

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

WASHINGTON

October 17, 1913

Hon. Key Pittmen,
House of Representatives,
Washington, D. C.

My dear Mr. Pittmen:

I have received your letter of September 26, 1913, regarding water conditions on the Hupa River reservation, Nevada, and the matter has been given careful consideration by the Office.

This reservation was created by Executive Order of March 12, 1873, setting apart certain described lands in the southwestern part of Nevada for the use of the Indians in that locality, and was changed and enlarged by executive Order of February 12, 1874.

By the Act of March 3, 1875 (18 Stat. L., 430-443), it was reduced to one thousand acres to be selected by the Secretary of the Interior in such manner as not to include the claim of any settler or miner.

July 3, 1875, the Secretary of the Interior approved the selection of the tract of country described in a report by Inspector Vandever, and set it apart as a reservation for the Paiute Indians.

Agent Bateman, in his annual report, 1875, said

This land is situated in the upper part of the Moapa Valley, and includes what was once known as the West Pointe Mormon settlement. We decided on this part of the valley for the following reasons:

First. There were no conflicting titles in abeyance to contend with hereafter, the Mormons long since having gone back to Utah.

Second. The irrigating ditches constructed by this people were still in a tolerably good condition, and extended all over the land. To construct these on land which had never been under cultivation would have cost more money than I could conveniently spare from my appropriation. (Report on Indian Affairs, 1875, p. 337.)

In 1873 Agent Ingalls reported that the Indians in the valley of the Moapa had cultivated crops of wheat, corn, barley, etc., carefully watering the land by irrigation, 130 acres having been cultivated. (Annual Report 1873, p. 328). In 1874 he reports that the entire amount under cultivation was 730 acres, the value of all the crops amounting to over \$25,000. (Annual Report, 1874, p. 283).

Although the reservation had not then been reduced, the land cultivated was in the Moapa Valley, included in the present reservation. In 1876, 230 acres were reported under cultivation.

In 1906, an assistant of the State Engineer of Nevada made a survey of the lands under cultivation on the reservation, and on the adjoining country, to determine the appropriations of the Moapa or Muddy river.

I-116162

With the acreage as determined by this survey as a basis, the waters of the river were adjudicated. The Moapa Indian Reservation was issued certificate No. 479 for sufficient water to irrigate 87 acres, and was given priority No. 19, priority numbers being allotted according to the year the land was first irrigated.

The first 18 priorities were for the years 1870, 1874, ^{1876,} 1879-1888, 1890-1894, the reservation being the last of nine certificates for 1894. In consequence of this act of the State, these Indians are about to be allotted 625 acres of land, with an approved water right for only 87 acres, the land being useless without water.

The only practicable method of meeting this situation seems to be by ignoring the apportionment as made by the State Engineer, and making use of all the water that may be needed. The Indians live near the source of the stream and there is always an abundance of water flowing by their canals.

The only objection to this course is the question as to the legal right of the Indian to take sufficient water from the stream flowing through their reservation to irrigate their lands in order to make them productive.

In the opinion of the office this question should be answered in favor of the Indians.

The waters of a stream flowing through the public lands are a part of the public domain, and the right to their use may be sold or granted by the general Government, either absolutely or subject to such conditions, restrictions, or reservations as it may choose to impose, but after the Government has parted with title to the soil, the general right to regulate and control watercourses and the use thereof belongs to the State where they flow. (40 Cyc. 703.)

In the case of *Winters v. the United States* (207 U. S. 564), the Supreme Court of the United States held in effect that when the United States reserved the land for Indians, they were entitled to sufficient waters from the boundary streams to make these lands productive.

The Circuit Court of Appeals (9th Circuit), in the case of *the Conrad Investment Company v. the United States*, following the opinion in the above case, held that the agreement establishing the Blackfeet reservation, with the middle channel of Birch Creek for part of its boundary, impliedly reserved to the Indians a prior right to a portion of the waters of such creek with which to irrigate the arid lands in the reservation, which right was paramount to that of persons subsequently taking up desert land claims on the public domain adjacent to the creek. (161 Fed., 829). It is true that the reservations

involved in these decisions were created by Act of Congress in pursuance of agreements with the Indians, while the Board River reservation was originally established by Executive Order and subsequently reduced in Act of Congress. The principle, however, would seem the same, as it is inconceivable that Congress should reduce a reservation containing at least thirty townships to one containing 1,000 acres of arid land without impliedly protecting the right of the Indians to the waters within its boundaries.

It is therefore the opinion of the office that the apportionments made by the State Engineer (except the two in which the priority antedates the Act of 1875), should be ignored and the rights of the Indians to the water be asserted.

The Irrigation branch of the Service is devoting careful attention to the situation in this valley, and it is believed that the construction of an efficient irrigation system will greatly lessen the difficulties of both whites and Indians. It may be that an amicable adjustment of the matter can be reached without prejudice to the rights of either party. It is regretted that there should have been

any violation, and this office will use all possible efforts
to adjust the differences, so far as this may be done with-
out jeopardizing the rights of the Indians.

Very cordially yours,

(Signed) Cato Sells,

Commissioner.

10-McC-11