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DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

MAY 26 1923

My dear Mr. Hayden:

Further reference is made to your letter of May 12, 1923, relative to the right of the State of Arizona to construct a dam site in the Colorado River.

Executive Order of January 8, 1900, quoted in the reply of May 21, 1923, thereto, states that the boundary line of the reservation runs "thence west to the Colorado River; thence up that stream, etc." Section 2365 of the Civil Code of Arizona, 1913, defines the words "up" and "down" a creek or river to mean the middle of the main channel thereof. Therefore the boundary of the Navajo Reservation extends to the middle of the Colorado River. The land on the east and south of the Colorado River to and up the stream was legally withdrawn for the use of the Navajo Indians and is under the exclusive control of the United States for their benefit. Such being the case, the State of Arizona cannot extend the doctrine of eminent domain over any part thereof, and cannot appropriate any of the land for any purpose without the consent of the United States.

Indian Reservations have been created by Treaties, Acts of Congress, Executive Orders, and Departmental withdrawals. There are numerous reports of cases where the question has been considered by the courts as to the right of the President to reserve public lands for different purposes, including Indian Reservations. In *United States v. Payne* (8 Fed. Rep., 883), it was held that "The president of the United States can, by proclamation or executive order, reserve a part of the public domain for a specific lawful purpose". Also, "Congress can, by law, reserve a part of the public domain for such purpose. In *Grisar v. McDowell* (6 Wallace, 363), it is stated: "From an early period in the history of the Government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

"The authority of the President in this respect is recognized in numerous Acts of Congress. Thus, in the Preemption Act of May 29, 1830 (4 Stat. L., 421), it is provided that the right of preemption contemplated by the Act shall not 'extend to any land which is reserved from sale by Act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever'. Again, in the Preemption Act of September 4, 1841, 'Land included in any Reservation by any Treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes', are exempted from entry under the Act. So by the Act of March 3, 1853, providing for the survey of the public lands in California, and extending the preemption system to them, it is declared that all public lands in that State shall be subject to preemption, and offered at public sale, with certain specific exceptions, and among others 'of lands appropriated under authority of this Act, or reserved by competent authority'. The provisions under the Acts of 1830 and 1841 show very clearly that by 'competent authority' is meant the authority of the President and officers acting under his direction". As to the right of the State to unreserved public lands as against the United States, see *Wilcox v. McConnell* (13 Peters, 498).

This part of the reservation was created in 1900, or prior to the enabling Act admitting Arizona as a State. The right of the President to create a reservation being clearly established, you are further referred to Subsection 2, Section 20, of the Act of Congress of June 20, 1910 (36 Stat. L., 557-569), being the Arizona enabling Act, which reads in part as follows: "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * *".

A copy of this letter is being inclosed for your convenience.

Cordially yours,

(Signed) Chas. H. Burke

Commissioner.

Hon. Carl Hayden,
Phoenix, Arizona.