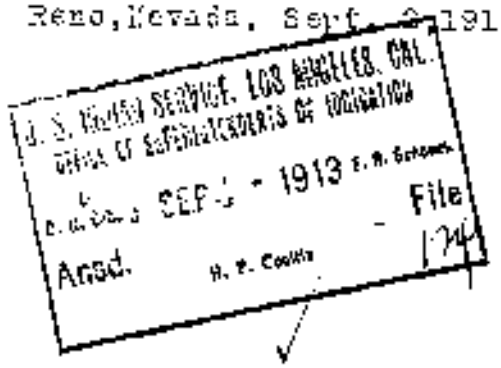
ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C.

Reno, Nevada, Sept. 6, 1913.



W. C. D. Oldberg,
Supt. of Irrigation,
Federal Building,
Los Angeles, California.

Dear Mr. Oldberg:

I think it will be convenient for me to look into the Mono Lake matter next week, and have thought that if you could meet me there you could go with Mr. Spalsbury and myself on that trip and you and I could make at least a hurried investigation of the Owens Valley situation. Let us get this in now so as to at least get it started, as I fear that I may be very busy on other matters a little later in the season.

I enclose a copy of a letter I have just written to Mr. Spalsbury which will give you further information. I expect to be here in Reno tomorrow, and possibly the next day. I shall be in Carson Friday and then at Dance Cavern, Lake Tahoe. Letters or telegrams to Carson City will be forwarded.

Sincerely yours,

John F. Powell

By Special Asst. to the Attorney-General.

Dict. C/MC.

Train leaves S. Tahoe Thurs. 7:30 p.m.

Denver, Colo., Oct. 18, 1913.

Mr. Ross L. Spalsbury,

Superintendent Bishop Indian School,

Bishop, California.

My dear Mr. Spalsbury:

I send you herewith a memorandum ~~of~~ the Mono Lake suits and a copy of a letter I have just written the Assistant United States Attorney concerning them. Will you kindly go over this memorandum with some care and write me at your earliest convenience any suggestions which you may have. Please especially keep in mind whether there would be anything gained by having the mere riparian rights in connection with these lands determined at this time.

The more I think it over, the more I come to the conclusion that what we ought to do is to build better ditches and make a full use of these waters on these lands, so as to have water rights by appropriation as well as under the riparian doctrine, and when this is done, to prevent any interference with the full use of such waters, by an appropriate injunction suit if that is necessary.

I am also asking Mr. Olberg for his opinion.

With warm personal regards, I am

Enc.

Yours very truly,

Special Assistant to the
Attorney-General

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WASHINGTON, D.C.

U. S. INDIAN SERVICE, LOS ANGELES, CAL.
OFFICE OF SUPERINTENDENTS OF IRRIGATION
Rec'd OCT 21 1913 F. H. Brandt
Ansd. File
H. F. Cowie

Denver, Colo., Oct. 18, 1913.

Mr. C. H. Olberg,

Superintendent of Irrigation,

Los Angeles, California.

My dear Mr. Olberg:

Herewith I enclose a copy of a memorandum just made on the Mono Lake suits and a copy of a letter I have just written to Mr. Hettman, Assistant United States Attorney and also copy of a letter written to Mr. Spalsbury. Please give me your views about this matter.

I go tonight to New Mexico for a conference at Albuquerque, Monday, and may go from there to Fort Stanton, but I shall not have time just now to return to San Francisco by way of the Gila and Los Angeles, as I had hoped, but shall return to Denver and then go to San Francisco by way of Nevada where I must stop for a few days.

I duly received your communications, and that one concerning the Lehi Indians will receive prompt attention. I shall take it with me and endeavor to write you in a few days. I shall give you my views on the Owens Valley matters at the earliest possible moment.

With warmest personal regards, I am

Yours very truly, John P. Dennett

Special Assistant to the Attorney-General

Enc.

Denver, Colo., Oct. 18, 1913.

Walter E. Hettman, Esq.,

Assistant United States Attorney,

San Francisco, California.

My dear Mr. Hettman:

I have just finished a rough memorandum about the Mono Lake water rights suits against the Indians, a copy of which I enclose.

If you could go over this and make up your mind about the law, and particularly see what kind of a pleading we could make in these suits under the California practice, the filing of which would not amount to a general appearance, and which would be sufficient to question the jurisdiction of the Court over the persons of these Indians, it would help this matter forward very much.

The authorities quoted in this memorandum are just those that I happened to run on in a hurried search. They would serve to give you an insight into the relation of the Government to the Indians, if you have not already studied that matter, but of course, do not in any sense amount to a brief on the points we have to consider.

I expect to be in San Francisco on the first of the

month and will see you either then or a day or two before or after. Let us at that time, if possible, have our ideas in such shape that we can send them on to Washington for approval.

I am writing to Mr. Spalsbury and to Mr. Olberg, asking them if they see any reason why we should do more than get these suits dismissed as to the Indian defendants, except, perhaps, the filing in the Court of a suggestion such as I have mentioned.

I trust you got along all right with Mr. Parker when he called on or about the 15th, and that he is not in a very great hurry about this, as it necessarily takes some time to determine what course should be pursued, and to get it approved by the Department.

Yours very truly,

Encs.

Special Assistant to the
Attorney-General.

U. S. INDIAN SERVICE, LOS ANGELES, CAL.
OFFICE OF SUPERINTENDENTS OF IRRIGATION

C. R. Olberg OCT 21 1913 F. A. [illegible]

Ansd. File

H. F. [illegible]

MEMORANDUM CONCERNING SUITS AGAINST

INDIAN ALLOTEES IN THE MONO BASIN, CALIFORNIA.

Three suits have been brought obviously for the purpose of adjudicating the water rights in Rush, Parker and Lee Vining creeks. The Indian allotees on these streams have been made defendants, along with other settlers and supposed owners of water rights.

Rush creek has a length of not to exceed ten miles running through irrigable land. Parker creek flows into Rush creek and Walker creek does also. These latter streams only have irrigable lands bordering them for a short distance. Lee Vining creek has a somewhat greater agricultural length, if one can so call it, and it flows into Mono Lake. Rush creek also flows into Mono Lake. This lake is saline and its waters are useless for agricultural purposes.

There is a scheme for utilizing the head waters of Rush creek for power purposes, and it is supposed that some company acting in the interests of the Nevada-California Power Company, controls this scheme and has made application to the Government for rights-of-way and to the State Water Commission of California for permission to use the waters for power purposes. But little work has been done on the ground and I do not know what steps have been taken, if any, by the power companies to appropriate water. It is supposed that the power in-

terests have obtained options on the lands of the plaintiffs in the suits covering the Parker and Rush creeks, and that these suits are brought in their interests.

It seems that Rush and Parker creeks provide ample water for the irrigation of all lands that are riparian to them. It is also supposed that there is a large surplus, and a company has been organized to build a ditch from Rush creek to supply water to a large acreage on the south side of Mono Lake that would not be riparian to Rush creek. The plan is to get settlers to locate these lands as Desert Entries and to subscribe for stock in the ditch. Those interested in this scheme have bought a ranch at the outlet of Rush creek and I am told, have acquired the permission of many of the other riparian owners on Rush creek, to divert the water as planned. If the suit is successful, it will determine the extent of appropriations on these streams and their priorities, and perhaps will apportion the waters among riparian owners. Very likely, also, it will declare the riparian rights that are not being used, and enjoin interference with them by the other parties to the suit. As far as it can go in the matter of determining the inchoate rights of what I may call the Desert Entry land scheme, which is under the charge of a man by the name of McPherson, is to find the capacity of the ditch and declare that if the builders of the ditch proceed with diligence and succeed in appropriating the water, that they will have certain priorities. It is not clear that the Court can even go this far because the McPherson in-

terests will not have the consent of all riparian owners, and any riparian owner who has not consented, would have the right to object to the diversion for non-riparian uses, if it would in any way injure him.

The settling of the rights of the power interests would seem to be equally difficult at this stage, because they are in such an inchoate shape. The situation being as it appears to be, I do not fully understand the reason that the suit was brought, unless it be merely for the purpose of determining some few disputed facts between the power interests and the McPherson interests, or be for the purpose of establishing, as against other riparian owners and appropriators, a large appropriation in the plaintiff, which might be used to advantage by the power companies in the future.

The Indian lands were in some instances occupied by these same Indians, but for the most part, the Indians came on the allotments at the time or shortly before the allotments were made. Practically all of these allotments were made before 1906, but the trust patents in no instances were issued until after 1906. The lands alloted belonged to the public domain before the allotments, so the Government has no peculiar water rights in connection with them, as it would, if they had belonged to an Indian or other reservation.

As I understand the law to be, these allotees, because they did not receive their trust patents until after 1906, are not citizens of the United States, and are under the exclusive

jurisdiction of the United States. (See the Act of 1906).

Furthermore, the land embraced within these allotments is still the property of the United States and all riparian rights belong to the United States. These riparian rights would date from the segregation of these lands from the public domain and their devotion to Indian purposes, which would be the time the allotments were made or ~~immediately~~ before the time that the allottees settled upon the land. This, in analogy to the rule that riparian rights attach to the land of a Homesteader when he settles on the land, if settlement precedes filing. I understand also that though Indians entitled to allotments are permitted by Act of Congress to sue therefor in the United States Courts and a judgment in their favor operates to give them title just as a patent by the Secretary of the Interior, nevertheless, they have no vested rights as against the United States until they get their patents in fee, and that Congress could, if it saw fit, in dealing with them as its wards, make an entirely different provision for them, or no provision, and could take from them these lands. I have had no time to examine the authorities, if any there be, on this question, but the view expressed here is probably correct. At any rate, the land, including riparian rights, is now owned by the United States, and as the United States cannot be sued without its consent, these suits could not affect the title of the Government in this property.

I believe further, though I have not been able to exhaust the subject, that under the Act of 1906, these Indians

are under the exclusive jurisdiction of the United States and cannot be made defendants in a civil suit, and that therefore the Court in these suits has obtained no jurisdiction over the persons of these Indians. Even if these Indians can be sued and the Court has jurisdiction of their persons, it would seem to be clear that if the Court did investigate their rights in the waters of these streams and did decide that they had no such rights, or attempted to limit them to a certain amount and to enjoin them from taking any more water, that the United States, being the owner of both the land and water, could at any time permit these Indians to use it, and that such permission would amount in each instance to a new title and would not be affected by the action of the Court in these cases.

See, for instance, the Matter of Heff, 197 U. S. 488-506, where it is held that lands devoted to Indian purposes cannot be taxed as long as the title is in the United States, because it is the purpose of the United States to turn over the fee to the Indians, unincumbered.

The Act of May 8, 1906, will be found in the Supplement of 1909 of Federal Statutes, annotated, page 204.

Now the question is, what to do about these suits?

Generally speaking, it is an advantage to have ~~the~~ water rights determined, and here is a suit that seems to be meant for that purpose. The Government has no water rights in this instance that differ materially from the rights of private persons, so there would not be that objection to submitting its

rights to the jurisdiction of a State Court. However, I think, generally speaking, it is unwise for the Government to surrender its privilege of not being sued and to submit to the jurisdiction of a Court, and especially a State Court, unless it is perfectly clear that great advantage will come to it by doing so. In this case, by submitting to the jurisdiction of the State Court, the Government might permit questions concerning the acquisition of rights against it in these streams to be determined, that it would not care to have determined now or in that tribunal.

It is not at all clear that those suits can result in determining at all satisfactorily the rights of the power interests or those of the McPherson interests, because of the inchoate nature of these rights. Furthermore, the Indians have not been using much water, so the claim of the Government would be confined to its purely riparian rights, and I should prefer to have these rights adjudicated when a greater use of water had been made and the Government would be in a position to have decreed to it rights by way of appropriation, in addition to its purely riparian rights.

If the Government stays out of this suit, its rights will be in no way affected and it can at any time defend those rights against others interested, and it probably is in no danger of losing any rights because of the use of the waters by others, for the reason that so long as lands granted to Indians remain inalienable, no title thereto can be acquired by adverse possession. (See 32 Kan, 534; 40 Kan. 346; 46 Kan. 1).

I never believe, however, in relying upon this

exemption, and think that any diversion that would be likely to diminish the water available for and that could be used on, the Government land, should be enjoined.

On the other hand, I realize that determinations as to priorities and extent of use by others made in these suits, while not binding on the Government, would have some weight in a future trial, unless clearly excessive.

I am, on the whole, inclined to the opinion:

1st. That the Government should not go into these suits and submit its rights to the State Tribunal.

2nd. That the Government is under no obligation to, and it would not be advisable for it to institute an adjudication proceeding in its own Courts to take the place of the suits now started in the State Tribunal.

3rd. That while the Court probably has no jurisdiction over these Indian defendants, and certainly has no jurisdiction over the lands and water rights in question, belonging to the Government, these suits ought not to be ignored, but they should be dismissed as to the Indian defendants. If the plaintiffs, as is likely, can be persuaded to dismiss the Indians voluntarily, I think that should be done. Possibly after such a dismissal, the Government, out of courtesy to the State Tribunal, should set up, by way of suggestion, its rights in these lands and waters and suggest to the Court that while the Government in no way submits to its jurisdiction, the Court should recognize in its decree the existence of the Government's rights.