BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, et al.,	)	
Plaintiff,	)	
v.	)	Docket No. 236-E
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: January 10, 1974

Appearances:

Z. Simpson Cox and Alfred S. Cox,
Attorneys for Plaintiff.

David M. Marshall, with whom was
Assistant Attorney General Shiro Kashiwa,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This is an action brought under Section 2, Clause 2, of the Indian Claims Commission Act (25 U.S.C., § 70a(2)). It has been determined that plaintiff is an identifiable group of American Indians residing on the Gila River Indian Reservation in Arizona. Docket 228, 24 Ind. Cl. Comm. 301 (1970). Plaintiff maintains in this suit that defendant has wrongfully charged it with operation and maintenance charges in connection with the use of irrigation waters delivered through the facilities of the San Carlos Irrigation Project since 1937, the year such charges were first assessed against the Indian land owners within the project under rules and regulations promulgated by the Secretary of the Interior.

The San Carlos Irrigation Project, which includes by merger previously constructed projects in the Gila River area,[1/] was completed by the construction of the Coolidge Dam, authorized by the Act of June 7, 1924 (43 Stat. 475), hereinafter referred to as the San Carlos Act. The Coolidge Dam, completed in 1928, created the present sole water storage facility, known as the San Carlos Reservoir, which serves the San Carlos Project. The project as constructed embraces 50,000 acres of land in Indian ownership and 50,000 acres of land in public or private ownership. The project facilities are divided into Joint Works serving Indian and non-Indian lands, Indian Works serving Indian lands only, and District Works, serving non-Indian lands.[2/] Practically all the principal canals, laterals, and diversionary dams in the system, as well as the Coolidge Dam itself and the San Carlos Reservoir, are included in the definition of joint works. Indian works, located for the most part within the reservation boundaries, begin at points at which water is received from joint works canals. This combined system is maintained by the Federal Government. The district works are maintained by the San Carlos Irrigation and Drainage District at its own expense.

The complained-of charges for the operation and maintenance of the project facilities relate only to those facilities listed in Department of Interior regulations as Indian works and joint works. As construed by the Secretary

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1/ See Act of March 7, 1928, 45 Stat. 200.

2/ San Carlos Project facilities are defined in 25 C.F.R., secs. 221.69a to 221.69c.

of the Interior, existing law, which includes the pertinent provisions of the San Carlos Act, authorizes him to assess on a per acre basis the cost of operating and maintaining the San Carlos Project. Under existing regulations issued by the Secretary, plaintiff is required to pay all operation and maintenance charges for Indian works (25 C.F.R. §221.69c) and one-half of the cost of operating and maintaining the joint works (25 C.F.R. §221.69d). Plaintiff has, since water was first made available in the San Carlos Project in 1933, objected to the operation and maintenance regulations of the Secretary and has, since 1937, made payments for these charges under vigorous protest by way of tribal council resolutions. It was plaintiff's contention that they should not pay operation and maintenance charges because the Coolidge Dam had been built for the main purpose of restoring their immemorial rights to the water of the Gila River, rights which had been virtually destroyed as a result of Government acquiescence to white encroachments.

Plaintiff invokes herein the doctrine of prior appropriation, and argues that defendant's assessment against plaintiff of operation and maintenance charges in disregard of plaintiff's prior appropriation rights is wrongful. Defendant contends that operation and maintenance charges in this case have been properly assessed pursuant to the provisions of existing laws, which include the San Carlos Act and numerous other acts of Congress prior and subsequent to the 1924 Act. Defendant views the issue as a question of law which can be determined by the

application of long-standing principles of statutory interpretation, and dismisses plaintiff's argument relating to prior appropriation as irrelevant. We agree that the issue can be decided through proper statutory construction, but as our decision is adverse to the defendant, we find it unnecessary to consider plaintiff's principal argument, for reasons which follow.

The plaintiff asserts that under the doctrine of prior appropriation of water rights as is applicable in Arizona:

> An appropriator of water from a running stream is entitled to have it flow down the natural channel to his point of diversion undiminished in quantity and quality or, if diverted from the natural channel by other appropriators for their convenience, to have it delivered to him at available points by other means provided by subsequent appropriators and at their expense. Pima Farms Co. v. Proctor, 30 Ariz. 96, 106-7; 245 P. 369, 372-3 (1926).

The Pima had the first priority to appropriate Gila River water: 210,000 acre feet per year as of time immemorial. United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz. 1935). Since the San Carlos project diverts virtually the entire natural flow of the Gila River into its canals, plaintiff argues that it is entitled to receive its water through the canals as unburdened by charges as though it were the natural flow it formerly received. It would appear that had such a burden been imposed on plaintiff's water rights by the United States' construction of a dam, a taking of plaintiff's rights might exist. See Dugan v. Rank, 372 U.S. 609 (1963). We find no such taking here, for we find no authorization under the statutes for burdening plaintiff's water rights

with the operation and maintenance charges of the San Carlos Project. Contemplation of plaintiff's possible water rights by Congress may explain the intent we find manifested in the pertinent legislation not to impose a charge on the Pima water entitlement.

The entire text of the San Carlos Act is set out in Finding 11, infra. Section 1 states that the primary purpose of the act is to provide water for Pima Indian irrigation, and that the total cost of the project is to be equally divided per each acre served, Indian and non-Indian. Section 2 deals with the construction charges assessed against the Indian lands, and makes the charges reimbursable under rules prescribed by the Secretary of the Interior. Section 3 deals with the repayment of the construction charges against private lands, and then contains a proviso:

> Provided, That the operation and maintenance charges on account of land in private ownership or of land in Indian ownership operated under lease shall be paid annually in advance not later than March 1st, no charge being made for operation and maintenance for the first year after said public notice. It shall be the duty of the Secretary of the Interior to give such public notice when water is actually available for lands in private ownership.

This is the only mention of operation and maintenance charges in the act. Nothing specific or of significance on operation and maintenance charges is cited to us from the legislative history.

It is our conclusion that a clear construction of the act is attained by application of the familiar maxim "expressio unius est exclusio alterius". Firstly, Section 2 of the act deals with the

construction charges to be assessed against the Indian lands and made reimbursable; no other charges against Indian lands are mentioned in Section 2 or elsewhere. Secondly, the proviso in Section 3, the only mention of operation and maintenance charges, speaks of such charges only against non-Indian lands and Indian lands leased to non-Indians, with no mention of wholly Indian lands. The "construction charges" of Section 2 cannot be thought to include operation and maintenance charges when Section 3 expressly names the latter in distinction to construction charges.

Further, it will be noted that the proviso of Section 3 enacts a forgiveness of the first year's operation and maintenance charges for the non-Indian San Carlos users only. In view of the expression of legislative purpose to aid the Pima Indians, it is hardly likely Congress would have thought it equitable to provide this forgiveness for non-Indians and not for Indians if operation and maintenance charges were to be assessable against the Indians. Rather, this provision is consonant with an intent that no such charges were to be assessed against the Indians, so no special forgiveness provision was deemed necessary.

The defendant advances several lines of argument against such a plain reading of the statute. It is argued that the proviso of Section 3 was probably intended by its sponsor to insure that no non-Indian operator would escape operation and maintenance charges on a technicality. Such an interpretation is not inconsistent with an intent that these charges would not be assessed against the Indians: without the proviso there is still no specific authority for such charges.

Defendant argues from evidence in the record that most Indian irrigation projects were made reimbursable as to all costs and were the San Carlos project to have been made an exception, the statute would have so stated. We cannot accept this argument that a prevailing practice spelled out in a broad category of statutes can be implied in a particular statute where the practice is not spelled out. There is no indication that Congress ever intended that all Indian irrigation projects operate under a unified scheme or a single congressional intent. Inspection of Indian irrigation statutes shows that each is uniquely tailored to meet a particular local set of conditions, and their provisions vary widely. Defendant concedes that there is at least one other act in which Congress undoubtedly relieved the benefitted tribe of any charges, Act of March 1, 1907, 34 Stat. 1015, 1024.

Acts of Congress relating to irrigation on the Gila River Reservation we do regard as being in pari materia with the San Carlos Act. Pertinent extracts from these statutes are set out in our Findings 7 and 14. It will be seen that the costs of previous irrigation works on the Reservation were made reimbursable, but under differing criteria. Was the 1924 San Carlos Act intended to make a break in that practice? The answer is found in the Act of March 7, 1928, 45 Stat. 200, 211, where, among other provisions relating to the San Carlos project, its merger with the previously existing Florence-Casa Grande project is authorized. The 1928 act provides that payments for both projects so merged are under the terms of the San Carlos Act. It further provides that reimbursement continues to be required for pre-existing projects not merged:

for irrigation on the Gila River Indian Reservation according to the authorizing act of August 24, 1912 (37 Stat. 522) and for the Florence-Casa Grande project according to its authorizing act of May 18, 1916 (39 Stat. 130). To us these provisions confirm that Congress made provision in each act for reimbursement tailored to fit the legislative purpose, and that Congress recognized in 1928 that its 1924 San Carlos Act's reimbursement provisions were something distinct from previous practice. The 1928 act confirms that Congress intended the San Carlos Project to furnish water to the Indians without the burden of operation and maintenance charges because that exemption is the only significant difference in the 1912, 1916, and 1924 acts' respective reimbursement obligations as to the Indians. Congress took particular care in the 1928 act to assure the applicability of the beneficial San Carlos Act to all the merged project regardless of prior obligations.

Defendant argues that great weight should be given to the contemporaneous administrative construction of the San Carlos Act, under which construction the Secretary of the Interior has consistently issued regulations assessing operation and maintenance charges against the plaintiff. We doubt that the label "contemporaneous" can be applied to the Secretary's regulation, which first issued some dozen years after the passage of the San Carlos Act. Defendant has offered no determinative administrative documentation contemporaneous with the time of the passage of the act, when display of what recommendations were before the Congress at the time of enactment might shed light on their then intentions. No great weight can be given to an administrative interpretation so far

removed in time. Indeed, by 1937, administration officials were asking the sponsor of the act as to the intent, while the sponsor was writing the Department for its interpretation.

The defendant urges that special significance be given to a memorandum written by then Assistant Solicitor of the Interior Department, Felix S. Cohen, on January 30, 1937, while the Department's position on the issue was under consideration (Finding 15); defendant rightly bows to the recognized authority of Mr. Cohen. The memorandum argues that the Pima Indians have no "legal claim to get something for nothing". It does not discuss the Pima claim of right as prior appropriators. Of equal authority, we presume, is the author's statement, "I agree that there is no statutory duty upon the Indians in either case to pay for irrigation services . . ."[3/] We believe that the statutory gap was not a technical oversight which the Department of Interior might fill with its notions of proper policy, but was an affirmative manifestation of Congressional intent that no operation and maintenance charges were to be made.

> Executive or administrative acquiescence in practices violative of congressional enactments or failure to enforce them, however long continued, does not preclude belated enforcement of statutes designed for the benefit and protection of Indian wards of the United States. [United States v. Labbitt, 334 F. Supp. 665, 667 (D. Montana 1971).]

3/ ". . . The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law . . ." Creek Nation v. United States, 78 Ct. Cl. 474, 485 (1933), quoted in F. Cohen, Handbook of Federal Indian Law 106 (1941).

We have examined each of the statutes cited in the Secretary of the Interior's regulation (see Finding 12) as the authority for it, and do not find any statute in derogation of the intent of the San Carlos Act not to impose operation and maintenance charges on the Indians. The 1924 and 1928 acts supplant prior enactments.

Congressional acquiescence in the Interior Department interpretation, defendant argues, confirms the correctness of the interpretation and ratifies it. Defendant cites a long series of appropriation acts declaring various appropriations for Pima irrigation as reimbursable. We cannot view these acts, based on budget information supplied Congress by the Department of Interior, as supplying an authorization for charging for operation and maintenance that was not previously authorized. Most cogent, we think, is the appropriation act of August 9, 1937 (50 Stat. 577) (Finding 14 (f)), passed the year that the charges were first imposed, and after the Pima Tribal Council paid them under the threat of receiving no water. The act provides that operation and maintenance charges may be collected from tribal cropping revenues "in accordance with tribal resolution of June 16, 1937, and subject to the approval of the Secretary of the Interior". The Pima were authorized to employ an attorney and accountant to advise them on the legality and equity of the contested charges. We find in this language no intent to authorize a charge not previously authorized by law, nor an attempt to ratify the Secretary's assessment of charges, but rather the acknowledgement of a pending legal dispute or claim as to the validity of the charges. Subsequent enactments

cannot be said to be designed to resolve the dispute by supplying new authority, but rather to preserve the status quo.

There would seem to be no general invalidating reason why revenues from tribal lands may not be made subject to reasonable administrative expenses incurred by the United States in managing tribal property, where such charges are authorized by law. See Quinault Allottee Association v. United States, No. 102-71, Ct. Cl., October 17, 1973. However, where it is not shown that the intent of Congress was that such charges should be made, expenditures from plaintiff's funds are improper.

We hold that the San Carlos Act did not authorize the imposition of operation and maintenance charges of the San Carlos Project on the plaintiff tribe, and the plaintiff is entitled to the recovery of any such charges wrongfully paid from plaintiff's funds. The case will proceed for ascertainment of the amount of defendant's liability.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner