

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36200

February 12, 1954

Memorandum

To: Assistant Secretary Lewis

From: The Solicitor

Subject: Colorado River Indian Reservation Development

This is responsive to your letter of January 5, 1954, requesting my opinion on five specific questions regarding the legal status of the development of the Colorado River Indian Reservation.

Question No. 1 calls for an opinion of the tribal ownership by the Colorado River Indian Tribes. Solicitor Margold wrote a series of three opinions for the Commissioner of Indian Affairs in 1936, copies of which are among the attached papers. It was stated at that time that, although the reservation was legislatively created in 1865 for the Indians of the Colorado River and its tributaries; the lapse of a period of over 70 years without the location of any other tribes thereon, coupled with subsequent legislation and Executive orders creating separate reservations for each tribe within the Colorado River watershed, has had the effect of abandonment of the original purpose for which the reservation was created. He concluded that the members of the Mohave and Chemehuevi Tribes who had been in actual occupancy of the lands of the Colorado River Reservation had succeeded to the ownership under a Federal trust to the exclusion of the other Indian tribes along the Colorado River and its tributaries.

The argument of Solicitor Margold in 1936 was possibly strengthened by the Supreme Court in United States v. Santa Fe Pacific R. Co. in 1941 (see 314 U. S. 339), which considers to some extent the act of March 3, 1865 (13 Stat. 559), creating the Colorado River Reservation for the benefit of the Indians of said river and its tributaries. The Court observed that although the purpose of locating Indians of the Colorado River watershed was expressed in that act it only amounted to an offer of lands to those Indians. In other words, the creation of the Colorado River Reservation did not per se extinguish any Indian title which the Indians claimed to lands outside that reservation as it did not vest any title in them, at least in their failure to locate thereon. However, in 1881, the Walapais requested that a separate reservation be created for them and in 1883 an Executive order creating the Walapai Indian Reservation was signed by President Arthur. As to this reservation for the Walapais, the Court said:

THE TITLE TO THE LANDS OFFERED TO THE INDIANS OF THE COLORADO RIVER WATERSHED WAS NOT VESTED IN THEM BY THE ACT OF MARCH 3, 1865, AND THE RESERVATION CREATED BY THAT ACT WAS NOT A BAR TO THE LOCATION OF OTHER RESERVATIONS FOR OTHER TRIBES IN THE SAME WATERSHED.

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" * * * But in view of all the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of section 2 of the Act of July 27, 1866. * * * In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved."

In the light of this case, it can be argued that the Navajo, the Hopis, and all the other tribes along the Colorado River and its tributaries for whom separate reservations have been created must be deemed to have relinquished their claims to all lands lying beyond the boundaries of their separate reservations. Therefore, their acceptance of other reservations has divested them of their right to share in the ownership of the Colorado River Indian Reservation.

There is another side to the argument, however, having in mind the following sentence expressed by the Court: "But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."

It appears in the Santa Fe Pacific case that the Walapais were attempting to quiet title in lands outside the Walapai Reservation which the railroad claimed under the act of July 27, 1866 (14 Stat. 292), which provided: "The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act." It is at once apparent that Congress expressed its intent in the act of 1866 to extinguish Indian titles to certain railroad lands. To the contrary, however, Congress created the Colorado River Reservation for the benefit of all Indians of the Colorado River watershed, and the plain intent was to create rather than to extinguish Indian titles to those lands. The 1865 act was construed to be an offer. It is fundamental that an offer may be accepted at any time until it is withdrawn. There was never a withdrawal of the offer expressed by the 1865 act. It stands today as it originally stood. To illustrate further, let us assume arguendo that the Navajos never claimed any title or right to the lands which are now in the Colorado River Reservation. When they entered into a treaty in 1868 (15 Stat. 667-672), expressly relinquishing their claims to all lands not within the Navajo Reservation, can it be said that they relinquished for all time the right to accept an offer of new lands which they had never claimed? Clearly, if the offer were made subsequent to their treaty there was no relinquishment. Likewise, where the offer has been kept open after all tribes affected had obtained separate reservations in one form or another, there is a very serious doubt that

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Congress intended them to be foreclosed from ever occupying the Colorado River Reservation. This matter deserves far more direct consideration than was given in the Santa Fe Pacific case. Indeed, Congress might at any time take some further action which will greatly enlighten the question, and perhaps it already has in recent years.

The question of ownership of the Colorado River Indian Reservation is further complicated. As you apparently suspected, the ownership of the Colorado River Indians is very definitely in litigation and the ultimate outcome can by no means be predicted at this time. Case No. 283, in the Indian Claims Commission, and Case No. 424-52, in the Court of Claims, both involve claims filed by the Colorado River Indians arising out of the colonization of other Indians on the Colorado River Indian Reservation. In its answer to each claim, the Department of Justice has taken the position that the Colorado River Reservation was created for the benefit of a class of Indians; that the purpose has never been abandoned; and that the words of the act of 1865 did not operate to convey any compensable title to any of the Indian tribes.

Passing now to Question No. 2, former Solicitor White in a memorandum to the Secretary dated February 26, 1952, stated that Ordinance No. 5 of the Colorado River Indian Tribes was contractual in its nature, and was not subject to the referendum provision of the tribal constitution.

While Ordinance No. 5 is not by its terms an express agreement between the Colorado River Indian Tribes and the Government, it can easily be said to constitute an offer which was accepted by an overt act on the part of the Government. Congress has appropriated money which has been used on the projects required under Ordinance No. 5. Whether Congress has an unqualified right to relocate Navajos and Hopis on the Colorado River Reservation without making any contract with the Colorado River Indian Tribes will be judicially determined for nothing appears in the legislative history of the Navajo-Hopi Rehabilitation Act of 1950 (64 Stat. 44-47), which indicates the precise intent of Congress. However, the Colorado River Indian Tribes offered more than lands on the reservation by Ordinance No. 5. In addition, they offered to adopt the Indians colonized.

On the Government's side of the bargain, the consideration expressed was to be the subjugation of 15,000 acres of land within the Northern Reserve (occupied entirely by the Colorado River Indians) and supplying them with adequate irrigation and drainage facilities at no cost to the tribes. This project is substantially completed at this time. As near as I can conclude from information supplied by the Bureau of Indian Affairs, about 13,350 acres out of 15,000 have been completed at this time.

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In conclusion, although the question of ownership of the unallotted lands of the Colorado River Reservation is unsettled at this time, Congress has in the Navajo-Hopi Rehabilitation Act of 1950 certainly indicated its intent to carry out a policy of relocation of Navajo and Hopi Indians there. Therefore, until it is declared to be illegal, the Secretary of the Interior is bound to carry out the policy of Congress as an administrator, and in doing so to approve further expenditures for that purpose.

(Sgd) Clarence A. Davis
Solicitor

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