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Secretary Adams:

The Arizona Statutes, edition 1901, sections 4168 et seq., provide that the common law doctrine of riparian water rights shall not be operative in Arizona but that rights to the unappropriated waters may be acquired through appropriation. Provision is made for the posting and filing of written notices of appropriation.

Although I have been unable to find any reported cases in Arizona upon the question, it seems clear that, as is the case in other western States, a water right may be acquired by a completed actual diversion for a beneficial purpose without following the statute which provides for the posting and filing of a written notice, the only difference being that where written notice is posted and filed the appropriator may claim the benefit of the doctrine of relation, while in the case of actual diversion the right is acquired only by actual construction of the diversion works and the application of the water to the lands irrigated. This has been the holding of the courts in Colorado, Idaho, Nevada, Utah, Washington, Wyoming, and in California.

I, therefore, conclude that if Mr. Hubbell constructed an irrigation ditch and conveyed therein unappropriated water for the irrigation of his 160 acres of land, he acquired a valid water right.

It would appear from the somewhat vague notes attached to the record in the Indian Office that during the last season

or two the ditch has become out of repair and possibly has not conveyed water to Hubbell's land. Mr. Abbott states that three years ago the ditch was in good condition and he saw alfalfa growing on the land as a result of irrigation.

So far as I can find there is no Arizona law which specifies a time after which the right to water may be lost by non-use. Under the general rule of water rights, as laid down by Wiel, it would seem that it certainly would not be forfeited under three years, and I do not believe it would be forfeited even under those conditions if the owner were asserting his claim to the water in some positive manner. In this case Mr. Hubbell has been diligent in endeavoring to negotiate with the Indian Service for the joint use of the ditch, and the Indian officials further state that no one else is using the water or in position to acquire title thereto by adverse possession. This view seems to be supported by the fact that all the land at this point is reserved for the Navajoes, except Mr. Hubbell's 160 acres and a ^{small} ~~similar~~ tract included in a mission station.

I am not satisfied with the manner in which the case is presented by the Indian Office. There is no definite and complete description of the canal or of its value. It appears, however, from Mr. Abbotts' statement, based on report from superintendent Robinson, that the portion of the ditch in question cost Mr. Hubbell \$6000 and that \$1800 would put it in perfect repair, which would seem to leave a value in the existing struc-

tures of something over \$4000. If the United States were selling a water right to Mr. Hubbell for 160 acres of land, it might possibly be worth more than \$4000, but it would seem that we are simply recognizing his existing right to the water, and in view thereof and in consideration of his turning over a ditch worth \$4000, permitting him to join with the Indians and secure the benefit of the storage to be secured by the construction of a reservoir.

From the standpoint of the maintenance and operation and to avoid a possible controversy with Hubbell, it would seem to me that an arrangement, whereby all interests should be pooled in common and the water stored in a single reservoir and transmitted through a single canal to all lands involved, would be advantageous.

Respectfully,


Assistant Attorney

March 6, 1913.