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UNITED STATES GOVERNMENT

memorandum

DATE: AUG 21 1985

REPLY TO ATTN OF: ACTING Phoenix Area Director

SUBJECT: Request for Issuance of Trust Patent for Chemehuevi Indian Tribe

TO: Superintendent, Colorado River Agency

We have received the packet you forwarded us including Mr. Marston's letter addressed to Ms. McCurdy and his memorandum to Mr. Alvarez.

Mr. Marston is accurate in his letter presentation as to the events that occurred. He is not correct, however, in his supposition that it was by an administrative oversight that no patent was issued for the Chemehuevi Reservation. The simple fact was that the Chemehuevi Indians were not Mission Indians. Therefore, the acts of January 12, 1891 and March 1, 1907 had no application to the Chemehuevi Tribe or the Reservation.

The confusion is caused because the withdrawal was included in the February 2, 1907 withdrawal order, which was primarily directed towards the betterment of the Mission Indians. Special Agent Kelsey's report was not limited to the Mission Indians. He was very familiar with all of the Indians in the State, including the Chemehuevi. He noted that the lands of the Chemehuevi had not yet been recognized but should be. His report, though, was preponderantly directed towards groups of Mission Indians. The February 2, 1907 withdrawal order was a direct response to Mr. Kelsey's reports. It's not difficult, then, to understand how the Chemehuevi lands were included with the Mission lands in that order. There are no other records, before or since the February 2, 1907 withdrawal order, that would tie the Chemehuevi Indians with Mission Indians.

We believe it would have been a real disservice to the Chemehuevi Tribe and its people to have considered them as Mission Indians and to have given them a patent for their land. The decision in 57ID 87 may well have been different had that been done. The Chemehuevis have, rather, been recognized to have far greater title than can be granted by a patent. A patent is, in effect, no greater than a quit-claim deed. It would recognize title only from the date of the patent.

The Chemehuevi Reservation has been recognized by the Secretary of the Interior in the 1907 withdrawal order, in the 1939 decision cited above, by approval of the Tribal

consitution, by the Restoration order of October 15, 1974, and in countless ways throughout the years such as in requests for appropriations, approvals of leases, loans, rights of way, etc. It has been recognized by Congress in the Act of July 8, 1940 and, by reference thereto, in the Act of October 28, 1942. It has been recognized by the Indian Claims Commission as evidenced by the final judgement in Docket 351, dated January 18, 1965. It has been recognized by the Supreme Court in Arizona-v-California. The Tribe has aboriginal rights to its reservation recognized by all branches of the government. A patent would evidence nothing but a recent acquisition by the grace of the government.

We should also comment on the memorandum of Mr. Marston to Mr. Alvarez concerning the authority of the Secretary to add Public Lands to the reservation. We understand the reasoning of Mr. Marston. It is not new or unique. In fact, an attorney in the Office of the Solicitor once reasoned the same way and prepared a letter for the Secretary to a member of Congress stating the same. It was executed by the Secretary and mailed to the congressman. Neither the Secretary or the Solicitor has ever rescinded that letter, to our knowledge, but it was an embarrassment and no such letter would ever be sent again.

One really has to strain to interpret the language of 25 USC 465 as referring to the public lands. The Secretary is authorized to acquire, through various means, interests in lands for Indians. Since public lands are already under his jurisdiction he does not acquire them. We believe he could exchange public lands for tribal lands under that authority but not assign or transfer public lands unilaterally.

It is very clear that neither Congress or the Department (except for the very brief moment noted above) ever interpreted the act as allowing the Secretary that authority. If such authority is there, think of all the time, money, manpower, and equipment that has been wasted over the years by Congressman and their aides and committees, Tribes, tribal attorneys and other tribal employees and Interior employees in the pursuit of legislation to have public lands transferred to Tribes. Just in the past few years, in our area alone, we would have been able to grant lands to the Cocopahs, Moapas, Las Vegas Colony, Southern Paiutes, Western Shoshones, Yavapais, and others without the need to bother Congress. The fact that Congress was involved in all of those cases and in hundreds of others throughout the country is sufficient evidence to prove our case.

Walter Mills

(RE-PRINT from ORIGINAL)

January 30, 1986

To:
Patrick Hayes
Superintendent
U.S. Department of the Interior
Bureau of Indian Affairs
Parker Agency Office
Route 1, Box 9C
Parker, Arizona 85344

From:
Lester J. Marston
P.O. Box 488
200 West Henry Street
Ukiah, California 95482
Attorney for Chemehuevi Indian Tribe

Re: Request for Issuance of Trust Patent

Dear Mr. Hayes:

On July 26, 1985, I sent a letter to Donna McCurdy, Realty Officer for your agency, requesting that the Bureau of Indian Affairs issue a trust patent to the Chemehuevi Indian Tribe for the Chemehuevi Indian Reservation pursuant to the Act of January 12, 1891 (Mission Indian Relief Act). For your convenience I have enclosed a copy of that letter for your reference. On August 2, 1985, I received a letter from your office acknowledging receipt of my letter to Donna McCurdy and advising me that the request had been submitted to the Phoenix Area Director for his consideration.

On September 24, 1985, I received a letter from your office with an attached memorandum from Walter Mills, Acting Phoenix Area Director, advising me that the Tribe's request for a trust patent had been denied. For your reference I have enclosed a copy of Mr. Mills memorandum.

I am writing to you now on behalf of the Tribe to request that you reconsider your previous decision and approve the Tribe's request for a trust patent designating the Chemeheuvi Indian Tribe as the beneficial owner of the Reservation. The basis for the Tribe's request is twofold: (1) The Tribe respectfully disagrees both with the rationale and conclusions contained in Mr. Mills memorandum and (2) the United States has a statutory obligation to issue the Tribe a trust patent for the Reservation.

Except for the Mission Indian Relief Act ("Act"), the Secretary had no statutory authority to create the Chemehuevi Indian Reservation. In fact unless the Secretary was acting pursuant to the Act, his February 7, 1907 order was issued in direct violation of the "Four Reservations Act", Act of April 8, 1864 (13 Stat. 39) which limited the authority of the President to creating no more than four reservations within the State of California. Mattz v.Arnett, 412 U.S. 481, 489 (1973).

There is absolutely no doubt that the Secretary issued his order under the authority of the Act. Both the Commissioner's letter to the Secretary recommending the withdrawal of these lands and the Secretary's order specifically state that the land was being withdrawn under the authority of "the bill that was presently before Congress" at that time (i.e. the amendments to the Mission Indian Relief Act). The fact that the order was issued prior to the passage of the amendment does not effect its validity. Administrative action taken to create an Indian Reservation in anticipation of Congressional authorization is legally valid. United States v. Walker River Irrigation District, 104 F.2d 334, (9th Cir. 1939)

The amendment to the Act places a mandatory duty on the Secretary to "cause to be patented to the Mission Indians such tracts of the public lands of the United States..., as he shall find ... to have been in the occupation and possession of the several bands.... of Mission Indians ... Kappler, Vol. III, p. 273-274. The Secretary in fact did this for all the other reservations named in his February 2, 1907 order, except the Chemehuevi Indian Reservation.

This interpretation of the Act (i.e. that the Secretary has a duty to issue the Tribe a trust patent for the Reservation) is consistent with the plain wording of the Act, its legislative history as set forth above and the canons of statutory construction that statutes passed for the benefit of Indians are to be liberally construed with all doubts and ambiguities resolved in their favor. Bryan v. Itasca County, 426 U.S. 373, 392 (1976).

Contrary to Mr. Mills memorandum, it would not be a "disservice" to the Tribe to issue a trust patent for the Reservation. Mr. Mills statement that the patent would be nothing more than a quit claim deed and that a reservation created by Secretarial order is somehow better than one created by a statute is legally incorrect. A reservation created by the Secretary rather than by Act of Congress creates no compensible interest in the tribe if the Reservation is terminated. Also the Reservation probably could be revoked by the Secretary or the President at any time. Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947); Sioux Tribe v. United States, 316 U.S. 317 (1942).On the other hand, if the Secretary creates a reservation pursuant to Congressional authorization, the reservation can only be terminated by Act of Congress after paying the Tribe just compensation for the lands taken. Shoshone Tribe v. United States, 299 U.S. 476 (1937).

Furthermore, at present there is no document, including the Secretary's order, which specifically designates the Chemehuevi Indian Tribe as the beneficial owner of the Reservation. While I am confident that the Tribe would prevail in any lawsuit brought by any other Indian group claiming a beneficial interest in the Reservation, such claims can be laid to rest conclusively by the issuance of trust patent for the Reservation designating the Tribe as the beneficial owner. In light of what has occurred in Northern California in the Jessie Short case, I would think the United States would be anxious to clear up any ambiguities as to who is the beneficial owner of the Reservation.

Moreover, the failure of the United States to issue a trust patent to the Tribe would be inconsistent with the United States continuing trust obligation. It is clear that
the United States acting through the Secretary did not fulfill his statutory and fiduciary obligation under the Mission Indian Relief Act (i.e. issuance of a trust patient) "duties that must be exercised with "great care," ... in accordance with "moral obligations of the highest responsibility and trust, " that must be measured "by the most exacting fiduciary standards. " Smith v . United States, 515 F. Supp. 56, 60 (N.D. Cal. 1978) . Such a willful failure and or delay in compliance with its statutory obligations under the Mission Indian Relief Act would certainly be reviewable by a federal court under the Administrative Procedure Act and would expose the United States to liability for money damages for breach of trust. United States v. Mitchell, 463 U.S. 206 (1983); Duncan v. United States, 667 F.2nd 36 (1981); Smith v . United States, 575 F . Supp. 56 (1978).

Finally, there is no reason for the government not to grant the Tribe's request. What harm is there in issuing the Tribe a trust patient for its' Reservation. If anything it protects the Tribe's Interest in Reservation lands by specifically designating the Tribe as the sole beneficial owner. It also provides the Tribe with a compensible interest in the Reservation and guarantees to the Tribe that its Reservation can never be terminated except by an Act of Congress.

I would hope that since this involves a number of legal issues that you would refer this letter to the Solicitor for his review prior to making any decision on this matter. I would appreciate it if you would send me a letter acknowledging receipt of this letter and then forward any decision with respect to this request directly to the Tribe in care of me at the address on the above letterhead.

If you need any additional information in order to act favorably on this request, please do not hesitate to give me a call. I look forward to your favorable reply.

Yours very truly,
LESTER J. MARSTON
Directing Attorney

LJM/le
Enclosure
cc: Richard Alvarez
Irene Kellywood
Robert Moeller