TITLE TO CERTAIN LANDS WITHIN THE BOUNDARIES OF THE FORT YUMA (NOW CALLED QUECHAN) INDIAN RESERVATION

M–36908

January 2, 1979

1. Indian Lands: Ceded Lands—Statutory Construction: Generally

When interpreting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. Doubtful expressions are to be resolved in the Indians' favor.

2. Indian Lands: Ceded Lands—Statutory Construction: Generally

Congressional intent to modify or abrogate Indian property rights must be clear and cannot be lightly inferred.

3. Act of Aug. 15, 1894—Indian Lands: Ceded Lands

The Agreement of Dec. 4, 1893, between the Yuma (now Quechan) Indians and the United States, ratified in the Act of Aug. 15, 1894 (28 Stat. 286, 332) provided for a conditional cession of the nonirrigable land of the Fort Yuma Reservation. The conditions which included allotment and sale of surplus irrigable land and the opening of nonirrigable lands to settlement and entry, did not occur during the decade following the agreement and ratifying statute.

4. Act of Apr. 21, 1904—Indian Lands: Irrigation—Statutory Construction: Generally

Sec. 25 of the Act of April 21, 1904 (33 Stat. 189, 244), which authorized the application of the 1902 Reclamation Act to the Fort Yuma and Colorado River Reservations, and which provided for the allotment and sale of surplus irrigable lands on those reservations, was unrelated to and was not intended to effect the conditional cession provided for in the 1893 agreement and the 1894 ratifying statute.

This opinion overrules two previous Solicitor's Opinions on the same subject: M–28198 (Jan. 8, 1936), finding, inter alia, that the Indian title to certain lands within the Fort Yuma Indian Reservation has been extinguished; and M–36886, 84 I.D. 1 (1977), Title to Certain Land Within the Boundaries of the Fort Yuma Indian Reservation as Established by the Executive Order of Jan. 9, 1884.

OPINION BY
OFFICE OF THE SOLICITOR

December 20, 1978

To: Secretary

From: Solicitor

Subject: Title to Certain Lands Within the Boundaries of the Fort Yuma (Now Called Quechan) Indian Reservation

The Quechan Indian Tribe, the Bureau of Indian Affairs,[1] and the

[1] Memo of Nov. 15, 1977, from Acting Assistant Secretary for Indian Affairs to Associate Solicitor for Indian Affairs.

Chairman of the Senate Committee on Interior and Insular Affairs,[2] have requested this Department to reconsider the legal question of whether the Quechan Tribe retains ownership of approximately 25,000 acres of nonirrigable land within the boundaries of their 1884 Executive Order Reservation. This question has been considered on two previous occasions by the Solicitor, resulting in the issuance of opinions in 1936 (M–28198), and 1977 (M–36886, 84 I.D. 1), which have concluded that title to this land was unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement and an 1894 statute, ratifying such agreement. (28 Stat. 286, 332).

Prior to the issuance of the 1977 Solicitor's Opinion, a draft Solicitor's Opinion to the opposite effect was widely circulated. That Opinion concluded that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the nonirrigable lands, that the conditions were not fulfilled, and that the cession of the nonirrigable lands had therefore not been effected. Department files on this subject reveal that the draft opinion was seriously considered, and that extensive preparations were made for the issuance of a decision in favor of the tribe. The February 1976 decision by the Solicitor upholding the 1936 opinion was an unexpected event. The Senate Subcommittee on Indian Affairs held hearings in May and June of 1976, to air the controversy and learn the legal basis of the 1976 decision by the Solicitor. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion supporting the 1976 decision. A written opinion, M–36886, was published on Jan. 17, 1977.

The sharp and continuing divergence in legal views with respect to this issue have persuaded me that the matter merits reconsideration. Accordingly, I directed review of the Department's files and all previously prepared legal opinions to provide an independent evaluation of the Quechan claim to the 25,000 nonirrigable acres.

Having reviewed that evaluation, I conclude that the 1893 agreement and 1894 ratifying statute provided for a *conditional* cession of the nonirrigable acreage. The conditions articulated in the agreement, which included the allotment and irrigation of irrigable land to the Indians, the sale of surplus to settlers under strictly prescribed conditions, the construction of an irrigation canal, and the opening of nonirrigable lands to settlement, were not met by the United States. No lump sum, or other form of compensation, was provided for the land cession. Allotment and irrigation did not occur on the reservation until Congress passed a 1904 statute (33 Stat. 189) which applied the Reclamation Act to the Ft. Yuma and Colorado River Reservation. The 1904 Act appears to be totally unrelated to the 1893 cession agreement, ex-

[2] Letter of Feb. 8, 1977, from Senator Henry Jackson to Honorable Cecil Andrus, Secretary of the Dept. of the Interior.

cept for mention of it in the legislative history as part of the explanation of the continuing lack of irrigation on the reservation. In short, the conditional cession in 1893 was never effected and the title to the nonirrigable acreage, therefore, remains in the Tribe.

The records of this Department reveals that the nonirrigable lands were administered as tribal lands until the 1936 opinion of Solicitor Margold. *See* footnotes 8 and 9, *infra*, detailing the numerous occassions on which actions were taken by the Department during that period on the basis that these were Indian lands.

In the more than forty years since this Department first ruled that the land in question did not belong to the Quechan Tribe, third parties have acquired various interests such as easements or rights of way. Some of these interests existed prior to the establishment of the reservation, some were granted by Congress and still others were granted by Bureaus in this Department. My recognition of title in the Quechan Indians is subject to these valid third party interests. The Quechan Indian Tribe has previously recognized that their title will be subject to each of these third party interests and also to lands taken by the United States for reclamation purposes.

Background Facts

The Fort Yuma Reservation was created by executive order on Jan. 9, 1884. (1 Kappler, Indian Affairs—Laws and Treaties 832.) In 1893, the Quechan Indians sent a petition to the President and to Congress in which they indicated a willingness to cede their rights in their reservation in return for receiving allotments of irrigated land. (S. Exec. Doc. No. 68, 53rd Cong. 2d Sess. 14–16 (1894)). The Indians expressed belief that they would improve economically if they had smaller, individual units of irrigated land, suitable for farming. In 1893, an agreement was negotiated providing for the allotment of irrigable lands, the sale of surplus irrigable lands under strictly prescribed conditions, the holding of sale proceeds in trust for the tribe and the opening of nonirrrigable acres to settlement under the general land laws of the United States. There was no other provision for a lump sum payment or for any identifiable consideration. The agreement was ratified by Congress in 1894 (28 Stat. 286, 332). The ratifying act further provided that construction of an irrigation canal (the right-of-way for which had been granted in an 1893 statute) would have to be commenced within 3 years of the date of passage of the act or the right-of-way would be forfeited. In addition, each adult male was to receive free water for 1 acre of his allotment over a 10-year period.

During the following decade, allotment did not occur, the President did not proclaim the nonirrigable

lands a part of the public domain and open to settlement, and the irrigation canal was not built. Then, on June 17, 1902, Congress passed the Reclamation Act (32 Stat. 388). In 1904, mindful of the continuing and unsatisfied need for irrigation on both the Fort Yuma and Colorado River Reservations, Congress passed an Indian Appropriations Act which extended the benefits of the 1902 Reclamation Act to those two reservations, and which provided for the allotment of irrigable land to tribal members and for the sale of surplus irrigable lands to non-Indians (Act of Apr. 21, 1904, 33 Stat. 189, 224). The terms under the 1904 Act for the sale of surplus lands and for holding of proceeds differed significantly from those in 1893 agreement and 1894 ratifying act. The 1904 Act was amended in 1911 to increase the allotments to 10 acres. (36 Stat. 1059, 1063.) Allotment of irrigable lands was completed by 1912. The irrigable lands were fully disposed of by 1949. The 25,000 nonirrigable acres were not returned to the public domain, opened to settlement and disposed of. They are the subject of this opinion. While the majority of these lands continue to be nonirrigable, it is estimated that between 5,000 and 5,500 acres, the bulk of which are in California, are "practicably" irrigable.

Legal Analysis—1893 Agreement and 1894 Statute

The resolution of the title question turns, I believe, on the correct interpretation of the 1893 agreement and the ratifying statute. Case law establishes that when interpeting Federal agreements and statutes pertaining to Indian Affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices, to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. In so doing, doubtful expressions are to be resolved in the Indians' favor. [3] Clearly, such interpretative approach is appropriate in a case such as this where the trustee is examining and interpreting a transaction involving valuable assets of its ward, and in which the trustee is the other party to the transaction, who stands to gain from the disposition of the assets other than to the tribe. As stated in the case of *Navajo Tribe of Indians* v. *United States*, 364 F. 2d 320, 322, 323 (Ct. Cl. 1966):

> Since the Department of the Interior had an obligation to safeguard the property of the Navajos when they were dealing with third parties, it is clear that an even greater duty existed when the Department itself entered into transactions with the Indians. * * * Because of

[3] *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *Antoine* v. *Washington*, 420 U.S. 194 (1975), *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here are those which are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

this and because of the Government's special duty toward the Indians, the various dealings must be carefully scrutinized. * * *

Neither the agreement nor the ratifying statute is sufficiently clear with regards to the cession of the nonirrigable lands to compel one interpretation over another. The actual language of the cession Article is:

> Article I. The said Yuma Indians, *upon the conditions hereinafter expressed,* do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following described tract of country in San Diego, California, established by executive order of January 9, 1884, which describes its boundaries as follows * * * . (*Italics added.*)

The remaining articles of the agreement provide for the allotment of irrigable lands to Indians, the sale of surplus irrigable lands to settlers, the manner in which such sale was to be conducted and proceeds thereof handled, the issuing of trust patents and the opening of lands, not subject to irrigation, to settlement.

In Article I, there is an apparent conflict of meaning, with regard to timing of the cession, between the phrase, "*upon* the conditions hereinafter expressed" and the phrase, "do *hereby* surrender and relinquish." Also, the remainder of the agreement does not list conditions or governmental duties, describing them as such; this makes it difficult to discern from the face of the document, which of the Articles contain conditions or compensation which might affect the relinquishment. Article VI, the only article specifically relating to the nonirrigable lands, merely provides for the future opening of such lands to settlement—suggesting a cession in trust, *i.e.*, a cession solely for purposes of permitting the United States to act as broker with respect to those lands. *See Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). The corresponding provision in the ratifying statute provides that the nonirrigable lands *shall* become a part of the public domain, and *shall* be opened to settlement by *Presidential proclamation.* The language is in the *future* tense and requires executive action. Lastly, while the Article providing for the sale of irrigable lands provides for holding proceeds for the tribe, there is no corresponding arrangement expressed regarding the sale of nonirrigable lands. This raises the question of whether the same arrangement was intended, or understood, for the nonirrigable lands.

Under these circumstances the language is not clear and unambiguous on its face. It is not clear to me, from the cited language, that the Indians immediately ceded title to all their reservation lands, for no money whatsoever, and without actual performance of certain acts by the U.S. Government.

Because the language of the agreement and statute is not clear,

it is necessary to resort to rules of interpretation. I am aware of the general principles of contract law which favor the construction of provisions of contracts as promises rather than conditions, 3A A. Corbin, *Contracts*, § 635 (rev. ed. 1960); 5 S. Williston, *A Treatise on the Law of Contracts*, § 665 (W.H.E. Jaeger ed. 1961), and the general principles of real estate law which favor covenants over conditions. *See* 2 R. Powell, *The Law of Real Property*, §§ 187, 188 (1974); cf. I *American Law of Property*, § 2.8 (1952); 5 id. § 21.3 (a). Technical rules of conveyance should not be applied in the construction of agreements between the Indians and the Government. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). Rather, as noted above, the focal point of such construction is the intent of the parties. Thus, when construing another cession agreement containing conditional language, the Supreme Court examined legislative history, contemporary statements by tribal members, actual benefits delivered to the tribe (*i.e.*, lump sum payment) and subsequent treatment of the lands. *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975). In finding that an immediate cession was effected, in spite of seemingly conditional language, the Supreme Court relied heavily on the facts that a sum certain was paid for the lands and that there was no evidence that the lands were subsequently administered as Indian lands. (*DeCoteau*, *supra* at 448). Furthermore, the Court examined numerous contemporaneous accounts of the cession, which showed that at least some Indians believed they had sold their land.

The background information in this case is quite different from that in *DeCoteau*. The legislative history indicates that the main purpose of the Agreement—from the standpoint of the Indians who signed it,[4] and the Congress that ratified it [5]—was to provide irrigation to the reservation. Indeed, in the 1894 statute, Congress added statutory provisions concerning the construction of a canal requiring that it be commenced within 3 years or the right of way previously granted would be forfeited. The Indians perceived

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[4] In a post-Agreement letter from the Indians 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 if the land now embraced in our reservation could be thrown open to settlement an irrigating 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."

(Italics added).

53rd Congress, 2d Session, Senate Ex. Doc. 68 at 14–15.

[5] The paramount reason for the proposed Agreement is found in the proposition of the Colorado River Irrigating Co. to furnish the Yuma Indians with water for irrigation purposes. 53rd Congress, 2d Session, House Report No. 1145, at 2. See also Senate Ex. Doc. 68, *supra*. Later legislative history affirms this view of the 1894 Act. 58th Congress, 2d Session, Senate Report 1660.

farming irrigated allotments as the key to achieving their goal of economic improvement and they offered to cede their reservation in return for irrigated allotments, perhaps believing they had to do so to entice Government action (since the negotiation of cession-allotment agreements was a prevailing practice at that time). There is no evidence that obtaining money as the desired compensation was considered by the Indians.

Evidence of either the Government's or the tribe's intent regarding the nonirrigable lands is inconclusive. There is nothing to suggest that the Government wanted to acquire the nonirrigable lands. In the negotiated agreement, the Government did not specify any compensation for the nonirrigable lands, whereas it did clearly provide compensation for any irrigable lands that would be removed from Indian ownership. This is a particularly troublesome point because the cession agreement was negotiated pursuant to the General Allotment Act which authorized the Government to negotiate for the cession of surplus Indian lands, *upon just* and *equitable* terms. (Act of Feb. 8, 1887, 24 Stat. 389, § 5, 25 U.S.C. § 348 (1976). This failure of compensation for the nonirrigable lands seems a crucial "oversight" of the agreement.

To be sure, Congress could have simply taken the nonirrigable lands under Article VI of the Agreement with no compensation.[6] However, evidence of such intent is not obvious. First, the Government had proceeded by agreement with the Indians. Secondly, the Agreement and statute were intended to implement the General Allotment Act, which authorized the Secretary to negotiate with Indians for the cession of their lands only under such terms as were "just and equitable." Congress and the Department, it seems, were acting more in their guardianship capacity,[7] and not in a confiscatory manner.

There is, moreover, nothing in the history of that time indicating that the Government had any particular interest in acquiring the lands in question. By contrast, in the case of the cession agreement construed in the *DeCoteau* case, *supra*, there was evidence of strong pressure by non-Indian settlers on the Government to acquire particular Indian lands so that the settlers could move in. Not only is evidence of such pressure totally lacking in this case, but the Government's failure to ever open the land to settlement strength-

[6] The courts have held that Congress (or the executive, for that matter) *could* constitutionally take the land of an executive order reservation even without providing the tribe any compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317 (1942); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103–104 (1949). The result of these cases, however, was not clearly anticipated in 1904. *Cf.* 34 Op. A.G. 181 (1924); William F. Tucker, 13 L.D. 628 (1891); C. N. Cotton, 12 L.D. 205 (1890).

[7] *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *United States* v. *Creek Nation*, 295 U.S. 103, 109–110 (1935); *Lane* v. *Pueblo of Santa Rosa*, 249, U.S. 110, 113 (1919); *United States* v. *Lynah*, 188 U.S. 445, 462 (1903).

ens the impression that no one was very interested in, much less had specific designs on, the land.

There is a similar lack of evidence as to how the Indians understood the agreement to affect the status of the nonirrigable lands. It must be remembered that Article VI of the agreement did not refer to the cession or sale of nonirrigable lands, nor did it state they were returned to the public domain. It merely stated they would be opened to settlement. One might assume that because the Indians expressed interest in farming irrigated land, that the Indians were as disinterested in the nonirrigable land as was the Government. But, whether the Indians understood that they had casually given away such land, without any apparent compensation, and without retaining any interest therein, is a further assumption for which there is simply no evidence and, therefore, which we are not justified in making. Belief that non-Indian settlement on such lands to be a benefit to the Indians and, therefore, a condition of, or compensation for the cession of such lands, in strict technical sense, a possible theory supporting an immediate cession. However, it is not clear that these Indians—who were not versed in either the English language or such a sophisticated concept—understood that they would be giving up valuable real estate in exchange for the "privilege" of having non-Indian settlers as neighbors on their reservations.

In addition to the lack of payment, and the lack of evidence that the parties intended the transfer of the nonirrigable lands, this case differs sharply from that in *DeCoteau* and in *Rosebud Sioux Tribe*, *supra*, in that the Department of Indian Affairs continued to administer the nonirrigable lands in trust for the tribe in the granting of leases and permits and in holding rents in trust for the tribe.

The results of an intensive file review, conducted in 1975 by staff of the Solicitor's Office and detailed below, show a clear and basically consistent history of administration of the nonirrigable lands by the Bureau of Indian Affairs prior to the 1936 Solicitor's Opinion. This administrative history was acknowledged in the 1936 Opinion. Maps of the area issued between 1894 and 1936 include the Fort Yuma Indian Reservation and depict its boundaries as declared in the 1884 Executive Order.[8] The

[8] *E.g.*, U.S.G.S. map, "Colorado River from Black Canyon, Ariz.–Nev. to Arizona–Sonora Boundary," surveyed in 1902 and 1903 (Exhibit RO–13, *Quechan Tribe* v. *United States*, Indian Claims Commission Docket No. 320 [hereinafter cited as Claims Exhibit——]); U.S.G.S. map "Yuma Quadrangle, California–Arizona," ed. of Apr. 1905 (BIA Files, Phoenix); 1936 reprint of Apr. 1905 U.S.G.S. map (Claims Exhibit RO–13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (*e.g.*, Third Annual Report: 1903–04, at 192–193 (2d ed. 1905); Fifth annual Report: 1906, at 100–01 (1907)); U.S. Reclamation Service Map No. 16774 (Jan. 1916) (Yuma Project File 154–D, A610158; File 154, "Lands–General," A609223); U.S. Reclamation Service Map No. 17471 (1917) (Yuma Project File 154, "Lands–General," A609224, 2–328). The latter two maps, which were produced after issuance of the Indian trust allotment 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 plat of survey prepared by General Land Office Surveyor

Bureau of Land Management's plat records, as well as the original documents signed at the Secretarial level, show that all rights of way issued by the Department across the nonirrigable lands (except those which may have been issued by the Bureau of Reclamation within its own rights of way) were issued under statutory authority pertaining to Indian reservations.[9]

The Commissioner of Indian Affairs issued trader's licenses to occupy and use nonirrigable land on the reservation, near the western boundary until the issuance of the

F.N. 8—Continued
John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions Group 264, Calif.) repeatedly refer to, affirm 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; and General Land Office Special Instructions Group 281, relating to T. 16 S., R. 23 E., S.B.M., dated Apr. 15, 1932, refers to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River" (Claims Exhibit RO–13, and, supporting documents). Additional maps recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 9 *infra*.

[9] "Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, Calif.," 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 (1976)) (BIA Files, Phoenix) (the BLM plat records for sec. 36, T. 16 S., R. 22 E., Record 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 Calif. Ry. in Yuma Indian Reservation, Calif.," received by Superintendent 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 Co., Right of Way Map LA 011977, approved by First Assistant Secretary of the Interior A. A. Jones 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 (Claims Exhibit 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 Mar. 3, 1891 (26 Stat. 1095, 1101–02, *as amended*, 43 U.S.C. §§ 946–49 (1970)), sec. 2 of the Act of May 11, 1898 (30 Stat. 404, *as amended*, 43 U.S.C. § 951), 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 Co. 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," Calif. Highway Commission, dated July 16, 1923, *as amended* by maps of changes "A" through "D", dated Sept. 28, 1923, through May 1924, approved

(Continued)

1936 Solicitor's Opinion.[10] Sand and gravel leases were issued by the Bureau of Indian Affairs on tribal unallotted lands within the Yuma Indian Reservation from at least 1929 to 1936 pursuant to sec. 26 of the Act of June 30, 1919 (41 Stat. 3, 31, *as amended*, 25 U.S.C. § 399 (1976)). The tracts which were described were all nonirrigable lands in the western portion of the reservation.[11]

F.N. 9—Continued
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 (1976)), and amending the right of way as originally approved under the same act on Nov. 9, 1917 (Claims Exhibit RO–8; BLM Plat Records, Sacramento): 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, 858, 43 U.S.C. § 148 (1970), 25 U.S.C. § 352 (1976)) (Yuma Project File 150, "Purchase of Lands–General, 1909 thru June 1919," A606156, A606163, A606167–68); "Southern Pacific Railroad Station Grounds" map received by the Superintendent of the Yuma Indian Reservation June 30, 1928, and approved by the Department on Dec. 18, 1928, pursuant to the Act of Mar. 2, 1899, *supra* (Claims Exhibit RO–11; BLM Plat Records, Sacramento). The Bureau of Land Management plat records in Sacramento, Calif., 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*, 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 right of way, LA 040525, issued Mar. 23, 1927, under the Act of Feb. 15, 1901, *supra*.

[10] Trader's License covering 80 acres in the N/2 of the NW/2, sec. 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).

[11] Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency; Letters dated Dec. 13, 1939, and Apr. 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guarantee Co.; Letter dated Mar. 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler; Letter dated Nov. 18, 1934, from H. L. Gardner to the Quechan Tribal Council; Letter dated Aug. 3, 1934, from H. L. Gardner to Superintendent Jolley, Fort Yuma Indian Agency; 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 the 1919 Act (BIA Files, Phoenix, Claims Exhibits RO–4, RO–12, RO–15).

There is no record of management of the nonirrigable areas by the Bureau of Land Management prior to 1936. Only one document even hints at such 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 nonirrigable 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 nonirrigable 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 Co. for a "Piece of

In addition to this formal evidence of administration, there are many informal recognitions of the continued inclusion of the nonirrigable lands within the Indian reservation. Both the Commissioner of Indian Affairs and the Director of the Reclamation Service described the Yuma Project as encompassing only "the *bottom lands* in the Yuma Indian Reservation," [12] and the chief officers of the two bureaus repeatedly referred to the nonirrigable lands as "Indian country within the meaning of the law," [13] "Indians lands * * * [which] are not public lands in the ordinary sense of the word," [14] and lands the disposal of which "is primarily

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Ground at Pot Holes" (a site in sec. 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 the documents referred to in note 10 *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 nonirrigable 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, as several of the maps referred to in note 8 *supra* indicate. It did *not* cover the nonirrigable 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 nonirrigable 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 opened 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 practically entirely, irrigable. See, *e.g.*, leases I24r–202, I24r–305, I24r–307, I24r–354. Leases 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 I24r–169 and described as secs. 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 sec. 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for farming or grazing. Considered as a whole, however, the account analysis supports BIA jurisdiction over the nonirrigable lands prior to 1936.

[12] Fifth Annual Report of the Reclamation Service: 1906, at 100 (1907) (italics added); Letter dated Feb. 28, 1906, from the Commissioner of Indian Affairs to the Secretary of the Interior (Yuma Project File 154–A, "Indian Lands," A609694). A letter dated July 18, 1913, from Reclamation Service Yuma Project Engineer Sellew to supervising engineer Hill enclosed three prints of a map showing "the entire Indian Reservation," including as one subdivision thereof "the area allotted to the Indians, amounting to about 8,200 acres" (Yuma Project File 154–A, "Indian Lands, 1910 thru June 1919," A609380, A609382–84).

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

[14] Copy of memorandum dated Mar. 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierras Power Co. for a right of way "west of the east line of Sec. 19, T. 16 S., 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 thru 1929").

within the control of the Indian Office." [15]

More particularly, the nonirrigable lands between the reservation levee and the Colorado River are expressly recognized as being reservation lands subject to the jurisdiction of the Indian Bureau, except insofar as such lands were necessary for the protection of the levee. In a letter dated May 28, 1906, District Engineer Homer Hamlin advised the Director of the U.S. Reclamation Service that "[t]he jurisdiction over this land 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." [16] In 1907, Superintendent Deaver of the Yuma Reservation raised the question of the status of these lands, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purposes," in light of the failure of Congress, in the Act of Apr. 21, 1904 (33 Stat. 189), to "provide for the disposition of the balance of the reservation that is not irrigable." [17] The Secretary of the Interior directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters. On Apr. 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." [18] In 1919, the Director of the Reclamation Service implicitly recognized the right of the Indian Office to irrigate "some lands in Sec. 25, T. 16 S., R. 22 E., which lie outside of our levee and consequently are not included within the proposed Yuma project." [19] And in a letter dated Oct. 20, 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.

[15] Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden (Yuma Project File 154–A, "Indian Lands, 1910 thru June 1919," A609414).

[16] Yuma Project File 154–A, "Indian Lands," A609709–11. See *id.* A609702–13 for related Secretarial level correspondence.

[17] 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 (Yuma Project File 154–A, "Indian Lands," A609721–28).

[18] Yuma Project File 154–A, "Indian Lands," A609734–39.

[19] 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.").

In fact, the jurisdiction of the Bureau of Indian Affairs over the nonirrigable lands of the 1884 reservation was not challenged, insofar as the available documents show, until July 15, 1935, during the final stages of approval of the right of way for 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 Indian lands, mostly the latter. The entire right of way route was considered to be within the reservation, so that compensation would have to be paid to the Indians for both the allotted and unallotted lands.[20] When the Reclamation Service decided to construct the canal itself, it shifted the right of way slightly north so that only tribal lands would be involved, and, in a letter dated June 27, 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 Sec. 13 of the Act approved June 25, 1910 (36 Stat. 855, 858, 43 U.S.C. § 148 (1970))," an Act applying 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 dated July 5, 1934, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands." [21] The Reclamation Service's reversal of position in 1935 seems to have been prompted by its receipt of a report dated Mar. 12, 1935, making substantial claims for compensation and consideration on behalf of the Quechan Indians.[22] The resulting dispute led to the 1936 Solicitor's Opinion.

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 [23] by Representative Stephens of Texas on Dec. 6, 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, most of the "nonirrigable" lands which are affected by this Opinion) was in Indian ownership at that time. And, during hearings in San Diego,

[20] *See, 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; "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed Apr. 27, 1928 (Claims Exhibits RO-7, RO-10).

[21] Claims Exhibit RO-7. See in addition the Bureau of Reclamation document cited in note 14 *supra*.

[22] *Id.*

[23] 49 Cong. Rec. 748.

Calif., 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 the lands of the Indians down there [in the Yuma Indian Reservation]" and told John Curran, a Yuma Indian concerned about compensation for the right of way, "They will have to pay you for it, if they take your land." [24]

Solicitor Austin's 1977 Opinion devotes much effort to establishing that the Department's administrative practices with respect to these lands were inconsistent at best. After carefully reviewing his discussion, it seems clear that the isolated deviations do not alter the fact that this Department treated the nonirrigable acreage as belonging to the Indians.

An example of why the 1977 analysis of administrative practices is unpersuasive can be found on p. 29 of that Opinion where Solicitor Austin quotes a 1903 letter from the Commissioner of Indian Affairs on the subject of the nonirrigable lands. The quoted language, however, is taken somewhat out of context as can be seen from the remainder of the Commissioner's discussion which is found in footnote 16. Taken as a whole, the Commissioner's statement does not offer strong support for the proposition that the nonirrigable lands had been ceded. Secondly, Solicitor Austin cited a series of letters by government officials, giving their opinion of the effect of the 1893 agreement. However, such statements appear to me to be more in the nature of gratuitous comments, rather than researched legal opinions, and they do not deal with the *essential issue* of how the lands were administered. In fact, the comments quoted appear to be confused on the point of whether the nonirrigable lands were public domain lands. And, as Solicitor Austin then stated on p. 31 of the 1977 opinion:

> * * * there is a great deal of administrative material that indicates that the subject of non-irrigable 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.

Thirdly, the 1977 Opinion relies strongly on the Warboys' survey in 1928 as evidence of the Government's view of the current reservation boundaries. However, it has been pointed out that the surveyor's notes [25] indicate that the surveyor was not instructed to or attempting to define the reservation boundaries, as affected by the cession agreement. Moreover, Warboys' comment, cited by Solicitor Austin, only dealt with the status of *irrigable* lands and not of the nonirrigable lands. Therefore, the survey does little to per-

[24] *Survey of Conditions of the Indians in the United States, Hearings before a Subc. of the Senate Comm. on Indian Affairs,* pt. 33, 73d Cong., 1st Sess. 17245 (1935). See *id.,* pt. 2, 70th Cong., 2d Sess. 628–29 (1929) (reference to lease of Quechan tribal lands).

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

suade one that it reflected the Government's view of the continuing status of the nonirrigable lands. A last example of the unpersuasive line of argument taken to discredit evidence of administrative practices is the statement that the cession of the nonirrigable lands was not entered on the tract books until the 1960's which may explain why the lands were administered as Indian lands. The nonentry in the tract books does more to suggest that the Government did not consider the nonirrigable lands ceded than it does to diminish the impact of administrative treatment as tribal lands.

I am persuaded that the administrative treatment reflects what must have been the prevailing view that the lands had not been separated from the reservation. Even if there were some inconsistency, such inconsistency does not detract from the legal significance of an undeniable pattern of administration of the lands as tribal lands. In any event, neither the executive nor the legislative branches of the Government treated the 1893 Agreement and the 1894 Act as having worked an immediate cession of any reservation lands or termination of the reservation.[26]

In conclusion then, it appears far more likely than not, considering the actual language of the documents, the stated purpose of the Indians, the circumstances surrounding the negotiation of the agreement, the fact that the agreement was negotiated under the authority and therefore prescribed compensation terms of the General Allotment Act, and the overwhelming evidence of continuing treatment of the subject lands as reservation lands, that an immediate automatic cession of the irrigable and nonirrigable lands was not intended by either party to the agreement. Rather, it seems more logical that the cession of the reservation lands was contingent upon what the Indians perceived as adequate compensation—allotment to them of irrigable lands, sale of their surplus lands under profitable terms, the proceeds to be held in trust for the Tribe, the construction of an irrigation canal, and the opening of the area to settlement. I can find no legal or factual basis for separating the nonirrigable lands from the irrigable lands and deciding that the nonirrigable lands were not subject to fulfillment of such conditions. Indeed, strong argument can be drawn from the nonirrigable acreage section that cession of those lands was specifically tied to the condition that the area be returned to the public domain by executive order, opened to settlement and the tribe compensated as the lands were sold to settlers.[27]

[26] In 1900, both the Dept. of the Interior and the President felt it was necessary to issue an executive order (dated December 19, 1900) to withdraw certain lands in the then Territory of Arizona from the reservation by revoking the 1884 Executive Order as to those lands.

[27] Although the 1894 Act does not provide as detailed a description of the various duties of the Government as trustee as was the case in *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920), some form of trusteeship status may

I believe that the foregoing interpretation of the agreement comports with the previously cited canons of construction relating to Indian agreements and statutes, in that it considers all relevant circumstances to determine what the parties intended and it resolves what may be ambiguous in the Indians' favor. Moreover, this interpretation is appropriate in light of the well established legal principle that Congressional action terminating or altering Indian property rights is not to be lightly inferred. Such Congressional intent must be clear.[28] Indeed, this interpretation is so well founded on the available information that to espouse the opposite interpretation, that the Indians ceded the nonirrigable lands for virtually no consideration, would violate this Department's obligation as trustee to follow an ordinary fiduciary standard in dealing with Indian property rights, *Seminole Nation* v. *United States*, 316 U.S. 286 at 297 (1942).

As the foregoing discussion of the Government's intent regarding the nonirrigable lands has demonstrated, the Government's intent and subsequent administration of the agreement and legislation certainly do not substantiate the interpretation that Congress intended to take title to those lands. There is no room, moreover, for asserting that the conditions of the agreement and ratifying statute were fulfilled, in any way, during the decade following the enactment of the ratifying statute. Therefore, no cession of the reservation lands became effective during that period.

The 1904 Act

The second legal issue on which correct resolution of the title question turns is whether, as the 1977 Opinion holds, the 1904 Act providing an allotment and irrigation scheme for both the Fort Yuma and Colorado River Reservations, was intended to implement the 1893 agreement and ratifying statute by fulfilling the United States' obligations undertaken in that agreement. The 1904 Act does not, as explained below, evidence Congressional intent to fulfill the conditions of the cession agreement and 1894 statute and to execute the cession of all the reservation lands, including the nonirrigable acreage. The case is more compelling, based on the language of the Act, as well as its legislative history, that Congress intend-

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be imputed to the Government over the Indian land until the fulfillment of the stated condition. While the 1936 Opinion recognizes that the agreement can be construed as conditional, Solicitor Margold concluded that the opening of the nonirrigable land was not a material condition. But, the fact that the requirement appears in the Agreement and is expanded in the Act indicates its importance to the Indians and to Congress. Otherwise, the parties could merely have stated that the land was ceded to the United States or placed in the public domain. Second, one policy of the General Allotment Act of 1887, 24 Stat. 388, which statute we have been recently told by the Supreme Court is relevant to the understanding of Indian legislation of the period (*Mattz* v. *Arnett*, 412 U.S. 481 (1973)), was to further the assimilation of Indian tribes into the non-Indian community. The condition of opening the lands to non-Indian settlement was, then, essentially part and parcel of a primary national policy with respect to Indians at the time.

[28] *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

ed to create an entirely new scheme for the irrigation of the area under which there was no cession of "nonirrigable" lands. The language and entire purpose of the 1904 Act were restricted to allowing the "irrigable" reservation lands to be developed under the Reclamation Act of 1902 and the Act should not be interpreted as either a repeal or an implementation of the 1894 statute.

The Act of Apr. 21, 1904, Sec. 25, 33 Stat. 224, states:

> 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 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.

In 1911, the statute was amended to provide for 10-acre rather than 5-acre allotments. Act of March 3, 1911, 36 Stat. 1058, 1063.

As in the case of the 1893 agreement and 1894 ratifying statute, the face of the 1904 Act does not compel any one interpretation concerning the effect of the Act on the cession of the nonirrigable lands. The language of the 1904 statute does not refer to the 1893 Agreement or to the status of nonirrigable lands. In fact, the statute does not limit its focus to the Fort Yuma Reservation but includes the Colorado River Reservation. The Act, moreover, authorizes a substantial reclamation project intended to include both Indian and nonreservation lands. The Act states that the Yuma project would take place "in connection with the reclamation of other lands." Furthermore, the 1904 Act, which does not refer to the nonirrigable lands, provides for *different* allotment and surplus land sale procedures from those agreed to by the parties in 1893 and subsequently ratified by Congress.

The 1894 Act provided for the United States to bear the cost of surveying and appraising the sur-

plus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5% per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must for ten years provide free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction. The 1904 Act, by contrast, made no provision for free water. It also credited to the Indians only that portion of the proceeds of sale as surplus irrigable land reflecting the value of the land *before* reclamation. Otherwise, the "surplus" irrigable lands were simply opened to settlement under the homestead laws, rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Moreover, out of the amount the Tribe did receive under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge in the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians *without* provision for interest, as contrasted to the five percent interest provided in the 1894 Act.

Reference to the legislative history is helpful and appropriate in construing the scope of the Act. The 1904 Act was proposed by the Department. The Senate Report records in the letter of the Director of the Geological Survey, also read into the Congressional Record,[29] to the effect that the 1893 Agreement and 1894 Act had created a scheme for irrigation which never was realized, and that Congress was not to be restricted by the prior Agreement and Act, including the failure of the canal venture. This letter made specific reference to two contemporaneous Supreme Court decisions establishing that Congress was not bound by such agreements but "has full power to dispose of the Indian lands in such manner as it may consider best fitted for the benefit of the Indians." [30] The Senate Report then records a letter from the Commissioner of Indian Affairs which states that:

> 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.[31]

A purpose, stated in the legislative history for bringing a reclamation project to the reservation was to construct a "portion" of a "general" and comprehensive system of utilizing the waters of the river to the best possible advantage". [32]

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[29] 38 Cong. Rec. 2811.

[30] *Cherokee Nation* v. *Hitchock,* 187 U.S. 294 (1902) and *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), cited in 58th Cong. 2d Sess., Senate Report No. 1660 at 28.

[31] *Id.* at 29.

[32] *Id.* at 38.

It appears that some material in the legislative history might be susceptible of divergent interpretations. For example, the reference to the Yuma Indians' having already assented to allotments of five acres each ties the 1904 Act to the 1894 statute. But, I think that does little more than indicate what is already clear, that is, that Congress was aware of the 1894 statute. It does not compel the conclusion that the 1904 Act was an implementation of the prior act and cession agreement, with all the ramifications thereof. In addition, the letter from the Director of The Geological Survey, referred to above, might be interpreted as evidence of Congressional intent to implement the Act and cession agreement. But, the discussion in that letter is more susceptible to the interpretation that Congress believed it did not have to take action to acquire Indian land title before disposing of such land. In other words, effectuation of the cession agreement was not at all necessary for Congress to accomplish its stated purpose in 1904, namely provision of irrigation on the reservation as part of a major reclamation project involving the Colorado River. When it is clear that Congress knew it did not have to acquire Indian lands by cession before it could dispose of them, the burden of proving that Congress intended to effectuate a cession becomes more difficult. This is particularly true in the case of these nonirrigable lands which were nowhere mentioned in the Act or in the Director's letter.

In addition to the legislative history, the administrative practices, detailed earlier in this Opinion, support the interpretation that the title to the nonirrigable lands was not affected by this enactment.

In conclusion, interpreting the 1904 Act as an intended implementation of the cession agreement has little, if any, support in either the language, the legislative history, or subsequent administrative practice. Such interpretation would not conform with the applicable rules for interpreting Indian statutes, [33] particularly the rule that the cession of Indian property rights may not be lightly inferred. I think the interpretation which follows the language and stated purpose of the 1904 Act most closely is that the Act was not intended to implement and give legal effect to the agreement for the cession of the Fort Yuma lands. Rather, the nonirrigable lands were not affected in any practical way by that Act. Therefore, the conditional cession of the nonirrigable lands remained uneffected and title to those lands remains in the Quechan Tribe.

In the preceding discussion, I have explained why I have concluded that the Agreement and the 1894 statute must be construed as providing for a conditional conveyance of the nonirrigable lands; the 1904 Act did not, contrary to the

[33] See cases cited in footnote 3, *supra*.

1977 opinion of the Solicitor, implement the 1893 Agreement and ratifying Act. As a consequence, that conveyance was not validly effected. The 1977 opinion is overruled. Title to the subject property is held by the United States in trust for the Quechan Tribe. That title, however, is subject to interests which have vested in third parties as noted above.

LEO KRULITZ,
Solicitor.

MABLE M. FARLOW

(On Reconsideration after Hearing)

39 IBLA 15

Decided *January 11, 1979*

Reconsideration after hearing before Administrative Law Judge Ratzman of decision of the Oregon State Office, Bureau of Land Management, rejecting color of title application OR-12944.

Affirmed.

1. Color or Claim of Title: Generally—Color or Claim of Title: Cultivation—Color or Claim of Title: Improvements

To satisfy the requirements of a class 1 claim under the Color of Title Act, "valuable improvements" must exist on the land at the time the application is filed, or it must be shown that the land has been reduced to cultivation. If land was once cultivated, but is not cultivated at the time the application was filed and has not been cultivated for 10 years previously, the cultivation requirement of the Act has not been satisfied.

2. Color or Claim of Title: Description of Land

While the general rule is that a color of title claim must be based on a deed or other written instrument which on its face purports to convey the land sought, extrinsic evidence may be used to make definite the description in a deed which contains a latent ambiguity.

3. Administrative Procedure: Burden of Proof—Color or Claim of Title: Generally

The burden of proving a valid color of title claim is on the claimant. Where it cannot be said from the evidence presented that the grantors and grantees in the claimant's chain of title acquired a parcel of land with the bona fide belief that the parcel included all the land claimed, the color of title application must be denied.

4. Color or Claim of Title: Description of Land—Color or Claim of Title: Good Faith

Where extrinsic evidence does not adequately show that predecessors in a color of title claimant's chain of title, whose holdings must be tacked on to establish the requisite 20 years holding for a class 1 claim, could have a bona fide basis for believing that land described as lot 5, shown on the official Government plat on one side of a river, included land on the opposite side of the river, there could not be a good faith holding under color of title.

APPEARANCES: Dennis C. Karnopp, Esq., and C. Montee Kennedy, Esq., of Panner, Johnson, Marceau, Karnopp & Kennedy, Bend, Oregon, for appellant. Robert H. Memovich, Esq., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON