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January 17, 1969 - 8

M-36770

BOUNDARY OF THE SALT RIVER INDIAN RESERVATION, ARIZONA

Indian Lands: Generally--Indian Lands: Tribal Lands--Executive Orders and Proclamations--Boundaries

The south boundary of the Salt River Indian Reservation, established as "up and along the middle of the [Salt] River" by the Executive Order of June 14, 1879, lies in the south channel of the Salt River in T. 1 N., R. 5 E., G. & S. R. M., where the river is separated by a large island into two distinct channels, since the preponderance and weight of evidence indicates that the main channel of the river flows south of the island.

Words and Phrases: "up and along the middle of the * * * river"

When an executive order designates the boundary of an Indian Reservation as "up and along the middle of the * * * river," the boundary lies within the main channel of the river when it is separated by an island into two distinct channels.

Indian Lands: Generally--Boundaries--Surveys of Public Lands: Generally

The holding in Boundary of San Carlos Indian Reservation, 55 I.D. 560, that an Indian Reservation boundary description which has been uniformly interpreted by the Department for many years will be considered controlling, is not applicable when the exact location of the boundary has never been indicated on a map prepared for that purpose or officially surveyed and established upon the ground.



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

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January 17, 1969

M-36770

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Identification and Reestablishment of the South Boundary
of the Salt River Indian Reservation

Informally in January, 1968, and later by your memorandum of October 1, 1968, you requested that this office review the March 5, 1963, memorandum opinion of the Director of the Bureau of Land Management, approved by the Assistant Secretary for Public Land Management on May 6, 1964, concerning the location of the south boundary of the Salt River Indian Reservation within Township 1 North, Range 5 East, Gila and Salt River Meridian, Arizona (Exhibit 1).

The Executive Order of June 14, 1879, which established the Salt River Indian Reservation, described its south boundary as "up and along the middle of the [Salt] river" (Exhibit 2). At the time of the order, the river flowed through T. 1 N., R. 5 E., in two distinct channels, separated by a large island. The question discussed in the March 5, 1963, opinion is what was meant by "the middle of the river" as applied to the Salt River within T. 1 N., R. 5 E., or, more generally, what is the exact location of the south boundary of the Salt River Reservation.

The Director of the Bureau of Land Management concluded that the boundary lay in the channel north of the island. Having reviewed his determination and all available background material, we are of the opinion that the boundary lies in the south, rather than north channel. We therefore recommend that Secretarial approval of the March 5, 1963, decision be withdrawn and that new instructions regarding the boundary be issued.

I. There is no evidence that the north channel was intended as the boundary of the reservation.

In order properly to evaluate the meaning of the phrase "middle of the river" as it was used in the Executive Order of June 14, 1879, the order itself must be put in its historical context, for the events leading up to its issuance provide valuable indices to the intent of its drafters.

The Act of February 28, 1859 (11 Stat. 388, 401), reserved for the Pima and Maricopa Indians the land they occupied on and near the Gila River, just south of the Salt River. There, the Indians constructed irrigation works and successfully raised wheat. The surrounding area, the Salt River Valley, considered the prime agricultural district of the Arizona territory, was extensively cultivated by white settlers, many of whom filed private claims to their land under various federal laws. A struggle for water developed in the mid-1870's which left the settlers in control of the irrigation ditches in the valley and forced the Indians to look elsewhere for farmland. They gradually began leaving their reservation and migrating north to the Salt River.

On January 10, 1879, in response to numerous reports that the Indians were being deprived of water on the Gila Reservation and needed additional land protected from encroachment by white settlers, an executive order was issued setting aside approximately 656,000 additional acres of the Salt River Valley on both sides of the Salt River for the Pimas and Maricopas (Exhibit 3). The order made no mention of the two channels of the Salt River, alluding merely to "the course of the river."

Reaction to the order was immediate and generally adverse. Captain A. R. Chaffee wrote to the Assistant Adjutant General on February 18, 1879, "I am lothe to believe the boundaries described correct" (Exhibit 4), noting that the reservation encompassed an unnecessarily large amount of valuable land and warning that the order was sure to trigger hostilities with the settlers of the region. Chaffee then reiterated a suggestion he had made in November 1878, that a smaller reservation, located in T. 1 N., R. 5 E., and Tps. 2 and 3 N., Rs. 5, 6, and 7 E., be established. A map dated March 4, 1879, and marked "traced in the Adjutant General's office" indicates the area reserved in the January 10 Executive Order as well as the reservation proposed by Captain Chaffee (Exhibit 5). The south boundary of the latter extends to the south channel of the Salt River, while that of the former lies south of the Gila River.

An early map, simply identified as "traced in Adjutant General's office, January 1879," (Exhibit 6) shows a proposed reservation whose south boundary runs north of the river.

On March 1, 1879, the Governor of Arizona, suggested that the Indians be removed from the Salt River Valley entirely and settled on the Colorado River. This suggestion was unfavorably received by Major General McDowell, Commander of the Military Division of the Pacific, who noted, in a letter dated April 28, 1879, that the Pimas and Maricopas were peaceful Indians who had unjustly been driven from their land once and should not be so treated again (Exhibit 7). He relayed the suggestion of the Army Division Commander, suggesting the establishment of a reservation smaller than that described in

the Executive Order, with a south boundary "along the middle of the Salt River," and added his own proposal for a reservation whose south boundary would be "along the Salt River to the initial point [NE corner, Sec. 15, T. 1 N., R. 4 E.] which is within the bed of the stream."

Because there was apparently some uncertainty as to the exact location of the Indians within the area reserved in the January 10 Executive Order, Inspector J. H. Hammond was sent to Arizona by the Commissioner of Indian Affairs to investigate. In his report, dated March 8, 1879 (Exhibit 8), Inspector Hammond stated that the Indians had left the Gila River Reservation in 1876 and 1877 in search of water, encouraged by white settlers who hoped the Indians would prove helpful in coping with the less friendly Apaches north of the Salt River. The map which accompanied his report entitled "Gila River Reservation and Surroundings, Pima Agency, A.T." (Exhibit 9), indicated where the Indians had settled; the region along the south channel of the Salt River, east of the island, was designated "Pima fields, 375 persons, 47 families."; along the north channel was the notation "Pima settlement, 1300 persons, 240 families." Hammond concluded by suggesting a new reservation to replace that created by the January 10 Executive Order, with boundaries almost identical to those proposed earlier by Captain Chaffee, with the exception of the south boundary, which was to follow the north bank of the Salt River.

Hammond's report was forwarded to the Secretary of the Interior by the Acting Commissioner of Indian Affairs on June 12, 1879, with a letter (Exhibit 10) commenting unfavorably on the plan to remove the Indians to the Colorado River ("It would do peaceful Indians a great injustice"). The Acting Commissioner then recommended that the January 10 Executive Order, which had originally been drafted by his office, be rescinded, and a new reservation set aside in accordance with a draft Executive Order which he had prepared. The south boundary of the new reservation was to run "up and along the middle of the said [the Salt] River," and those lands south of the river owned by Indians were to be temporarily withdrawn until the lands and improvements thereon could be sold to settlers. The proposed Executive Order was signed by President Hayes on June 14, 1879 (Exhibit 2).^{1/}

Thus, the Executive Order of June 14, 1879, was concerned with the protection of the Pima and Maricopa Indians who had settled on both sides of the channels of the Salt River. Prior to its issuance, at least five different persons had presented plans for a reservation. Only one (Inspector Hammond) had suggested that the south boundary of the reservation run along the north bank of the Salt River (since the Executive Order establishing the reservation spoke of the middle of the river, it is apparent that this plan, which would not have included

^{1/} That order was amended by the Executive Orders of March 22, 1911, September 28, 1911, and October 23, 1911. These amendments have no bearing on the boundary question.

any of the river within the reservation, was rejected); two (Commissioner of Indian Affairs and Army Division Commander) had proposed that the south boundary be placed "in the middle of the river"; one (Major General McDowell) had located it "in the bed of the river"; and one (Captain Chaffee) had set it in the south channel of the river. Nowhere was the north channel mentioned.

II. The preponderance of evidence indicates that the south channel is the south boundary of the reservation.

The Executive Order of June 14, 1879, sought to establish the Salt River as the south boundary of the reservation. Its specification that the boundary was to extend up and along the middle of the river, a non-navigable channel, reflected contemporaneous (and current) law on the subject. At common law, a grant bounded by a non-navigable river transferred title to the center thread of the river. Middleton v. Pritchard, 3 Scammon 510, 520. This principle had been held applicable to the United States, St. Paul P. and R. Company v. Schurmeir, 7 Wall 272, 19 L. Ed. 74 (1868); St. Clair County v. Lovington, 23 Wall 46, 23 L. Ed. 59 (1874); and was explicitly recognized by this Department, 6 L.D. 538, 637 (1888), 25 L. D. 413 (1879).

When a non-navigable river has two or more channels, the middle of the river is generally considered synonymous with the thread of the stream, or the middle of the main channel, Buttenuth v. St. Louis Bridge Co., 17 N.E. 439, 443, 123 Ill. 535, 5 Am. St. Rep. 545; see also Bishel v. Faria, 1 Cal. Rptr. 153, 157, 347 P.2d 289, the main channel being the widest and or deepest channel, Grand Rapids R. Co. v. Butler 158 U.S. 87 (1895).

We are not persuaded by any of the evidence cited by the Director in his March 5, 1963, opinion or reflected in the record that the main channel of the Salt River flowed north rather than south of the island in T. 1 N., R. 5 E. The earliest official survey of the township, completed by W. F. Ingalls and approved on October 22, 1868, merely contained sketches of the channels. They were not meandered (Exhibit 11). In his general description of T. 1 N., R. 5 E., Ingalls characterized them as "of about equal size" but "constantly changing position and size" (Exhibit 12). This general description is contradicted by the actual measurements contained in the body of his field notes, which indicate that the south channel was wider.

Ingalls measured the width of the channels wherever they intersected a surveyed line. His field notes, contained in Arizona Territory Volumes 1 and 2, show the following for T. 1 N., R. 5 E.:

<u>Surveyed Line</u>	<u>Width of South Channel</u>	<u>Width of North Channel</u>
North between § 3 & 4	3.46 chains	2.63 chains
North between § 4 & 5		4.85 chains
North between § 8 & 9	3.70 chains	
East between § 4 & 9	7.25 chains	
East between § 5 & 8		4.11 chains
North between § 7 & 8		3.25 chains
North between § 17 & 18	4.91 chains	

These figures indicate that the average width of the south channel in T. 1 N., R. 5 E., was 4.83 chains, while that of the north channel was only 3.71 chains. Ingalls' measurements along the entire length of the channels, through T. 2 N., R. 5 E., as well as T. 1 N., R. 5 E., reflect an overall average width of 4.35 chains for the south channel and 3.96 chains for the north channel. While they are certainly not conclusive, these figures are the only available evidence of the relative size of the two streams prior to the establishment of the reservation; and they suggest that the south channel was the wider.

A map dated July 12, 1879, and entitled "Plat showing lands reserved for Pima and Maricopa Indians by Executive Order of June 14, 1879" (Exhibit 13), was prepared by the Surveyor General at the request of the Commissioner of the General Land Office. It represented both channels of the river by single lines and sketched the south boundary of the reservation slightly north of the north channel. In his opinion, the Director of the Bureau of Land Management cites this map as being both "most pertinent" and "official." We cannot agree that either adjective is appropriate. The map is certainly not an "official plat", its title notwithstanding, since it does not reflect the findings of a duly authorized and approved survey of the land represented. United States v. Morrison, 240 U.S. 192 (1916). In his letter of June 27, 1879, the Commissioner of the General Land Office merely requested preparation of a "diagram" (Exhibit 14); nothing as elaborate as an official survey was indicated. In fact, there is no evidence that the Surveyor General, who prepared the map in Tucson, 125 miles away from the reservation, even inspected the area. Indeed, he was able to complete the map a scant 15 days after the date of the Commissioner's request, which, considering the time then required for transmission of the request, was quite remarkable. More important than its lack of official status, however, is the map's obvious lack of accuracy. It depicts the south boundary of the reservation as north of the river entirely, while the Executive Order which it purports to be illustrating explicitly extends the boundary to the middle of the river. Clearly an instrument containing such a gross error on its face can be accorded little weight.

An official survey of the reservation was completed by L. D. Chillson in July 1888. His plats indicate nothing below the north bank of the north channel of the river (Exhibit 15). Although the Director cites this survey to support his conclusion that the north channel was the main stream of the Salt River, in fact the survey does not furnish any evidence at all about location of the boundary. Chillson was instructed to survey the reservation into 40-acre tracts following the rules of the surveyor's manual (Instructions to Surveyors General, 1881). His special instructions, contained in a letter from the Surveyor General dated December 27, 1887 (Exhibit 16), stated:

The southern boundary of this reservation being the Salt River, it will be necessary for you to meander same.

Chillson did precisely what was asked of him -- he meandered the Salt River, limiting his work to the north bank only, since the surveyor's manual directed that non-navigable rivers "will only be meandered on one bank. For the sake of uniformity the surveyor will traverse the right bank when not impracticable." (page 34) Thus, the only information the Chillson survey furnishes with regard to the Salt River is the meander line of its north bank.

A meander line merely determines the sinuosities of a stream and is not a boundary, United States v. Elliott et al., 131 F.2d 720 (10th Cir., 1942); Witaker v. McBride, 197 U.S. 510, 512, 26 S. Ct. 530; Producer's Oil Co. v. Hanzen, 238 U.S. 325, 339, 35 S. Ct. 755; the waters themselves constitute the real boundary, Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808 (1891). That Chillson's survey is limited to the north bank of the Salt River thus does not indicate that he thought that it was the south boundary of the reservation or had determined the north channel to be the main thread of the river; it merely reflects his adherence to the instructions pursuant to which the survey was executed. Chillson was not requested to indicate the boundary or to concern himself with the river at all, other than to meander its right bank. That is all he did; no effort was made to gather any information about the river itself, its islands, its channels, its flow, etc. Neither the Surveyor General's instructions nor Chillson's field notes refer to the south boundary of the reservation in any more specific terms than "the Salt River." Thus, the 1888 survey furnishes no real evidence as to the proper location of the south boundary of the reservation.

That the survey was of no help in establishing the boundary is further evidenced by the fact that on October 13, 1891, a little more than two years after Chillson completed his work, the Commissioner of the General Land Office wrote to the Commissioner of Indian Affairs and "being in doubt as to the exact location" of the south boundary, asked his opinion

on the matter (Exhibit 17). In his reply, dated August 18, 1892 (Exhibit 18), the Commissioner of Indian Affairs relayed a report he had received from the Pima Indian Agent on July 8, 1892, in which the agent made no reference to the two channels, merely noting that since the island between them was unoccupied, contained no timber and had sandy soil, it was not advisable that it be claimed for the Indians (Exhibit 19). The Commissioner then stated that whether the island was within the reservation was "a question of fact upon which I am not prepared to express an opinion at this time," but added that "the plat on file in this office indicates that the principal portion or branch of the river runs south of the island, and that what is termed the north channel is a much narrower stream." We have been unable to identify the plat referred to.

The National Reclamation Act, the Act of June 17, 1902 (32 Stat. 388), authorized a survey of, among others, irrigable lands in Arizona. The map prepared pursuant to that act by the United States Geological Survey indicated the south channel of the Salt River as the main stream, while showing the north channel as practically dry (Exhibit 20). The south boundary of the reservation was placed in the center of the south channel.

On December 15, 1910, R. A. Farmer completed a dependent resurvey of the reservation lands within T. 1 N., R. 5 E., for allotment purposes, based upon Chillson's 1888 survey. Like Chillson, Farmer simply meandered the right bank of the river. His plats stopped at the meander line and did not indicate any of the river itself (Exhibit 21). A dotted line was sketched in to indicate the reservation boundary, but it is of little significance since Farmer was not concerned with the boundary and made no effort to ascertain its precise location. Indeed, in his field notes (Exhibit 22), he refers to "the right bank of the Salt River * * * which river is the south boundary of the reservation" (emphasis added), thereby indicating that he had made no determination of the boundary beyond its general location somewhere in the river. Thus, the Farmer survey, like that of Chillson, conveys no information about the relative size of the two channels or the proper location of the south boundary of the reservation.

In November 1914, the United States Indian Service completed a map showing allotments and cultivated land on the Salt River Indian Reservation (Exhibit 23). The south boundary of the reservation was shown in the south channel of the river.

The foregoing indicates that the Director's conclusion that "the preponderance and weight of evidence favors the recognition of the north channel of Salt River as being the south boundary of the reservation" is not borne out by the record.

The July 12, 1879, diagram (Exhibit 13), which located the boundary north of the river entirely, is clearly erroneous on its face. The Chillson Survey (Exhibit 15) furnishes no information on the boundary

question. The plat on file in the Bureau of Indian Affairs referred to by the Commissioner in his letter of August 18, 1892 (Exhibit 18), indicates that the south channel was the principal branch of the river. The 1902-1903 irrigation map (Exhibit 20) shows the south channel as larger than the north and locates the reservation boundary in it. The Farmer survey (Exhibits 21 & 22) merely describes the boundary as "the river" and indicates it by a dotted line sketched beyond the edges of the surveyed area. The 1914 allotment map (Exhibit 23) shows the boundary running in the south channel of the river. The preponderance and weight of evidence favors recognition not of the north, but of the south channel of the river as the south boundary of the reservation.

III. There is nothing to preclude recognition of the south channel as the south boundary of the reservation.

In his March 5, 1963, opinion, the Director asserts:

In the apparent absence of protest or amendment by the Indians to the boundary as shown upon many maps and as officially surveyed and established upon the ground by two official surveys, it must be considered that until recent years the Indians were apparently complacent with the boundary being along the north channel.

and maintains that Departmental policy precludes recognition of the south channel as the boundary, citing Boundary of San Carlos Indian Reservation, 55 I.D. 560 (May 29, 1936).

We note initially that contrary to the Director's assertion, the boundary has not been shown to be along the north channel "upon many maps." Moreover, the boundary has never been "officially surveyed and established on the ground": the Chillson and Farmer surveys, to which we assume the Director is referring, did not purport to locate the boundary; they merely reflected the meanders of the north bank of the Salt River, without any attempt to ascertain or depict the middle of the river. In fact, to the best of our knowledge, the south boundary of the Salt River Indian Reservation has never been indicated on a map prepared for that purpose. Thus, by recognizing the south channel as the reservation boundary, the Secretary would not be reversing a determination of long standing, as the Director implies, but merely resolving a matter which has proven problematic for almost one hundred years.

In light of the confusion which has surrounded the question of the location of the boundary, the situation at hand is hardly comparable to that considered in Boundary of San Carlos Indian Reservation, supra, in which the Acting Secretary of the Interior held that a boundary description which had been uniformly interpreted by the Department for

60 years would be considered controlling. There certainly has been no such uniformity in recognition of the south boundary of the Salt River Indian Reservation. The Pimas and Maricopas can hardly be criticized and certainly should not be penalized for not questioning a Departmental determination which was not definitely made until 1963.

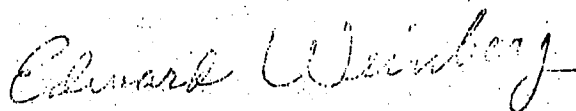
Indeed, the Indians have repeatedly asked for clarification of the location of the south boundary of their reservation. On March 23, 1940, the Salt River Indian Community Council passed a resolution requesting the Commissioner of Indian Affairs to "definitely locate and establish the reservation boundary line in and along the stream bed of the Salt River." (Exhibit 24) The Indians were advised that since no funds were available for a survey, their request could not be acted upon. Subsequent requests have met a similar fate.

IV. Conclusion

Under these circumstances we believe that the south channel of the Salt River should be recognized as the south boundary of the Salt River Indian Reservation. We therefore recommend that Secretarial approval of the March 5, 1963, memorandum opinion of the Director of the Bureau of Land Management be withdrawn and that new instructions regarding the south boundary of the Salt River Indian Reservation be issued.

A status report on the area between the channels furnished by the Bureau of Land Management on January 3, indicates that since the establishment of the reservation, the United States has issued patents to private individuals and granted rights-of-way to the State of Arizona and County of Maricopa involving lands which the survey to be made by the Bureau of Land Management may show to be within the boundaries of the reservation. The Salt River Pima-Maricopa Indian Community has explicitly waived any interest it might have in such lands. However, in order to avoid any cloud upon the title conveyed by the patents involved, all of which appear to have been issued more than 40 years ago, or upon the interests granted by the rights-of-way, we suggest that in the event the survey by the Bureau of Land Management discloses that the United States issued patents to and rights-of-way across lands already reserved for Indian use, remedial legislation be recommended to exclude the patented and rights-of-way areas from the reservation and confirm the titles thereto.

We would add that fairness to persons asserting interests in the lands between the two channels under the mining and other public lands laws will require this Department to promptly request the Department of Justice to commence appropriate actions to obtain judicial determinations of the merits of their claims.



Solicitor

EXHIBITS

1. March 5, 1963, memorandum opinion from the Director of the Bureau of Land Management to the State Director, Arizona
2. Executive Order of June 14, 1879
3. Executive Order of January 10, 1879
4. February 18, 1879, letter from Captain A. R. Chaffee to Assistant Adjutant General
5. Map dated March 4, 1879, "traced in the Adjutant General's office"
6. Map, "traced in Adjutant General's office, January 1879"
7. April 28, 1879, letter from Major General McDowell to Adjutant General
8. March 8, 1879, letter from Inspector J. H. Hammond to Commissioner of Indian Affairs
9. March 8, 1879, map, "Gila River Reservation and Surroundings, Pima Agency, A.T."
10. June 12, 1879, letter from Acting Commissioner of Indian Affairs to Secretary of the Interior
11. Official plats of W. F. Ingalls survey of T. 1 N., R. 5 E., and T. 2 N., R. 5 E., approved October 22, 1868
12. Excerpt from field notes of W. F. Ingalls' survey, Arizona Territory Volume 2
13. July 12, 1879, map, "Plat showing lands reserved for Pima and Maricopa Indians by Executive Order of June 14, 1879"
14. June 27, 1879, letter from Commissioner of the General Land Office to Surveyor General
15. Official plat of L. D. Chillson resurvey of T. 1 N., R. 5 E., approved July 11, 1888
16. December 27, 1887, letter from Surveyor General to L. D. Chilson
17. October 13, 1891, letter from Commissioner of the General Land Office to Commissioner of Indian Affairs
18. August 18, 1892, letter from Commissioner of Indian Affairs to Commissioner of the General Land Office
19. July 8, 1892, letter from Pima Indian Agent to Commissioner of Indian Affairs

20. Map of irrigable lands in Arizona prepared by U.S. Geological Survey, for Salt River Project 1902-03
21. Official plat of R. A. Farmer resurvey of T. 1 N., R. 5 E., approved December 15, 1910
22. Excerpt from field notes of R. A. Farmer resurvey of T. 1 N., R. 5 E.
23. November 1914, United States Indian Service map, allotments and cultivated land on the Salt River Indian Reservation
24. March 23, 1940, resolution of the Salt River Indian Community Council