

BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN
COMMUNITY, et al.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

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Docket No. 236-E

Decided: January 10, 1974

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. Capacity to Maintain Suit. As heretofore found by the Commission in Gila River Pima-Maricopa Indian Community v. United States, Docket 228, 24 Ind. Cl. Comm. 301, at 312-313, the plaintiff is an identifiable group of American Indians residing on the Gila River Indian Reservation, and has the capacity to maintain this action under the provisions of the Indian Claims Commission Act.

2. Nature of Suit. The claim asserted under Section 2, Clause 2 of the Indian Claims Commission Act (25 U.S.C. §70a(2)), is that defendant wrongfully charged plaintiff operation and maintenance charges in connection with the delivery of water to its lands within the San Carlos Irrigation Project (hereinafter, San Carlos Project). Plaintiff seeks to recover all amounts as were assessed and paid by them for operation and maintenance since 1937, excluding the amounts paid by defendant on behalf of plaintiff to make up deficits in such payments.

3. Early Irrigation of Gila River. Plaintiff Indians have occupied the general area now designated as the Gila River Indian Reservation from time immemorial. Archeological evidence and the later reports of Spanish and missionary visitors in the area in the 16th century discloses that plaintiff's predecessors practiced relatively advanced forms of irrigation farming, the principal basis of their subsistence. By the mid 19th century, plaintiff's agricultural activities were concentrated along both sides of the Gila River from the confluence of the Gila and Salt Rivers to Sacaton, Arizona. The Gila River was plaintiff's primary source of water and, until white settlers occupied the upper valleys of the Gila River in the late 1860's, plaintiff enjoyed unrestricted use of its waters. In a 1935 water rights adjudication of Gila River water, the Pima Indians were decreed to have the first priority to divert waters in the amount of 210,000 acre feet per season as of an immemorial date of priority.

4. Initial Recognition of Water Problem on Gila River. The first official mention of a shortage of water for irrigation on plaintiff's lands is found in the 1871 report of Captain F. E. Grossman, who established the Indian agency at Sacaton in 1869. Excerpts of this report along with a number of others of similar import are reprinted in House Committee on Indian Affairs, Information on S.966, 68th Cong., 1st Sess., pp 47-58 (1924). The earliest recommendation suggesting a reservoir on the Gila River as a means of supplying plaintiff

Indians with a steady flow of water was made by Indian Agent C. W. Crouse in his annual report to the Secretary of Interior in 1890. Mr. Crouse stated in part:

There is not an acre of the four reservations of this agency that will produce any kind of cereal without irrigation. . . Now, the chief difficulty is to secure for the Indian his proper share of the water. All kinds of schemes are planned to rob him of what he had formerly, which is not sufficient for his present needs. A storage reservoir for these Indians, or a bountiful and permanent interest in a reservoir or canal, would certainly be not only a humane act but an economical outlay of funds for without it these people will soon cease to be styled 'self-supporting.' [House Exec. Docs., 51st Cong., 2nd Sess., Vol. 12, p. 5 (1890-91)]

5. First Irrigation Projects on Gila River. Beginning in 1898, direct congressional concern with the rapidly depleting water supply on the Gila River Indian Reservation was manifested by the inclusion in the appropriation act of July 1, 1898. (30 Stat. 571, 594) for the Bureau of Indian Affairs of funds for investigating the feasibility and total cost of the construction of a dam across the Gila River near plaintiff's reservation. Under the Act of March 3, 1903 (32 Stat. 982, 997), which provided \$150,000 for general irrigation works to be administered under the authority and discretion of the Secretary of Interior, a program of drilling wells was inaugurated on plaintiff's lands. More extensive irrigation works on the reservation were provided for in Section 10 of the Act of March 3, 1905 (33 Stat. 1048, 1081), with a limit in cost of \$540,000. Subsequent appropriation acts passed between 1906 and 1919 provided funds for the continuance of the irrigation projects authorized by the 1905 act, supra, and also provided for additional irrigation projects, including diversion

dams and related controlling works designed to serve, at least in part, plaintiff's lands. Of particular importance was the Act of May 18, 1916 (39 Stat. 123), which provided funds for diversion dams on the Gila Reservation and in the Florence, Arizona, area, which dams were completed in 1922 and 1925, respectively.

6. Engineering Studies on San Carlos Project. The acts cited in Finding 5, supra, and the works they authorized, gave only partial relief to the Indians, these irrigation projects making up only a part of the total recommendations of the experts who had made comprehensive studies of the Gila River water problems. These reports include an early one completed in 1896 by Arthur P. Davis, hydrographer for the Bureau of Reclamation. This report appears as Sen. Doc. No. 27, 54th Cong., 2nd Sess. (1897). Dr. Davis's principal recommendation called for the construction of a storage reservoir at an initial cost of \$2,244,000. This report led to the feasibility study authorized by the Act of July 1, 1898, supra. The second report, that envisaging the total San Carlos Irrigation Project, was prepared by the Chief Engineer of the Irrigation Service, Department of the Interior, and completed on November 1, 1915. This report is reprinted in Hearings on The Condition of Various Tribes of Indians, House Comm. on Indian Affairs, 66th Cong., 1st Sess., Vol. II, Appendixes (1919). The report recommends that the San Carlos Project, which was to include a storage dam and reservoir, be carried out by the United States.

7. Language of Early Acts Relating to Costs. Each of the appropriation acts cited in Finding 5, supra, made some provision in

general terms for the payment of the construction costs as well as operation costs. Section 10 of the Act of March 3, 1905, supra, which provided the principal impetus for beginning the irrigation system on the Gila River Indian Reservation, provided with respect to costs, the following:

. . . Provided further, That when said irrigation system is in successful operation and the Indians have become self-supporting the cost of operating the said system shall be equitably apportioned upon the lands irrigated and to the annual charge shall be added an amount sufficient to pay back into the Treasury the cost of the work within thirty years, suitable deductions being made for the amounts received from disposal of lands which now form a part of the said reservation. . .

The same provision was repeated in the Act of June 21, 1906 (34 Stat. 325, 333), providing additional funds for the project. The Act of April 4, 1910 (36 Stat. 269, 272), provided for repayment in accordance with the provisions of the 1905 act, supra. The Act of August 24, 1912 (37 Stat. 518, 522), appropriating maintenance funds made such funds reimbursable "as and when funds may be available therefor". A similar appropriation in the Act of August 1, 1914 (38 Stat. 582, 587) was made reimbursable "from and funds of said Indians [Pima] now or hereafter available". Funds appropriated under the Act of May 18, 1916, supra, which act authorized the large diversion dams near Florence and Sacaton, Arizona, were made reimbursable in accordance with the provisions of the 1912 act, supra. The Acts of March 2, 1917 (39 Stat. 969, 974), May 25, 1918 (40 Stat. 561, 568), and June 30, 1919 (41 Stat. 3, 10), all applied the 1912 provisions to appropriations for continuing the work on those projects on the Gila River.

8. San Carlos Irrigation Act. The San Carlos Irrigation Project, which now includes, by merger under the Act of March 7, 1928 (45 Stat. 200), projects authorized under the acts cited above, reached its final stage in the construction of the Coolidge Dam, under the provision of the Act of June 7, 1924 (43 Stat. 475), hereinafter referred to as the San Carlos Act.

Sec. 1 of the San Carlos Act states that the works included in the San Carlos Irrigation Project were to be constructed "as contemplated" in the Chief Engineer's report of November 1, 1915 (see Finding No. 6, supra). This report, which was before Congress during its deliberations on S.966, and which became the San Carlos Act, discloses some of the principal considerations which led to the law's enactment. In a recapitulation, the report states as follows:

. . . The data collected in the compilation of the history of irrigation in the Gila River basin shows that irrigation was practiced during prehistoric times by the Pima Indians on the Gila River Indian Reservation, and has been continued by them on the same land until the present date. . . The Gila River Indian Reservation therefore has the first rights to the waters of the Gila River. . . . [p. 93.]

. . . If the San Carlos Reservoir is not constructed in the immediate future some other means must be found to supply water for the irrigation of lands belonging to the Pima Indians on the Gila River Indian Reservation.

The facts herein recited show that their rights in the waters of the Gila River antedate and it is believed are superior, legally and morally, to any and all of the rights of the whites. . . [p. 100.]

. . . The San Carlos project is primarily an Indian relief project and the Indians should therefore be given first consideration. . . [p. 260.]

9. Legislative History: Hearings on S. 966. With technical engineering reports as background, Congress resumed final consideration of legislation dealing with the concluding phase of the San Carlos Project. The House Committee on Indian Affairs held hearings on S.966 in April 1924. Senator Hayden, testifying before that Committee, had the following to say in his introductory statement:

. . . There is no question about the feasibility of the San Carlos project. Every board of engineers that has examined into it has pronounced the plan of reclamation to be entirely practical. The engineers know what to do. All that is needed is the money to pay for the work. The fact that the Pima Indians, wards of the Federal Government, are to be among the chief beneficiaries and the further fact that the enterprise is of such magnitude that it could not be undertaken by private interests fully justifies the United States in providing the necessary funds. . . . [Hearings on S.966, House Comm. on Indian Affairs, 68th Cong., 1st Sess., p. 2 (1924).]

Testifying further on the San Carlos Project and the necessity of restoring water rights to plaintiff Indians, Senator Hayden stated:

. . . The Indians can not pay for the project themselves, but if Congress takes care of the Indians first and restores their ancient water rights which they lost by reason of the fact that the Government neglected to protect as its wards, if we take care of them first, then we are at liberty to provide water for such quantity of the privately owned lands as the water supply will permit. . . . [id. p. 3]

In hearings before the House Committee on Indian Affairs, Charles H. Burke, then Commissioner of Indian Affairs (1924), discussing some elements of the cost of San Carlos project stated:

. . . it seems to me from every standpoint, that the Government would be justified in appropriating a good part of what is contemplated by this bill without any regard as to how much of it may be reimbursable to the Government. . . . [id. p. 5.]

While construction costs were discussed in great detail before the Committee, there is no indication in the printed hearings that operation and maintenance charges were accorded the same attention. The testimony of Wendell M. Reed, Chief Engineer of the Indian Irrigation Service, beginning at page 32 of the above-cited hearings, fully explores the question of construction costs, the estimated per-acre charge, and the anticipated time it would take to fully reimburse the Government for the cost of the project.

10. Legislative History: Senate Report on S. 966. The Senate Report on S. 966, which was favorable to the San Carlos Project, stated in part:

. . . This measure is primarily for the restoration to the Pima Indians of their water rights along the Gila River which have been gradually taken away from them by the white settlers above them appropriating the waters of the river. . . . The moral and the legal basis for this work could well be the sad plight of the Pima Indians. . . .

The long score of injuries which the American Indian has suffered in the past from the hands of the white man can never be balanced, but it is certainly true at this time that the people of the United States do not care to make the score worse, and in such case as this would undoubtedly prefer to treat them fairly no matter what the money cost might be. . . . [Sen. Rep. No. 129, 68th Congr. 1st Sess. p. 1 (1924).]

11. Text of San Carlos Act.

Chap. 288. An Act For the continuance of construction work on the San Carlos Federal irrigation project in Arizona, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, through the Indian Service, is hereby authorized to construct a dam across the Canyon of the Gila River near San Carlos, Arizona, as a part of the San Carlos irrigation project, as contemplated in the report of the chief engineer of the Indian irrigation service submitted to the Commissioner of Indian Affairs on November 1, 1915, at a limit of cost of \$5,500,000, for the purpose, first, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the said Secretary, can be served with water impounded by said dam without diminishing the supply necessary for said Indian lands: Provided, That the total cost of the project shall be distributed equally per acre among the lands in Indian ownership and the lands in public or private ownership that can be served from the waters impounded by said dam.

Sec. 2. That the construction charge assessed against the Indian lands shall be reimbursable to the Treasury of the United States on a per acre basis under such rules and regulations as the Secretary of the Interior may prescribe, and there is hereby created a lien against all such lands, which lien shall be recited in any patent issued therefor, prior to the reimbursement of the total amount chargeable against such land: Provided, That after said project is completed, the Secretary of the Interior is hereby authorized, in his discretion, with the approval of the Pima Indians, to sell, at public auction, at not less than the appraised value thereof, such surplus lands not now allotted within said Gila River Indian Reservation as he may determine to be irrigable from return and drainage waters, the proceeds of such sales to be deposited in the Treasury to reimburse the United States in part for the construction charge assessed against the Indian lands.

Sec. 3. The Secretary of the Interior shall by public notice announce the date when water is available for lands in private ownership under the project, and the amount of the construction charge per irrigable acre against the same, which charge shall be payable in annual installments, the first installment to be 5 per centum of the total charge and be due and payable on the 1st day of December of the third year following the date of said public notice, the remainder of the construction charge, with interest on deferred amounts from date of said public notice at 4 per centum per annum, to be amortized by payment on each December 1st thereafter of 5 per centum of said remainder until the obligation is paid in full: 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.

Sec. 4. That no part of the sum provided for herein shall be expended for construction on account of any lands in private ownership until an appropriate repayment contract in accordance with the terms of this Act and, in form approved by the Secretary of the Interior, shall have been properly executed by a district organized under State law, embracing the lands in public or private ownership irrigable under the project, and the execution thereof shall have been confirmed by decree of a court of competent jurisdiction, which contract, among other things, shall contain an appraisal approved by the Secretary of the Interior, showing the present actual bona fide value of all such irrigable lands fixed without reference to the proposed construction of said San Carlos Dam, and shall provide that until one-half the construction charges against said lands shall have been fully paid, no sale of any such lands shall be valid unless and until the purchase price involved in such sale is approved by the Secretary of the Interior, and shall also provide that upon proof of fraudulent representation as to the true consideration involved in any such sale, the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sale; and all public lands irrigable under the project shall be entered subject to the conditions of this section which shall be applied thereto: Provided further, That no part of any sum provided for herein shall be expended for construction on account of any lands in private

ownership until all areas of land irrigable under the project and owned by any individual in excess of one hundred and sixty irrigable acres shall have been conveyed in fee to the United States free of encumbrance to again become a part of the public domain under a contract between the United States and the individual owner providing that the value as shown by said appraisal of the land so conveyed to the United States shall be credited in reduction of the construction charge thereafter to be assessed against the land retained by such owner; and lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, upon such terms and conditions as he may prescribe.

Sec. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect; and the money hereby authorized to be appropriated shall be available for the acquiring of necessary right of way by purchase or judicial proceedings and for other purposes necessary in successfully prosecuting the work to complete the project.

12. Regulations Respecting Operation and Maintenance Charges.

Assessments for operation and maintenance charges were first made known to plaintiff Indians in 1934. The Secretary of the Interior set the assessment rate per acre for operation and maintenance on the San Carlos Project in a formal regulation. The current version of the regulation, which is harmonious with previous ones except for yearly increases in the rate, appears in 25 C.F.R., § 221:110 as follows:

Pursuant to the provisions of section 10 of the Act of March 3, 1905 (33 Stat. 1081), as amended and supplemented by the Acts of August 24, 1912 (37 Stat. 522), August 1, 1914 (38 Stat. 583, 25 U.S.C. 385), section 5 of the Act of June 7, 1924 (43 Stat. 476), March 7, 1928 (45 Stat. 210, Title 25 U.S.C. 387), and the Act of August 9, 1937 (50 Stat. 577), as amended by the Act of May 9, 1938 (52 Stat. 291-305), and in accordance with the public

notice issued on December 1, 1932, operation and maintenance charges are assessable against the 50,000 acres of tribal lands and trust patent Indian lands of the San Carlos Indian Irrigation Project within the boundaries of the Gila River Indian Reservation, Ariz., and the basic rate assessed for the calendar year 1970 and the subsequent years unless changed by further order, is hereby fixed at \$8.50. Such rate shall entitle each acre of land to have delivered for use thereon two (2) acre-feet of water per acre or its proportionate share of the available water supply. The assessment for the 50,000 acres of Indian land will be payable as provided in \$ 222.111 to \$ 221.116, inclusive.

13. Plaintiff's Objections to Operation and Maintenance Charges.

Plaintiff Indians objected to the operation and maintenance charges, from the very beginning of the assessment period in 1934, on the grounds that the San Carlos Project was intended to restore their water rights, that they were entitled to water free from any charges, and that they were financially unable to pay such charges. A three-year moratorium was declared granting plaintiff relief from such payments for the years 1934, 1935, and 1936. The cost for these years amounted to \$289,360.09 and were made payable with reimbursable funds appropriated for that purpose by Congress. While the point is not clear or explored by the parties, it appears that the authority for said moratorium can be found in the Act of June 1, 1932 (47 Stat. 564), known as the Leavitt Act, which act authorized and directed the Secretary of the Interior to adjust or eliminate, in an equitable manner, reimbursable charges of the Government existing as debts against Indians or Indian tribes.

When assessments were reinstated in 1937, tribal objections were made known to the Secretary of the Interior in the form of tribal resolutions. Under the threat of having its water supply cut off, the plaintiff, by tribal resolution dated June 16, 1937, agreed to pay such charges as emergency measures. Similar objections have been made by plaintiff annually up until the time of the filing of the present petition. The pertinent portion of the resolution states:

RESOLVED, That we appropriate, as an emergency measure, from the proceeds of the cropping operation from tribal lands so much money as may be necessary to keep the water flowing upon our lands for this season, provided that such an appropriation and the payment thereof can be made in such way as in no way to bind this community as to future action or payments, until all matters connected with the operation and maintenance assessment shall have been fully investigated, determined, and understood by the Gila River Pima-Maricopa Indian Community. [Pl. Ex. No. 7.]

14. Statutory Basis for Operation and Maintenance Charges. The statutory basis pursuant to which the Secretary of the Interior assessed operation and maintenance charges is found in the quoted language of the regulation in Finding 12 herein. The pertinent provisions of the acts cited in the regulation are as follows:

(a) Act of March 3, 1905, supra.

(Quoted in Finding 7 herein)

(b) Act of August 24, 1912 (37 Stat. 518, 522):

. . . That the proportion of the cost of the irrigation project on the Gila River Indian Reservation heretofore and herein authorized to be paid from the public funds shall be repaid into the Treasury of the United States

as and when funds may be available therefor. . .

(c) Act of August 1, 1914 (38 Stat. 582, 583):

. . . That all moneys expended heretofore or hereafter under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe.

(d) Act of June 7, 1924 (San Carlos Act, supra):

Sec. 5. The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect; and the money hereby authorized to be appropriated shall be available for the acquiring of necessary right of way by purchase or judicial proceedings and for other purposes necessary in successfully prosecuting the work to complete the project.

(e) Act of March 7, 1928 (45 Stat. 200, 210):

. . . For operation and maintenance of the pumping plants and irrigation system for the irrigation of the lands of the Pima Indians in the vicinity of Sacaton, on the Gila River Indian Reservation, Arizona, \$13,000, reimbursable as provided in section 2 of the Act of August 24, 1912 (Thirty-seventh Statutes at Large, page 522).

For all purposes necessary to provide an adequate distributing, pumping and drainage system for the San Carlos project, authorized by the Act of June 7, 1924 (Forty-third Statutes, page 475), and to continue construction of and to maintain and operate works of that project and of the Florence-Casa Grande project; and to maintain, operate, and extend works to deliver water to lands in the Gila River Indian Reservation which may be included in the San Carlos project, including not more than \$5,000 for crop and improvement damages and not more than \$5,000 for purchases of rights-of-way, \$485,000: Provided, That in addition to the amount herein appropriated the Secretary of the Interior may also incur obligations and enter into contract for development of electrical power at the Coolidge Dam as an incident to

the use of the Coolidge Reservoir for irrigation, such contract not exceeding a total of \$350,000 and his action in so doing shall be deemed a contractual obligation of the Federal Government for the payment of the cost thereof: Provided further, That no such obligation shall be incurred or contract entered into until a contract satisfactory to the Secretary of the Interior shall have been executed by the Florence-Casa Grande Water Users' Association providing for repayment of the cost of construction of said power plant as a part of the cost of said project and for furnishing power for agency and school purposes and for pumping for irrigation by Indians on the San Carlos Reservation at a cost not exceeding 2 mills per kilowatt-hour delivered at the switchboard at the Coolidge Dam. . . . Provided further, That the Secretary of the Interior is authorized to sell surplus power developed at the Coolidge Dam in such manner and upon such terms and for such prices as he shall think best, and the net revenues from such and all sales of power at that plant shall be devoted, first, to reimbursing the United States for the cost of developing such electrical power as that cost shall be determined by the Secretary of the Interior; second, to reimbursing the United States for the cost of the San Carlos irrigation project; third to payment of operation and maintenance charges, and the making of repairs and improvements on said project: Provided further, That reimbursements to the United States from power revenues shall not reduce the annual payments from landowners on account of the principal sum constituting the cost of construction of the power plant or the project works until such sum shall have been paid in full: Provided further, That the Secretary of the Interior is authorized in his discretion to effect a merger of the Florence-Casa Grande project in whole or in part with the San Carlos project and to require payments for both projects under the terms of the San Carlos Act: Provided further, That the cost of construction for the Gila River Indian Reservation as to works not included in said project and the cost of construction and operation of that part of the Florence-Casa Grande project not included in said project shall be reimbursed as provided for by the Acts of August 24, 1912 (Thirty-seventh Statutes, page 522), and May 18, 1916 (Thirty-ninth Statutes, page 130), respectively: Provided further, That the Secretary of the Interior is authorized to accept the conveyance to the United States for the benefit of the San Carlos project of canals, reservoirs, pumping plants, water rights, lands, and rights of way, and he may

pay for damage to crops and improvements incident to constructing project work: Provided further, That the Secretary of the Interior is authorized to contract with the State of Arizona, and with towns, villages, and municipalities of that State for delivering water to them from the San Carlos project upon such terms as he shall think best: Provided further, That the provisions in the Acts of June 30, 1913 (Thirty-eighth Statutes at Large, page 85), and August 1, 1914 (Thirty-eighth Statutes at Large, page 588), making the cost of two bridges on the San Carlos Reservation reimbursable from Indian tribal funds, are hereby repealed except as to the \$10,000 heretofore reimbursed. . . .

(f) Act of August 9, 1937 (50 Stat. 564, 577):

For operation and maintenance of the San Carlos project for the irrigation of lands in the Gila River Indian Reservation, Arizona, including not to exceed \$2,000 for purchase of land, \$76,300, reimbursable, together with \$112,200 (operation and maintenance collections) and \$161,000 (power revenues), of which latter sum not to exceed \$25,000 shall be available for major repairs in case of unforeseen emergencies caused by fire, flood, or storm, from which amounts \$112,200 and \$161,000, respectively, expenditures shall not exceed the aggregate receipts covered into the Treasury in accordance with section 4 of the Permanent Appropriation Repeal Act, 1934; in all, \$349,500.

For continuing subjugation and for cropping operations on the lands of the Pima Indians in Arizona, there shall be available so much as may be necessary of the revenues derived from these operations and deposited into the Treasury of the United States to the credit of such Indians, and such revenues are hereby made available for payment of irrigation operation and maintenance charges assessed against tribal or allotted lands of said Pima Indians in accordance with tribal resolution of June 16, 1937, and subject to the approval of the Secretary of the Interior, the Pima Indians are hereby authorized to employ an attorney and an accountant for the purpose of advising them in connection with the legality and equity of these operation and maintenance assessments at a cost of not to exceed \$2,000 including all expenses connected therewith payable from tribal funds.

(g) Act of May 9, 1938 (52 Stat. 291, 305):

For continuing subjugation and for cropping on the lands of Pima Indians in Arizona, there shall be available not to exceed \$200,000 of the revenues derived from these operations and deposited into the Treasury of the United States to the credit of such Indians and such revenues are hereby made available for payment of irrigation and maintenance charges assessed against tribal or allotted lands of said Pima Indians.

15. Administrative Interpretation of Operation and Maintenance

Regulations. In a memorandum dated January 30, 1937, addressed to the Commissioner of Indian Affairs, Felix S. Cohen, then Assistant Solicitor of the Department of the Interior, made the following observations respecting the legality of operation and maintenance assessments against lands of plaintiff Indians being served by the San Carlos project:

. . . I agree that there is no statutory duty upon the Indians in either case to pay for irrigation services or to accept such services but there is, I think, no way in which the Secretary of the Interior could supply free services for the benefit of the Indians concerned. The lack of express legislation, in the case of the Pimas, on the question of operation and maintenance charges on lands used by the Indians still leaves the Indians without any legal claim to get something for nothing. It would be legally possible, I believe, to provide that payments of operation and maintenance costs by Indians should be made in the form of labor on the project, wherever money payments cannot be made. I see no other practical way of relieving the Pima Indians of the burden of operation and maintenance charges. I think the one criticism that can justly be leveled against the Department in this connection is that we have incurred debts on behalf of the Indians without informing the Indians what was happening. This is a point that I raised a few months ago in connection with the Pima charges and two years ago in connection with the Pueblo charges. What steps

have since been taken, I do not know. . . . [Def. Ex. No. 26.]


Additional memoranda in evidence include, among others, inquiries from Senator Hayden addressed to the Commissioner of Indian Affairs (Def. Ex. 30). Senator Hayden, on May 28, 1937, sought information respecting operation and maintenance charges in view of the protests made by plaintiff Indians. The Commissioner's reply on June 4, 1937 (Def. Ex. 31), set forth the legislative history of the San Carlos Act and pre-1924 acts as forming the legal basis for assessing operation and maintenance charges in San Carlos Project. These cited acts include all those set forth in Findings 5 and 7 herein, which relate generally to the method by which appropriations enacted for earlier projects are to be repaid.

16. Statutes in Pari Materia Cited by Defendant. Defendant has cited some 23 post-1924 acts evidencing congressional ratification of contemporaneous administrative interpretation of the San Carlos Act. These acts are set forth in defendant's brief at pages 34 to 36. Four of said statutes^{1/} make operation and maintenance funds reimbursable under Sec. 2 of the Act of August 24, 1912, supra, Finding 14 (b). The 1912 Act funds are reimbursable "as and when funds may be available therefor". Of the 23 acts cited, those which referred specifically


^{1/} Act of March 3, 1925, 43 Stat. 1141, 1152; Act of January 12, 1927, 44 Stat. 934, 944; Act of March 7, 1928, 45 Stat. 200, 211; Act of March 4, 1929, 45 Stat. 1562, 1563.

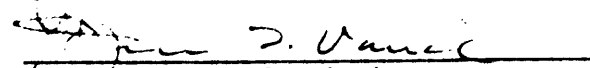
to the San Carlos (Coolidge) dam made funds reimbursable in accordance with the provisions of the 1924 San Carlos Act. Thirteen of the acts cited provided that the funds appropriated were reimbursable without reference to prior law or the method by which repayment was to be effected. The Act of August 9, 1937 (50 Stat. 564), provided for payment of operation and maintenance charges out of revenues derived from tribal farm operations in accordance with the June 16, 1937, resolution of the Tribal Council, cited in Finding 16 herein. The Act of March 7, 1928, supra, also cited by defendant, provided funds for the development of power in the San Carlos Project. This act also set forth several priorities under which power revenues were to be distributed. The third such priority was designated to pay for operation and maintenance charges on the San Carlos Project.

17. Conclusion. The Commission finds as a matter of law that there is no statutory authorization under the San Carlos Act or subsequent acts for the imposition of operation and maintenance charges on tribal funds for water furnished Indian lands in the San Carlos Project. Further proceedings will be held to determine the amount of plaintiff's damages.


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner