



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON

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A-45268

ACW

OCT 22 1932

The Honorable,

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The Secretary of the Interior.

Sir:

Referring to your approval of September 20, 1932, endorsed on a letter dated September 19, 1932, from the Commissioner of Indian Affairs to this office, and previous correspondence relative to the claim of Polson, Montana, under the act of February 20, 1929, 45 Stat. 1252, for \$255 as alleged damages during the years 1924 to 1928, inclusive, to certain crops, hay, etc., resulting from water breaking through an irrigation lateral dike in connection with the Flathead Irrigation Project, I have to advise as follows:

The act of February 20, 1929, provided:

"That the Secretary of the Interior be, and he is hereby, authorized to pay out of funds available for the Indian irrigation projects for damages caused to owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works of such projects and which may be compromised by agreement between the claimant and the Secretary of the Interior, or such officers as he may designate: Provided, That the total of any such claims authorized to be settled as herein contemplated shall not exceed 5 per centum of the funds available for the project under which such claims arise during any one fiscal year."

It will be noted that the damages which the Secretary of the Interior is authorized to pay out of funds available for Indian

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irrigation projects is limited to those caused "by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works," and it is alleged that the damages, aggregating \$255, to hay and growing crops of during the years 1924 to 1929 resulted from the breaking of a bank of a lateral ditch of the Post Subdivision of the Mississippi Valley Division, Flathead Irrigation Project. It is stated that the lateral is in fill for about one mile, and that this caused the condition, together with borrow pits and poorly drained land on each side of the lateral favorable for breeding of muskrats, and that notwithstanding the care by the watermaster and ditchriders muskrats invaded this part of the lateral, burrowing in the banks, so that when water was raised during the peak of the irrigation season a small break would occur allowing water to flood on to the land of Mr. , which was very level with occasional depressions into which the water would flow and from which it could not readily be drained, resulting in the damage to the crops and property.

The claim is unlike that considered in the decision of June 15, 1915, of the former Comptroller of the Treasury to your predecessor in connection with the operation of the Shoshone Reservoir. There employees of the Reclamation Service discharged a large volume of water from the reservoir in order to clean and repair it, causing a greatly increased flow of water in the Shoshone River below the dam and reservoir which overflowed the banks of the river and re-

sulted in damage to the owners of the adjoining lands. The one was a direct consequence of the other. Here the damage was not caused by any direct action of officers or employees of the United States, but the theory is suggested that the damages were caused in part through the ravages of muskrats notwithstanding the endeavor of the watermaster and ditchrider to eliminate them and in part because the land belonging to Mr. was very level with occasional depressions into which the water would flow and from which it could not readily be drained. The act of February 29, 1929, does not authorize the payment of damages resulting from activities of muskrats in burrowing into the banks of irrigation projects when due care was exercised by the representatives of the Government to eliminate the muskrats, and it certainly does not authorize the payment of damages resulting from the fact that the owner's land is flat and has insufficient drainage.

Furthermore, Mr. , who is apparently a beneficiary of the water resulting from the operation of the Flathead Irrigation Project, is presumed in law to have anticipated the risk of the operation of irrigation canals and in connection with the benefits to his lands to have assumed his part of such risk not directly resulting from acts of the United States, its officers or employees in connection with the operation and maintenance of the irrigation works.

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A careful consideration of all the factors in the matter leads to the conclusion that the rule of damnum absque injuria must be applied, which requires that the claim must be and is disallowed.

Respectfully,

Comptroller General
of the United States.