RED LAKE RESERVATION-TITLE TO LANDS

M-28107 *June 30, 1936.*

The Honorable,
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

At the suggestion of the Commissioner of Indian Affairs, you have requested my opinion on the following questions:

1. Does title to the lands submerged by the waters of Lower Red Lake and that part of Upper Red Lake inside the boundaries of the Red Lake Indian Reservation in the State of Minnesota rest in the State or in the Red Lake and Pembina Bands of Chippewa Indians?

2. What right, if any, has the State of Minnesota to interfere with the exclusive right of fishing within these waters heretofore enjoyed by the Indians of the Red Lake Reservation?

The first question needs little consideration. In *United States* v. *Holt Bank*, 270 U.S. 49, the Supreme Court decided that the lands underlying the navigable waters within the Red Lake Indian Reservation passed to the State of Minnesota upon its admission into the Union. The court said:

> "We come then to the question whether the lands under the lake were disposed of by the United States before Minnesota became a State. An affirmative disposal is not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. The existence of the reservation is conceded, but that it operated as a disposal of lands under lying navigable waters within its limits is disputed. We are of opinion that the reservation was not intended to effect such a disposal and that there was none. If the reservation operated as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake, having an area of 400 square miles, the greater part of the Lake of the Woods, having approximately the same area, and several navigable streams. The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, by the early legislation reviewed in *Railroad Company* v. *Schurmeir*,7 Wall. 272, 287 289, and *Economy Light & Power Co.* v. *United States*, *supra*, pp. 118-120, and emphasized in the Enabling Act under which Minnesota was admitted as a State, c. 60, 11 Stat. 166, which declared that the rivers and waters

bounding the State 'and the navigable waters leading into the same shall be common highways, and for ever free, as well to the inhabitants of said State as to all other citizens of the United States.' "

In view of this decision, it must be held that the title to the beds of Upper and Lower Red Lakes, both of which are conceded to be navigable bodies of water, rests in the State of Minnesota and not in the Red Lake and Pembina Bands of Chippewa Indians. The first question is answered accordingly.

Before discussing the second question, which presents more difficulty, it is appropriate to point out that the right of fishing in the waters of Upper and Lower Red Lakes may exist in the Indians notwithstanding State ownership of the submerged lands. If at the time of admission of the State into the Union, there existed in the Indians as a part of their larger rights in the lands used and occupied by them the right of fishing in these waters, the State may be said to have taken title to the submerged lands subject to that right. Thus in *Beecher* v. *Wetherby*, 95 U.S. 517, 525, the Supreme Court of the United States held that the State of Wisconsin, in virtue of her enabling act, took title to the sixteenth sections in the townships of that State, subject to the Indian right of use and occupancy. The court ruled that the fee was in the

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United States, subject to that right, and could be transferred whenever they chose, but added, "the grantee would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States." To the same effect is *United States* v. *Thomas*, 151 U.S. 577.

As pointed out by the Commissioner of Indian Affairs, the diminished Red Lake Reservation embraces the remnant of a large domain of land formerly occupied and claimed by the Chippewa Indians but subsequently acknowledged as belonging to the Red Lake and Pembina Bands of Chippewas by the treaty of October 2, 1863 (13 Stat. 667), and the acts of January 14, 1889 (25 Stat. 642), March 2, 1903 (32 Stat. 1009), and February 20, 1904 (33 Stat. 46). Prior to the cession made pursuant to the act of January 14, 1889, *supra*, the Indian title extended to all of the lands surrounding Upper and Lower Red Lakes. Under that cession, however, about one half of Upper Red Lake was excluded from the reservation, leaving the remainder of that Lake and all of Lower Red Lake within the boundaries of the diminished reservation.

An examination of the various treaties between the United States and the Chippewa Indians discloses that while the right in the Indians to hunt and fish on ceded lands was reserved in some of the earlier treaties (see Article 5, treaty of July 20, 1837, 7 Stat. 536; Article 2, Treaty of October 4, 1842, 7 Stat. 591; and Article 11, treaty of September 30, 1854, 10 Stat. 1109), no reservation of the right to hunt and fish was made with respect to the unceded lands of the Red Lake Reservation. But such a reservation was not necessary to preserve the right on the lands reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was "not much less necessary to the existence of the Indians than the atmosphere they breathed" remained in them unless granted away. *United States* v. *Winans*, 198 U.S. 371. Speaking of a similar situation, the Supreme Court of Wisconsin in *State* v. *Johnson*, 249 N.W. 285, 288, said:

> "While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they had theretofore enjoyed, we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to the lands reserved to them. At the time the treaty of 1854 was entered into there was not a 'shadow of

> impediment upon the hunting rights of the Indians' on the lands retained by them. 'The treaty was not a grant of rights to the Indians, but a grant of rights from them-a reservation of those not granted.' *United States* v. *Winans*, 198 U.S. 371, 25 S. Ct. 662, 664, 49 L. Ed. 1089. We entertain no doubt that the rights of the Indians to hunt and fish upon their own lands continued."

The court further recognized that as to unpatented lands inside the reservation, the fish and game laws of the State of Wisconsin were without force and effect.

By tradition and habit the Indians as a race are hunters and fishermen, depending largely upon these pursuits for their livelihood. Their ancient and immemorial right to follow these pursuits on the lands and in the waters of their reservation is universally recognized. The Indians of the Red Lake Reservation appear to have asserted and exercised an exclusive right of fishing in the waters of Upper and Lower Red Lakes from the beginning subject only to Federal control and regulation. The right of the Indians so to do has not heretofore been disputed by the State of Minnesota but has been recognized and acquiesced in. Such recognition and acquiescence is amply shown by the fact that the State through its Game and Fish Commissioner has entered into contracts with the Federal authorities in charge of Indian Affairs authorizing it to take and remove fish from that part of the Lake within the reservation boundaries upon conditions 'requiring among other things the payment to the Indians of royalties at prescribed rates (see Indian Office File No. 44606-17 Red Lake 115). And in an opinion dated November 27, 1931, the Assistant Attorney General for the State of Minnesota advised the Director of Game and Fish that white men could not take fish in that part of Red Lake within the reservation unless permitted so to do by the Federal authorities in charge of the reservation, and that Indians were not subject to State law when taking fish for their own use within the reservation. Circumstances somewhat similar to these, coupled with the rule of liberal construction uniformly invoked in determining the rights of Indians, were cited by the Supreme Court of the United States in support of its conclusion that the Metlakahtla Indians had an exclusive right to fish in the waters adjacent to Annette Islands in Alaska notwithstanding the fact that the Act of Congress setting aside the Islands as a reservation for the Indians made no mention of the surrounding waters or the fishing rights of the Indians therein. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 86. The court said, among other things:

> "This conclusion has support in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians. *Choate*v. *Trapp*, 224 U.S. 665, 675, and cases cited. And it has further support in the facts that, save for the defendant's conduct in 1916, the statute from the time of its enactment has been treated, as stated in the opinion of the Alaska court, by the Indians and the public, as reserving the adjacent fishing grounds as well as the uplands, and that in regulations prescribed by the Secretary of the Interior on February 9, 1915, the Indians are recognized as the only persons to whom permits may be issued for erecting salmon traps at these islands."

In *United States* v. *Sturgeon* (27 Federal Cases, Case No. 16,413), the court gave consideration to the rights of the Indians of the Pyramid Lake Indian Reservation in Nevada to fish in the waters of a lake inside the boundaries of their reservation and held:

> "The president has set apart the reservation for the use of the Pah Utes and other Indians residing thereon. He has done this by authority of law. We know that the lake was included in the reservation, that it might be a fishing ground for the Indians. The lines of the reservation have

> been drawn around it for the purpose of excluding white people from fishing there, except by proper authority. It is plain that nothing of value to the Indians will be left of their reservation if all the whites who chose may resort there to fish. In my judgment, those who thus encroach on the reservation and fishing ground violate the order setting it apart for the use of the Indians, and consequently do so contrary to law."

In an opinion dated May 14, 1928 (M-24358), the Solicitor for this Department ruled that the State of Washington was without right to regulate or control the use of boats on navigable bodies of water within the Quinaelt Reservation in that State. The Solicitor said, and his remarks apply with equal force here:

> "Manifestly, unless the Indians of the Quinaelt Reservation are protected in the exclusive use and occupancy of their reservation including ,the waters therein, navigable or non-navigable, then their rights may become subject to serious interference, if not jeopardy, by outsiders. If we admit the right of the State to invade the reservation for the purpose of regulating or controlling the use of boats on the Queets or any other body of navigable water therein, it would be tantamount to recognizing the right of the State to regulate other activities there, including fishing. This we can not afford to do."

Minnesota was admitted into the Union in 1858. The Indian title, as subsequently recognized by treaty and Act of Congress, then extended to all of the lands surrounding Upper and Lower Red Lakes. The Indian title was that of occupancy only, the ultimate fee being in the United States, but the right of occupancy extended to and included the right to fish in the waters of the Lakes. *United States* v. *Winans*, *supra*. These rights in so far as the diminished reservation is concerned have never been surrendered or relinquished by the Indians nor have they been taken away by any Act of Congress of which I am aware. In these circumstances, it is not unreasonable to hold that the State upon its admission into the Union took title to the submerged lands subject to the occupancy rights of the Indians in virtue of which the Indians possess an exclusive right of fishing in the waters of the Lakes. *Beecher* v. *Weatherby*, *supra*; *United States* v. *Thomas*, *supra*. If this be the correct view, and I think it is, the exercise by the Indians of the right of fishing is subject to Federal and not State regulation and control. *United States* v. *Kagama*, 118 U.S. 375; *In re Blackbird*, 109 Fed. 139; *Peters* v. *Malin*, 111 Fed. 244; *In re Lincoln,* 129 Fed. 246; *United States* v. *Hamilton*, 233 Fed. 685; *State* v. *Campbell*, 53 Minn. *354, 55 N.* W. 553.

In expressing the foregoing view, I am mindful of the statement of the Supreme Court in *United States* v. *Halt Bunk, supra*, that while the Indians of the Red Lake Reservation were to have access to the navigable waters therein and were to be entitled to use them in accustomed ways, "these were common rights vouchsafed to all, whether Indian or white." But when this statement is read, as it should be, in the light of the decisions cited in its support, it becomes apparent that the court had in mind rights of navigation of a public nature and not private rights of ownership such as the Indian right of fishing. The latter right was not involved and was neither considered nor discussed.

Accordingly, since the Indian's exclusive rights

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to fish in the waters of Lower Red Lake and that part of Upper Red Lake inside the Indian reservation is supported by all of the decided cases touching on the subject, it is my opinion that continued administrative recognition of such rights as exclusive in the Indians is fully justified.

FREDERIC L. KIRGIS,
Acting Solicitor.

Approved: June 30, 1936.
OSCAR L. CHAPMAN, Assistant Secretary.