was intended to repeal the 1894 Act and earlier Agreement in that regard. Finally, it cannot be said that the factual and legislative history shows any intention, much less a clear intention, of the Congress to repeal the 1894 Act. Therefore, the two acts are not irreconcilable and can be read together to give effect to all provisions of the 1894 Act not treated in the 1904 Act. Such a construction is preferred.[155]

If Cession Was Conditional, Were the Conditions Met?

If, for the sake of argument, we assume that cession of the nonirrigable lands under the 1893 Agreement and 1894 Act was conditioned upon the performance of certain acts on the part of the United States (we have reached the contrary conclusion), we would still find that all such material conditions were met, and that cession took place.

It has been argued on behalf of the Quechans that cession was conditioned upon a number of factors —allotment of certain irrigable lands to the tribal members, sale of other irrigable lands after appraisal and by public auction, provision of water by a private irrigation company and opening of nonirrigable lands to settlement—all of which were to be accomplished pursuant to specific procedures set out in the 1893 Agreement as ratified by the 1894 Act. It has been argued that these conditions were not properly met.

As previously noted, Indian allotments were not completed until 1912.[156] Substantial time was required to perform the necessary agricultural and engineering surveys prior to construction of irrigation works, and to construct the

[153] 296 U.S. 497, 503 (1936).
[154] 73 Am. Jur. 2d *Statutes* § 396 (1974).
[155] 73 Am. Jur. 2d *Statutes* §§ 249, 254 (1974).
[156] *See* text accompanying note 66 *supra.*

Yuma Irrigation Project itself;[157] it would have been desirable, from the Quechans' point of view, to delay the allotment process until substantial completion of the irrigation system; and the allotments to the Quechans were expanded to 10 acres per capita in 1911.[158] For these reasons we conclude that any condition created by the 1893 Agreement and 1894 Act requiring that allotments be made was substantially satisfied even though the allotments were not completed until 1912.

Although the method of appraisal and sale of the surplus irrigable lands called for by Article III of the 1893 Agreement and by the 1894 Act differ from the method of sale required under the 1904 Act,[159] we find that the difference was insubstantial, and that the change was made in the best interests of the Quechans so that the irrigation project could comply with the Reclamation Act. The modified performance could not properly be deemed a substantial failure of a condition.

While the 1893 Agreement contained no provision as to how irrigation water was to be provided to the Quechan lands, the following language appears in the 1894 Act:

> That the Colorado River Irrigating Company, which was granted a right of way for an irrigating canal through the said Yuma Indian Reservation by the Act of Congress approved February fifteenth, eighteen hundred and ninety-three, shall be required to begin the construction of said canal through said reservation within three years from the date of the passage of this Act, otherwise the rights granted by the Act *aforesaid* shall be forfeited. (Italics added.)[160]

It should be noted, however, that unlike the 1893 Agreement, the 1894 Act does not contain the "conditional" language. The conclusion that any provision of the 1894 Act created an implied condition to the cession of land involves an analysis of congressional intent and cannot be reached from the words of the statute alone. The very language of those provisions, however, limits the process of implication, as with the above-quoted provision. That provision mandates that the private company, the Colorado River Irrigation Company, build an irrigating canal within three years or lose its right-of-way granted by a previous Act of Congress ("the Act aforesaid"). The Company's loss of rights is the only consequence of its failure to build a canal within three years that is mentioned in the statute. There is no mention of such failure resulting in the nullification of the entire 1894 Act and with it, the cession of nonirrigable land. To imply such a consequence would, we

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[157] *See* text following note 65 *supra*, "Construction of Early Irrigation Works."

[158] Act of Mar. 3, 1911, 36 Stat. 1058, 1063.

[159] *See* note 62 and accompanying text *supra*.

[160] Act of Aug. 15, 1894, 28 Stat. 286, 336. The 1894 Act called the Company the Colorado River Irrigating Company, even though the 1893 Act granting the right-of-way called it the Colorado River Irrigation Company.

believe, be both improper and illogical.

While the Colorado River Irrigation Company did fail to construct the contemplated system, an irrigation system was in fact provided on the Yuma Reservation as a result of the Reclamation Act and the additional congressional authority provided by the 1904 Act. There is nothing in the 1894 Act which indicates that the proposed canal to be built by the Colorado River Irrigation Company was the only irrigating system which Congress believed would satisfy the requirements of the Act. The legislative history is unambiguous that the main purpose of the 1893 Agreement—from the standpoint of the Indians who signed it[161] and the Congress that ratified it[162]—was to provide irrigation to the Reservation, and this purpose was served.

While we note that Article VI of the 1893 Agreement provided for the nonirrigable lands of the Reservation to be opened to settlement under the general land laws of the United States, and the 1894 Act provided, "all of 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,"[163] we do not believe that the opening of these lands was a material performance required for the benefit of the Quechans. To the extent that settlement of non-Indians in the proximity of the Quechan allotments was called for under the policy of the General Allotment Act,[164] that requirement was satisfied by the settlement of the surplus irrigable lands which actually took place. Because of the harsh, desert character of the nonirrigable lands, any settlement of those lands would have been sparse. Further, since the Quechans retained only irrigable lands, any model provided by the non-Indian use of nonirrigable lands would not have been of significant value to the Tribe.

Therefore, we find that any obligations of the Government under the 1893 Agreement and 1894 Act, the performance of which might have been deemed conditions, were substantially performed, and that those deviations from the exact pro-

[161] In a letter from the Quechans to the President and Congress, the Tribe explained why they were willing to cede their lands: "We believe if furnished with a small tract of land, with water to irrigate it and with the means of cultivating, we could improve our fortunes to the extent of securing at least all the necessaries of life. We believe from what we hear that if the land now embraced in our reservation could be thrown open to settlement an irrigation ditch would be built through the reservation * * *. While with water the soil is fertile, nothing will grow without irrigation, for there is no rain. Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, if we can have small tracts set apart for our use." S. Ex. Doc. 68, *supra* note 9, at 14–15.

[162] *See* H.R. Rep. No. 1145, *supra* note 48, at 2. *See also* S. Ex. Doc. 68, *supra* note 9.

[163] Act of Aug. 15, 1894, 28 Stat. 286, 336.

[164] Act of Feb. 2, 1887, *as amended,* 25 U.S.C. § 331 *et seq.* *See* text accompanying note 23 *supra,* "Allotment Policy." Additionally, under the 1894 Act the nonirrigable lands were not to be disposed of with the proceeds or any benefits accruing to the Quechans, unlike the irrigable lands.

visions of the Agreement and Act which did occur were insubstantial and resulted in no detriment to the Quechans.

There are a number of cases in which contract or treaty terms specifying the Government's obligations assumed in return for Indian cessions were not fully performed, or were performed (as here) in a manner somewhat different than originally agreed upon. The Supreme Court has viewed some of such actions by the United States as breaches of its obligations for which a claim for damages might lie.[165] We are aware of no cases where a simple breach of a contract or trust obligation by the United States has been construed to void the initial cession of lands by the Indians. Hence, even had we concluded that the cession was conditional, and a substantial condition had not been met, in the absence of evidence of something more than a simple breach of contract we might still not have found the cession voided.

Administrative Treatment of the Lands

Consistent with the methods of interpretation prescribed by the Supreme Court,[166] we have thoroughly reviewed the administrative treatment of the nonirrigable lands in question subsequent to the enactment of the 1894 Act in an attempt to ascertain the post-enactment understanding of the parties. Although we find a number of documents treating the nonirrigable lands as a part of the "Yuma Indian Reservation," or as being under the jurisdiction of the Bureau of Indian Affairs, there are relatively few documents that either treat the nonirrigable lands as being owned by the Quechans or that assert ownership on behalf of the Quechans.[167]

The Supreme Court has made it clear that land may be defined as "Indian country" for certain purposes, and retain its reservation status without being in Indian ownership. In *Mattz* v. *Arnett*,[168] the central issue was whether the Klamath Indian Reservation terminated by an Act of Congress in 1892, in order that the Court might determine whether Mattz had violated the provisions of the Fish and Game Code of the State of California. If the Reservation had in fact terminated, California law would have applied. The question in *Mattz* went to the issue of jurisdiction and not to the status of title of land. The Klamath

[165] *E.g., Peoria Tribe of Indians of Oklahoma* v. *United States*, 390 U.S. 468 (1968); *United States* v. *Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U.S. 498, 500 (1913); *United States* v. *Blackfeather*, 155 U.S. 180, 190–91 (1894); *see also United States* v. *Kiowa, Comanche and Apache Tribes*, *supra* n. 130.

[166] *See* text accompanying note 175 *infra*, "Special Rules of Interpretation."

[167] *See* text accompanying notes 74–95 *supra*, "Administrative Treatment of the Yuma Reservation Lands."

[168] 412 U.S. 481 (1973).

Indian Reservation was established by an Executive Order of Oct. 16, 1891, and was disposed of through a cession, allotment, and sale of lands statute in 1892. Apparently, some allotments were made and some land was sold. The question was whether the statute terminated the Reservation for purposes of 18 U.S.C. § 1151 (1970). The Court held that despite the 1892 statute, the Reservation was not terminated. Interestingly enough, the court was influenced by a 1958 *statute* which restored to the Klamath Indians certain remaining ceded lands.[169] The court also noted that 18 U.S.C. § 1151 defined Indian country as all land within the limits of any Indian reservation "notwithstanding the issuance of any patent." [170]

Likewise, *Seymour* v. *Superintendent of Washington State Penitentary* [171] dealt with a jurisdictional but not an ownership question. The Supreme Court held that a 1906 statute providing for settlement an entry on Indian lands did not terminate the Colville Indian Reservation. The Court did not address itself to the issue of whether the land was ceded, nor did it resolve title or ownership issues. It simply ruled that the state court did not have jurisdiction over a crime committed on the Reservation.

Therefore, any administrative action dealing with the Yuma Reservation in a jurisdictional sense should not be weighed heavily in connection with the title problem on the Yuma Reservation.

There are a number of actions by senior Departmental officials indicating that ownership of the non-irrigable lands was ceded to the United States by virtue of the 1893 Agreement and 1894 Act, including a Secretarial Order withdrawing the lands under the Reclamation Act.[172] At the same time, the proceeds of some transactions concerning the land appear to have been credited to the Tribe. Much of the confusion with respect to ownership of the land and jurisdiction over the land may have resulted from the delays and errors in record-keeping described above, and from the uncertainty during the time prior to the issuance of allotments and disposition of the surplus irrigable lands.

As we have stated above, we believe that a clear determination can be made from the terms of the 1893 Agreement and the 1894 Act that absolute and immediate cession took place. Therefore, even if we had found a consistent administrative

[169] *Id.* at 505. The Supreme Court was strongly influenced by the Department of the Interior's contemporary conclusion that the 1892 Act did not terminate the reservation status of the land. *Crichton* v. *Shelton*, 33 L.D. 205 (1904). 412 U.S. 481, 505 (1973).

[170] *Id.* at 504, quoting the Act of June 25, 1948, 18 U.S.C. § 1151 (1970).

[171] 368 U.S. 351 (1962). The Court distinguished the statute governing the status of the land in question from prior legislation terminating another portion of the Reservation. The latter "vacated" the North Half of the reservation; the former, which treated the land where the crime was committed, "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government * * * regarded as beneficial to the development of its wards." *Id.* at 354, 356.

[172] Secretarial Order of July 2, 1902; Secretarial Order of Aug. 26, 1902. *See* note 72 *supra.*

recognition of Indian ownership of the lands in question subsequent to 1894, such administrative recognition would have to give way, because it was in conflict with the plain terms of the agreement and ratifying act. As the Supreme Court stated in *Harris* v. *Bell*,

> * * * This administrative view is, of course, entitled to respect, and those who have relied thereon ought not lightly to be put in peril. But is not controlling. * * *[173]

Similarly, the Department has corrected erroneous administrative construction of statutes, and has sought to correct errors and to resolve disputes within the Department over the administration of and jurisdiction over lands within its jurisdiction.[174] For this Department or for a court to hold that administrative action could override the plain language of an act would be the equivalent of assuming authority to modify an act of Congress in that fashion.

Special Rules of Interpretation

In our analysis of the 1893 Agreement, and in our analysis of the 1984 Act, the 1904 Act and the other congressional enactments pertaining to the subject of this Memorandum, we have had constantly in mind not only the trust obligations of the Solicitor and the Secretary of the Interior to the Indian people but also the special rules of statutory construction formulated by the Supreme Court for dealing with Indian statutes, agreements and treaties, which augment the normal rules of construction.[175] These rules have generally been formulated to give weight to what the Indians must have understood a particular document to mean, and to interpret language which is otherwise ambiguous in a manner most beneficial to the Indians. However, we have also had in mind the principle that rules of construction are not intended to alter the clear terms of statutes.

Solicitor Margold cited *United States* v. *Choctaw Nation*,[176] which is in accord with the legal principle that wherever possible one should apply the clear meaning of language in a statute. As a further example, in *Shoshone Indians* v. *United States*,[177] the Supreme Court said that it agreed that all doubts

[173] 254 U.S. 103, 109 (1920); *Tapp* v. *Stuart*, 9 F. Supp. 23, 24 (N.D. Okla. 1934), *rev'd. on other grounds*, 81 F.2d 155 (10th Cir. 1935).

[174] *E.g.*, *Solicitor's Opinion*, 74 I.D. 285 (1967). *See*, cases discussed in n. 103 and accompanying text *supra*.

[175] *E.g.*, *Worcester* v. *Georgia*, 31 U.S. (6 Pet. 515, 582), 214 (1832); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 398, 401–02 (1902); *Winters* v. *United States*, 207 U.S. 564, 576 (1908); *United States* v. *Celestine*, 215 U.S. 278, 290 (1909); *Choate* v. *Trapp*, 224 U.S. 665, 675 (1912); *Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 89 (1918); *United States* v. *Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345 (1941); *Shoshone Indians* v. *United States*, 324 U.S. 335, 353 (1945); *Arizona* v. *California*, 373 U.S. 546, 600 (1963).

[176] 179 U.S. 494, 535–36 (1900). *See also Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 179–80 (1947); *United States* v. *Mille Lac Band of Chippewa Indians*, 299 U.S. 498, 505–06 (1913); 73 Am. Jur. 2d *Statutes* § 151 (1974).

[177] 324 U.S. 335 (1945).

must be resolved in the Indians' favor. However, the Court went on to say that this rule:

> * * * meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties ment by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.[178]

In the *Choctaw Nation* case, *supra*, 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:

> But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands 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.[179]

The conclusions reached in this Memorandum are based upon what we find to be the clear meaning of the underlying statutory language. We generally find sufficient clarity in the statutory language, taken together with the legislative background, to leave no justification for the application of special rules of construction. However, even where, for the sake of argument, we have applied the special rules of construction, we have reached the same conclusions as Solicitor Margold. We think that the results obtained under the Margold Opinion and under the conclusions of this Memorandum are in fact the results intended by the Indian and the non-Indian parties to the 1893 Agreement.

Allegations of Fraud, Coercion or Inequity

In the Indian Claims Commission cases filed in connection with the subject matter of this Memorandum, the Quechan Tribe has charged that the signatures of the members of their Tribe to the 1893 Agreement were obtained by fraud and coercion.[180]

We have not found any documentation prior to the depositions filed with the Indians Claims Commission to support these allegations.[181] We note that fifty-eight years elapsed between the time of execution of the 1893 Agreement and the filing of the Indian Claims Commission petitions in 1951. The deponents were very young at the time of the events about which they tes-

[178] *Id.* at 353 (footnote omitted).
[179] 179 U.S. 494, 535 (1900).
[180] *See* text following n. 29 *supra*, "Alleged Coercion, Misrepresentation and Fraud."
[181] *See* text accompanying n. 31 *supra*.

tified, and they had a direct interest in the outcome of the legal proceeding at the time they testified. In a similar situation, the Indian Claims Commission, in *Potawatomi Tribe* v. *United States*, commented on claims of this nature:

> But the plaintiffs charge that signatures to the agreement were obtained by fraud and misrepresentation and have placed in evidence numerous affidavits made in 1936 and 1937 by Pottawatomie Indians and filed with a Senate Committee Report in 1939 on a proposed jurisdictional bill then pending in Congress. A number of aged Indians have also testified and some of these affiants and witnesses repudiated their signatures to the agreement while others say they signed but misunderstood what it was about, and a few thought it was to receive payment for a pledge to quit drinking liquor. We do not believe, however, that this evidence can be considered as sufficient to overcome what the contemporary documentary evidence discloses as to the explanation of the agreement to the Indians and the obtaining of their approval and signatures thereto. * * *
>
> There is nothing in the record reflecting on the honesty or integrity of the representatives of the Government who conducted the negotiation of the agreement, nor that the disinterested witnesses or the interpreter who certified that the agreement was fully explained to the Indians, had any personal interest in the matter that would cause them to make false certificates to that effect. The agreement was under consideration by the Indians for at least two months before it was completed and it is in evidence that in 1906 fifty percent of the Pottawatomie Tribe spoke and understood English sufficiently well to conduct their own business affairs. So, while we recognize the fact that it is quite impossible to say that every member signing the the agreement understood fully and completely the import of the agreement, it is quite evident that many of them did.[182]

Similarly, in the situation under consideration, there is no evidence which would reflect on the honesty or integrity of the Commissioners, or on the certificate of the official interpreter who certified the accuracy of the proceedings. The agreement was under consideration for five months before it was completed and there were ample safeguards to insure that the Indians knew what they were signing.

Further casting doubt on the allegations of fraud, coercion or inequity are the facts that the Quechan Tribe actually received under the 1893 Agreement and 1894 Act what they wanted; that what they received was fair and adequate for their purposes; and that the allotment of irrigable lands and cession of surplus lands was consistent with similar schemes being accepted by other tribes at that time.

In specific, in the original petition that the Quechans sent to the President and Congress, the Tribe stated: "We are willing to give up a large part of our reservation because as it is it is worthless to us;" and "[w]e do not want a great deal of land, for we have noticed that the

[182] 2 Ind. Cl. Comm'n 207, 219, 227–28 (1952); *see also Klamath and Moadoc Tribes* v. *United States*, 296 U.S. 244, 253–54 (1935).

white man who in this country has small holdings, 5 and 10 acres, and cultivates his land well, is the most successful * * *." [183] Some time later, Government experts determined that, with an average family consisting of four or five people, the twenty to twenty-five acres provided was adequate for subsistence.[184] In 1911, however, the allotments were increased from five to ten acres per Indian.[185]

In assessing the possibility that a fraud was worked upon the Quechan Tribe by the 1893 Agreement and the congressional ratification, it should be kept in mind that a long line of Supreme Court cases [186] hold that Congress has unfettered discretion to dispose of any lands of an Executive Order reservation for the public welfare and for the benefit of the Indians.

> An Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim. * * * [187]

Thus, since the Reservation was created by Executive Order, the Congress could have taken the Reservation without compensation had it deemed the action to be for the public welfare and for the benefit of the Tribe.

Finally, and perhaps conclusive of the question, is the fact that when a treaty has been made and ratified by the Congress, neither the executive branch nor the judicial branch has the authority to examine the basis of the treaty for the purpose of annulling the treaty in whole or in part. The basic rules on the validity of treaties and on treaty-making were discussed by the Supreme Court in *United States* v. *Minnesota:*

> But, while the earnestness of counsel has induced us to examine the basis of the argument advanced, there is another reason why the effort to overcome the cession must fail. Under the Constitution the treaty-making power resides in the President and Senate, and when through their action a treaty is made and proclaimed it becomes a law of the United States, and the courts can no more go behind it for the purpose of annulling it in whole or in part than they can go behind an act of Congress. Among the cases applying and enforcing this rule some are particularly in point here. In *United States* v. *Brooks*, 10 How. 442, where a grant made to certain individuals by the Caddo Indians in a treaty between them and the United States was assailed by the United States as induced by fraud practiced on the Indians, the Court held that "the influences which were used to secure" the grant could not be made the subject of judicial inquiry for the purpose of overthrowing the treaty provision making it.[188]

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[183] S. Exec. Doc. No. 68, *supra* n. 9, at 15; *see* text accompanying notes 9–15 *supra*, "Origin of 1893 Agreement."

[184] Letter from District Engineer, Geological Survey, Yuma to Chief Engineer, Reclamation Service, May 28, 1906, File 154–A, *supra* n. 74, A609709.

[185] Act of Mar. 3, 1911, 36 Stat. 1058, 1063.

[186] *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294 (1902); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567 (1902); *Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 175–76 (1947); *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 326 (1942).

[187] *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[188] 270 U.S. 181, 201 (1926).

Thus, we have found both that the evidence of fraud or coercion is not convincing and that, even if there were convincing evidence of fraud or coercion, neither the Solicitor nor the Secretary of the Interior would have authority to annul or modify the 1893 Agreement as ratified by the 1894 Act.

Legal Precedents

While we have attempted to reach our conclusions as to the effects of the 1893 Agreement and 1894 Act without being bound by prior legal interpretations of that Agreement and Act, this Memorandum would be incomplete without a recitation of those interpretations.

By 1935, the United States District Court for the Southern District of California had decided in two cases[189] that cession, at least insofar as surplus irrigable land was concerned, was effected immediately by the 1893 Agreement and the 1894 Act. We find no reason why the conclusion of that court would not pertain to nonirrigable lands.

In his 1936 opinion, Solicitor Margold specifically found that the Agreement and Act effected immediate cession. Officials throughout this Department as well as state and local officials and private parties have been acting in reliance upon the Margold Opinion for over forty years.

In 1968, Solicitor Weinberg issued an opinion relying on the conclusion that the Indian interest in the nonirrigable lands was extinguished under the 1894 Act, and implicitly endorsing the validity of the Margold Opinion.[190]

In *Arizona* v. *California*,[191] the Solicitor General took a position on the part of the United States which implicitly adopted the conclusion of the Margold Opinion. In the proposed findings, and conclusions submitted to the Special Master in that case, the Solicitor General interpreted the 1893 Agreement and 1894 Act as having resulted in immediate cession.[192] No Indian water rights were, therefore, awarded to the United States on behalf of the Quechans with respect to any Reservation lands other than the 7,743 acres of allotted lands.[193]

CONCLUSION

In conclusion, we find that Indian title to the nonirrigable lands of the Yuma Reservation was unconditionally extinguished on Aug. 15,

[189] *United States* v. *Johnson*, Civil No. 118–C (S.D. Cal., Aug. 2, 1935); *United States* v. *Walker*, Civil No. 126–J (S.D. Cal., Oct. 10, 1933).

[190] Memorandum from the Solicitor to the Secretary of the Interior, dated June 2, 1968.

[191] 373 U.S. 546 (1963).

[192] Federal Intervenor's Proposed Finding 4.8.3, *Arizona* v. *California*, 373 U.S. 546 (1963). *See* text following n. 120 *supra*, *"Was Cession of Land Conditional?"*

[193] Special Master's Report (Dec. 5, 1960), at 269, *Arizona* v. *California*, 373 U.S. 546, *Decree*, 376 U.S. 340, 344 (1964).

1894, upon ratification of the 1893 Agreement by Congress, and that the Opinion of Solicitor Margold is well founded and is affirmed.

H. GREGORY AUSTIN,
Solicitor.

APPROVED:

THOMAS S. KLEPPE,
Secretary of the Interior.

RESPONSE TO FEBRUARY 17, 1976, REQUEST FROM THE GENERAL ACCOUNTING OFFICE: INTERPRETATION OF MINERAL LEASING ACT OF 1920, AND OUTER CONTINENTAL SHELF LANDS ACT ROYALTY CLAUSE*

Oil and Gas Leases: Production—Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases—Words and Phrases

"Production" as used in all Federal oil and gas leases includes all oil and gas withdrawn from a reservoir.

Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

In the absence of a specific statutory bar, such as is found in secs. 18 and 19 of the Mineral Leasing Act of 1920, royalty is due in the "amount or value" of all production from a federal oil and gas lease, including vented and flared gas and gas or oil leaked, spilled or used in producing operations.

Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases

An assessment greater than the normal royalty charge may be required for oil and gas that are wasted.

M.P. Smith, 51 L.D. 251 (1925); *Computation of Royalty under Section 15*, 51 L.D. 283 (1925), overruled.

M–36888 *October 4, 1976*

OPINION BY
SOLICITOR AUSTIN

OFFICE OF THE SOLICITOR

To: Secretary

SUBJECT: Response to February 17, 1976, Request From General Accounting Office: Interpretation of Mineral Leasing Act of 1920, and Outer Continental Shelf Lands Act Royalty Clause

This memorandum responds to a request dated Feb. 17, 1976, by the General Accounting Office for a report on the views of the Department of the Interior and to questions raised by appeals pending before the Director, Geological Survey, regarding the proper construction of the oil and gas royalty provisions of the Mineral Leasing Act of 1920, *as amended and supplemented*, 41 Stat. 437, 30 U.S.C. §§ 181–287 (1970), and the Outer Continental Shelf Lands Act, Aug. 7, 1953 (67 Stat. 462), 43 U.S.C. §§ 1331–43 (1970) (referred to as OCS Act).

The relevant portions of the Mineral Leasing Act say that the lessee shall pay a percentage of the "amount or value of the production

*Not in Chronological Order.