

**SOLICITOR'S OPINION OF AUGUST 15, 1974**



United States Department of the Interior

OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

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IN REPLY REFER TO:

**AUG 15 1974**

Memorandum

To : Secretary of the Interior

From : Solicitor

Subject: Correction of Designation of Lands Within the  
Chemehuevi Indian Reservation Taken in Aid of  
Construction of Parker Dam

*IND  
Colorado  
River*

A dispute concerning the ownership of approximately twenty-one miles of shoreline along the Lake Havasu portion of the Colorado River in California is pending before this Department. The Chemehuevi Tribe of Indians claims to be equitable owner of the shoreline down to the minimum water level of Lake Havasu. Since construction of the Parker Dam, however, which created Lake Havasu, the riparian lands have been administered in part by the Bureau of Land Management as public lands and in part by the Bureau of Sport Fisheries and Wildlife as a portion of the Havasu National Wildlife Refuge.

The legal question to which this memorandum is addressed is whether the Secretary has authority to take action which determines, establishes and confirms that the Chemehuevi Tribe has equitable title to the lands in question (subject to the right of the United States to raise the water level of the Lake in connection with the operation of the Parker Dam). For the reasons that follow, it is my conclusion that the Secretary does have authority to determine, establish and confirm that the tribe has title and that such Secretarial action could successfully be defended as a matter of law.



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## I. FACTUAL BACKGROUND

The Chemehuevi Reservation was established in 1907 on the ancestral homelands of the Chemehuevi Indians; it included "a deep low valley [made] by the Colorado River [which] has been occupied from time immemorial" by the Tribe. 57 I.D. 87, 89 (1939). Lands in this valley were allotted to and resided upon by a number of Indian families until 1940, when the valley was flooded by the reservoir created by operation of Parker Dam. 57 I.D. at 92-93.

In 1933, the Secretary of the Interior entered into a cooperative contract with the Metropolitan Water District of Southern California (hereafter "Metropolitan") whereby the United States agreed to build and operate the Parker Dam with funds provided by Metropolitan. The State of Arizona resisted construction of the project, claiming that the contract between the Secretary and Metropolitan was not authorized by existing reclamation laws. At one point, the state mobilized a portion of its national guard to impede construction on the Arizona side, and in 1935 the United States filed a bill in equity in the Supreme Court to enjoin such interference. The Court dismissed the bill, finding that the United States had not complied with section 9 of the Act of March 3, 1899, 33 U.S.C. § 401, forbidding the construction of any dam in a navigable river unless consented to by Congress. United States v. Arizona, 295 U.S. 174 (1935).

On August 30, 1935, Congress passed an Act generally authorizing construction of Parker Dam and ratifying previous contracts made in aid of its construction. 49 Stat. 1039. The Act, however, did not specifically authorize the taking of any Indian land for the project. Solicitor Margold subsequently determined that the Chemehuevi Indians were entitled to payment by the United States "for damages to certain lands . . . which will be flooded by the Parker Reservoir," 57 I.D. 87, and an appraisal committee was created to set a fair valuation on those Chemehuevi Reservation lands to be taken in connection with the construction of Parker Dam. The Committee submitted both a majority and a minority report appraising certain lands within the

Reservation; these reports agreed as to what lands would be taken, but differed as to their proper value. In July 1940, a statute was enacted authorizing the taking, "in aid of construction of the Parker Dam Project," of such lands within the Chemehuevi Reservation "as may be designated by the Secretary of the Interior," 54 Stat. 744. On October 9, 1940, Acting Secretary Wirtz approved payment to the Chemehuevis of \$108,104.95, essentially adopting the valuation contained in the minority report submitted by the appraisal committee. And on November 25, 1941, Secretary Ickes approved a description of the reservation lands to be taken.

The source of the present controversy is that Lake Havasu, the reservoir behind Parker Dam, does not cover all the lands encompassed by the 1941 description and appraised by the committee. Most of the designated but non-inundated lands have been treated as reclamation withdrawn lands. Additionally, on January 22, 1941, President Roosevelt included the northern five-and-a-half miles of this shoreline within Havasu National Wildlife Refuge. Executive Order No. 8647.

The construction of Parker Dam concededly would have benefited the Chemehuevis if they had retained their ownership of riparian lands, since Lake Havasu has considerable recreational value. But the result of the taking and the subsequent federal administration of the shoreline property has been to deprive the Tribe of possession of any lands riparian to Lake Havasu. As a consequence, the purpose for which the Chemehuevi Reservation was created--to provide a lasting homeland for the Chemehuevi Indians--has been frustrated to a great degree. Most of the Reservation remaining in Indian control after the construction of Parker Dam is desert and mesa land unsuitable for habitation; in fact, I am advised that only one Chemehuevi family has resided there in recent years. The only land of substantial value in the area is the shoreline property.

## II. LEGAL ANALYSIS

If the power to designate the Chemehuevi lands to be taken in aid of the Parker Dam project is a continuing power

rather than one which terminated when the original designation was made in 1941, then the Secretary may modify that original designation. There are convincing arguments for the conclusion that the power of designation is indeed a continuing one.

If the original taking had been geographically insufficient, so that some inundated lands were not taken, it seems clear that the Secretary could have modified his original designation so as to include the inundated areas. No return to Congress for any additional authority would have been necessary, since the modification would merely have aided in accomplishing the existing statutory objective--i.e., it would have done what Congress had authorized the Secretary to do, namely, to effectuate the taking of those lands required for the project. Much the same reasoning would apply similarly to the converse situation where the Secretary at first designated more land than turned out to be required for purposes of the project--e.g., where certain of the designated lands extended so far beyond the Lake itself (or even beyond the adjacent designated lands) that sound administration of those lands was perhaps made unduly difficult. In this situation as well, the Secretary would appear to need no additional grant of authority to modify his designation so as to accomplish the statutory purpose. And this latter situation is, of course, in essence the present situation: there are compelling arguments to the effect that the Secretary's 1941 designation encompassed more territory than was required or desirable. Fee title in the United States to the shoreline is not truly required for project purposes;<sup>1/</sup> and the undesirability of

1/ The legislative history of the 1940 Act is entirely consistent with this view. The House and Senate Reports with respect to the 1940 statute, S. Rep. No. 1807, 76th Cong., 3d Sess. (1940); H.R. Rep. No. 2684, 76th Cong., 3d Sess. (1940), contain virtually identical letters from Secretary Ickes and Acting Secretary Burlew to the chairmen of the congressional committees involved. Each letter includes the following statements:

"The construction of Parker Dam will cause the reservoir created by the dam to flood certain lands within the Fort Mohave Indian Reservation in Arizona and the Chemehuevi Reservation in California. The lands flooded will include tribal lands and lands which have been allotted to individual Indians . . . .

depriving the Chemehuevis of the only property of any real value within their reservation is obvious.

In these circumstances it may be concluded that the Secretary may modify his original designation by correcting the 1941 description of lands taken, deleting from it the lands not permanently flooded, as to which the Chemehuevis' equitable title is to be determined, established, and confirmed.<sup>2/</sup> In order to allow for

(footnote 1/cont'd).

"[The bill], if enacted . . . , will grant to the United States the right, title, and interest of the Indians in and to such lands and will provide a method for compensating the Indians for their interests in the lands." (Emphasis added.)

Thus, Congress was not apprised that any lands would be taken above the pool level of Lake Havasu; indeed, this Department indicated to Congress that only "flooded" lands were to be taken.

<sup>2/</sup> The Secretary would in effect be reviewing an earlier decision of the Department. His authority to review the actions of his predecessors is clearly stated in West v. Standard Oil Co., 278 U.S. 200, 210 (1929):

"If at the time of Secretary Work's order the Department still had jurisdiction of the land, he possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official. For, so long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision."

See also Lane v. Darlington, 249 U.S. 331 (1919); Beley v. Naphtaly, 169 U.S. 353, 364 (1898); New Orleans v. Paine, 147 U.S. 261 (1893); Aspen Consol. Mining Co. v. Williams, 27 I.D. 1 (1898); Parcher v. Gillen, 26 I.D. 34 (1898); cf. Louisiana v. Garfield, 211 U.S. 70, 75 (1908). In the present case the lands have continued within the jurisdiction of the Department, so that there is no question as to the Secretary's authority.

situations in which the water level of Lake Havasu would rise above its minimum level, however, the Secretary's order would specify that that title is subject to a flowage easement in the United States.<sup>3/</sup> Specification of the easement--the minimum interest which the United States could take consistently with fulfillment of the purposes of the project--would accord with the principle that infringements on Indian property rights should be minimized wherever possible. Cf. Mattz v. Arnett, 412 U.S. 481, 504-505 (1973); United States v. Santa Fe Pac. R.R., 314 U.S. 339, 353-54 (1941); United States v. Celestine, 215 U.S. 278, 285 (1909); United States v. 2005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958); Confederated Tribes of the Umatilla Reservation v. Froehlke, Civ. No. 72-211 (D. Ore. 1972).<sup>4/</sup>

3/ It might be argued that the 1940 Act does not authorize the taking of an easement, since the terms of the statute speak of taking "all right, title and interest" of the Indians. While that argument is not convincing--since in my view the authority to take "all" of the Indians' interest necessarily includes within it the authority to take a part of that interest, especially where a limited taking is indicated by the principle of construction outlined above to be appropriate--I do believe that it would be prudent to request the Tribe to confirm the flowage easement by grant.

4/ An argument might be made that the Secretary's redesignation should result in a refund to the Government of some portion of the money paid to the Chemehuevis as compensation for the original taking. The redesignation would be made unilaterally by the Secretary, however; the transaction would not be in the nature of a bilateral agreement. And there is considerable question whether such action, in effect vesting title to property in another, can properly be deemed to impose a liability upon the party benefited. Such a result would seem especially inappropriate in this case, where a fiduciary would be imposing an obligation on his beneficiary.

Such Secretarial action would not be barred by statutes such as 25 U.S.C. § 398d or 43 U.S.C. § 150, which impose restrictions with respect to actions affecting Indian reservations. The first of these statutes, 25 U.S.C. § 398d, prohibits making any change in the boundaries of reservations except by Act of Congress. But just as the original designation affected only title to land within the Chemehuevi Reservation and did not change the Reservation's boundaries, see United States v. Celestine, 215 U.S. 278, 285 (1909), so too the redesignation would work no boundary change; it would merely confirm equitable title in the Chemehuevis to the lands in question. Under the other statute referred to, 43 U.S.C. § 150, executive action "withdraw[ing]" public lands "for or as an Indian reservation" is prohibited. But the Secretary would not be "withdrawing" lands; he would merely be exercising his authority to correct his designation of the lands needed for the Parker Dam project. The transaction would have to do with title, as indicated above, and would not affect the existence or extent of the Reservation.

In any event, 25 U.S.C. § 465 explicitly authorizes the Secretary "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." (Emphasis added.) And despite the possible argument that the term "acquire" as thus used refers only to the acquisition of land from third parties, a recent Supreme Court decision has given the term an extremely liberal construction, one which would appear to make section 465 applicable to "intragovernmental transfers" to trust status of land already owned by the United States. In Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Court indicated that section 465 was applicable to a tribe's leasehold interest in National Forest lands despite the fact that that interest had "not [been] technically 'acquired'" for the tribe by the Government. "It would have been meaningless," the Court stated, "for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe." 411 U.S. at 155 n.11. Thus, since the lands now in question are "within . . . [the] existing reservatio[n]," section 465 (which postdates 43 U.S.C. § 150 by fifteen years) would appear to provide additional authority for the Secretary's action.



cc: David Lindgren, Deputy Solicitor  
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