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In the Senate of the United States. Letter from the Acting Secretary of the Interior, relative to the construction of a canal across the Colorado River Indian Reservation in California.

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IN THE SENATE OF THE UNITED STATES.

LETTER

FROM

THE ACTING SECRETARY OF THE INTERIOR,

RELATIVE

To the construction of a canal across the Colorado River Indian Reservation in California.

MARCH 9, 1892.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, March 8, 1892.

SIR: I have the honor to acknowledge the receipt, by your reference of 27th January last, of letter from William D. Renner, of Hackensack, N. J., relative to the construction of a canal across the Colorado River Indian Reservation in California.

In response I transmit herewith a copy of a communication of 3d ultimo from the Commissioner of Indian Affairs, to whom the matter was referred, which contains the information sought by Mr. Renner.

This reply has been delayed for an opinion of the law officers of this Department as to the right of canals or ditches on reservations of the United States, as approved by act of March 3, 1891, entitled "An act to repeal the timber-culture laws, and for other purposes" (26 Stat., 1095).

For your information I have the honor to inclose a copy of said opinion, in which it is held that it was not intended by said act of March 3, 1891, to grant the right of way for canals and ditches through Indian reservations.

In view of this opinion Mr. Renner's relief seems to be in Congress. Mr. Renner's letter is herewith returned, as requested.

I have the honor to be, very respectfully,

GEO. CHANDLER,
Acting Secretary.

The VICE-PRESIDENT.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 3, 1892.

SIR: I am in receipt, by Department reference for report, of a communication from William D. Rennir, esq., addressed to Hon. Levi P. Morton, and by him referred to you for information, in which he states

that he is interested in a company for the recovery of desert land by irrigation, and also some placer mining in the same; that the company has a right to take water from the Santa Maria River, an affluent of the Colorado River in Arizona, and running through the Cactus Plains and McMullin Valley, emptying into the Colorado River through the Colorado River Indian Reservation near the town of Ehrenberg; that he has been told by some that the company will have to have an act of Congress passed to allow it to discharge its waste water through the Indian reservation, and by others that the Department of the Interior has the power to grant this privilege, and asking to be advised as to which is the correct procedure and what the company shall do in case an act of Congress is required in the matter.

In reply I have the honor to inform you that the right to construct the proposed ditch or canal through the Colorado River Indian Reservation appears, from the statements of Mr. Rennir's letter, to be solely for the benefit of the irrigating company in enabling it to dispose of its waste water; it does not appear that any benefit whatever will inure to the Indians by reason of the construction thereof. So far as this office is aware, however, there is no objection to granting an irrigating company the right to construct a ditch or canal across an Indian reservation, through which to discharge its waste water, upon such terms as a railroad is granted right of way for the construction of its road.

It is the opinion of this office that Congress alone can grant the privilege asked for, and that the Department is powerless in the matter in the absence of Congressional action.

While it is not believed that Indian reservations should be allowed to stand as barriers to the development of the country surrounding them, it is the opinion of this office that legislation authorizing the building of railroads or the construction of irrigating canals, for the benefit of the projectors thereof, should be framed with a due regard to existing treaty stipulations, and, whenever practicable, it should require the consent of the Indians.

The reservation in question was created by act of Congress approved March 3, 1865 (13 Stats., 559), and Executive orders of November 22, 1873, November 16, 1874, and May 15, 1876. There is nothing, however, in said act or in said Executive orders inconsistent with granting a right of way through the reservation to an irrigating company for the purpose of getting rid of its waste water.

The proper method of procedure would be by bill in Congress setting forth the rights and privileges desired with reference to the Indian reservation, which bill would be referred to this Bureau for opinion and report as to whether such construction should be authorized. In this connection I deem it but proper to suggest that in the framing of a bill to meet the objects desired, as stated in Mr. Rennir's letter, great caution should be exercised to provide that the lands adjacent to such ditch or canal should not be flooded or in anywise injured by reason of the construction thereof.

In cases of the construction of railroads, where this office can exercise its discretion, the maps of definite location are transmitted to the Indian agents for investigation and report, particularly as to whether such location is along the line authorized by right-of-way act, and also with regard to the individual holdings or allotments likely to be invaded or damaged by the construction of the proposed road.

Every company obtaining a right of way through an Indian reservation, no matter for what purpose, should file in this office a copy of its articles of incorporation duly certified to by the proper officers under

its corporate seal, and maps of definite location of its line, and no work of construction will be permitted until the maps of definite location are approved by the Department.

Much unnecessary delay and annoyance can be avoided if railway and irrigating companies will systematically comply with the conditions imposed by the acts granting them right of way.

Special instructions as to the preparation of the maps of definite location will be given on application, after the company is granted right of way and has filed in this office its articles of incorporation.

Mr. Rennir's letter is returned herewith.

Very respectfully, your obedient servant,

T. J. MORGAN,
Commissioner.

The SECRETARY OF THE INTERIOR.

OFFICE OF THE ASSISTANT ATTORNEY-GENERAL,
February 27, 1892.

SIR: I have the honor to acknowledge the receipt by reference of the letter of the Commissioner of Indian Affairs of November 11, 1891, submitting for the decision of the Department the question as to whether the act of March 3, 1891, in so far as it relates to the right of way for ditches and canals, includes Indian reservations, and if so, whether there is any stipulation in the treaties and agreements with the Ute Indians which would prevent the extension of canals into their reservation, together with your request for an opinion upon the question thus presented. Section 18 of the act of March 3, 1891 (26 Stat., 1095), reads as follows:

That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

In the act of March 3, 1875 (18 Stat., 482), granting to railroads the right of way through the public lands, it was specifically stated in section 5 that said act should not apply "to any lands within the limits of any military park or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation or by act of Congress heretofore passed." The question of the right of the United States to authorize an entry upon lands reserved for the use of the Indians could not arise under that act. The right of the United States to exercise the power of eminent domain within Indian reservations and over lands set apart for the exclusive use of the Indians has been recognized by the Supreme Court. (*Cherokee Nation v. Kansas Railway Co.*, 135 U. S., 641.)

The act of March 3, 1891, so far as it relates to the right of way for canals and ditches, does not purport to be the exercise of the power of

eminent domain; and hence it is unnecessary to consider whether the construction of such canals and ditches is an undertaking in aid of which that power might be properly exercised.

As to all that country known as "Indian country" the Indians had a right of occupancy. It has been the policy of the Government to relieve from this claim or right of occupancy that country as rapidly as possible, and in pursuance of that policy the Indians have been persuaded to relinquish such right, in consideration of which, among other things, they have been guaranteed the quiet and undisturbed possession and use of certain specified and well-defined smaller bodies of land. In almost if not every instance in which such an agreement has been entered into it has been stipulated that no one not in the employ of the Government should be allowed to go upon such reservation without the consent of the Indians. The provisions found in the treaties and agreements affecting the reservation, in regard to which the question is at this time raised, afford illustrations of this rule. By article 2 of the treaty of March 2, 1868 (15 Stat., 619), with certain bands of the Ute Indians, lands were set apart for the specific purposes and under certain agreements, as follows:

For the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes and individual Indians as from time to time they may be willing; with the consent of the United States, to admit among them; and the United States now solemnly agree that no persons, except those herein authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, except as herein otherwise provided.

This treaty also provided for the selection by and certification to any Indian desiring to commence farming of a specific tract of land, and that no treaty for the cession of any portion of said land should be understood or construed so as to deprive, without his consent, any individual member of the tribe of his right to any tract selected by him. Article 14 of said treaty reads as follows:

The said confederated bands agree that whensoever, in the opinion of the President of the United States, the public interests may require it, that all roads, highways, and railroads authorized by law shall have the right of way through the reservation herein designated.

By act of April 22, 1874 (18 Stat., 36), an agreement with these Indians was confirmed whereby they relinquished a part of the lands included within the reservation established by the treaty of 1868, article 5 of which agreement reads as follows:

All provisions of the treaty of eighteen hundred and sixty-eight not altered by this agreement shall continue in force; and the following words, from article two of said treaty, viz, "The United States now solemnly agrees that no persons except those herein authorized to do so, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article except as herein otherwise provided," are hereby expressly reaffirmed, except so far as they applied to the country herein relinquished.

The agreement with these Indians, ratified and confirmed by act of Congress of June 15, 1880 (21 Stat., 199), provided for the relinquishment of the former reservation, the establishment of new reservations, and that all the provisions of the treaty of 1868 and the agreement of 1874, not altered by the later agreement, should continue in force.

It is clear that to hold that Congress by the act of March 3, 1891, *supra*, authorized the entry upon such reservations of one who should desire to locate and construct a ditch or canal through or upon lands

embraced therein would be to say that Congress had by said act annulled the provisions of the treaties and agreements similar to those quoted hereinbefore. This construction should not be given the said law unless the intention of Congress to annul in that particular the agreements entered into with the Indians be clearly expressed; in fact, so clearly and unmistakably set forth that no other conclusion could be reached without doing violence to the language used. In my opinion, the language used in said act of March 3, 1891, does not thus clearly and positively express such an intention. The phrase "public lands" in said section eighteen is evidently used in contradistinction to lands in reservation, and hence that term would not include lands within an Indian reservation.

The term "reservations" used in the body of said section is defined and limited by the language used in the proviso, as follows:

Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation.

This would indicate that the reservations had in view were those actually and directly used by the Government. Indian reservations are not so used, but are set apart for the use of the Indians with the ultimate object of providing them permanent homes and of vesting in them full and complete title to so much, at least, as may be necessary for that purpose.

The act in question has full scope for its operation, both as to public lands and reservations outside these Indian reservations, and can thus be given effect without affecting the agreements with the Indians.

For the reasons herein set forth, I am of the opinion that it was not intended by said act of March 3, 1891, to grant the right of way for canals and ditches through Indian reservations.

The letter submitted is herewith returned.

Very respectfully,

GEO. H. SHIELDS,
Assistant Attorney-General.

The SECRETARY OF THE INTERIOR.

HACKENSACK, N. J., *January 8, 1892.*

DEAR SIR: I take the liberty, knowing the friendly relations which existed between you and my father, to make the following request from you:

I am interested in a company for the recovery of desert land by irrigation, also some placer mining in the same.

We have a right to take water from the Santa Maria River, an affluent of the Bill Williams fork of the Colorado River in Arizona, and running through the Cactus Plains and McMullen's Valley, empty into the Colorado, through the Colorado Indian Reservation, near the town of Ehrenburg.

I have been told by some that we will have to have an act of Congress passed to allow us to discharge our waste waters through the Indian reservation, and by others that the Department of the Interior has the power to grant me this privilege. Now, would you kindly inform me what would be the correct procedure, and also how I am to do it, in case we should require the action of Congress in the matter, and must the location of the crossing of the reservation be exact? This is a matter of great importance to me, and if you can supply me the desired information at an early day I shall feel very grateful for it.

Thanking you for your kindness in anticipation,

I remain, yours respectfully,

WM. D. RENNIE,
Hackensack, N. J.

Mr. L. P. MORTON.