

FEB 17 1959

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE  
HOPI TRIBAL COUNCIL OF THE HOPI  
INDIAN TRIBE FOR AND ON BEHALF OF  
THE HOPI INDIAN TRIBE, INCLUDING  
ALL VILLAGES AND CLANS THEREOF, AND  
ON BEHALF OF ANY AND ALL HOPI INDIANS  
CLAIMING ANY INTEREST IN THE LANDS  
DESCRIBED IN THE EXECUTIVE ORDER DATED  
DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAHO TRIBAL  
COUNCIL OF THE NAVAHO INDIAN TRIBE FOR  
AND ON BEHALF OF THE NAVAHO INDIAN TRIBE,  
INCLUDING ALL VILLAGES AND CLANS THEREOF,  
AND ON BEHALF OF ANY AND ALL NAVAHO INDIANS  
CLAIMING ANY INTEREST IN THE LANDS DESCRIBED  
IN THE EXECUTIVE ORDER DATED DECEMBER 16,  
1882; WILLIAM P. ROGERS, ATTORNEY GENERAL  
OF THE UNITED STATES, ON BEHALF OF THE UNITED  
STATES,

Defendants.

BRIEF OF PLAINTIFF SUPPORTING  
MOTION TO DISMISS COUNTERCLAIM,  
MOTION TO STRIKE AND MOTION FOR  
MORE DEFINITE STATEMENT

No. Civil-579-Pct.

By an Executive Order dated December 16, 1882, <sup>1/</sup> signed by President Chester  
A. Arthur, the land described in plaintiff's complaint was "set apart for the use  
and occupancy of the Moqui (Hopi) and such other Indians as the Secretary of the  
Interior may see fit to settle thereon." This reservation was expressly confirmed  
by Congress in the Act of July 22, 1858 (72 Stat. 402) when Congress provided,  
"That lands described in the Executive Order dated December 16, 1882, are hereby  
declared to be held by the United States in trust for the Hopi Indians and such  
other Indians, if any, as heretofore have been settled thereon by the Secretary  
of the Interior pursuant to such Executive Order." The Act further provided for  
and authorized this suit by and between the parties hereto, "for the purpose of  
determining the rights and interest of said parties in and to said lands and  
quieting title thereto in the tribes or Indians establishing such claims pursuant  
to such Executive Order as may be just and fair in law or equity."

The Hopi Tribe, acting through the Tribal Chairman, as authorized by said

<sup>1/</sup> I Kappler on Indian Affairs, Laws and Treaties 805 18

Act of July 22, 1958, commenced this suit to quiet title. The land described in the Executive Order creating the Moqui Reservation, the land described in the Act of July 22, 1958 and the land described in the complaint is identical. By the express words of the Act as hereinbefore quoted, the Hopi Indians have an interest in all of the land described. In this suit to quiet title the defendants are required to set forth the nature of their claims in the Hopi Reservation. In so doing, under the terms of the Act, it is incumbent upon defendants to allege and prove that the Indians on whose behalf their claims are asserted were:

- (a) settled upon the lands described in the complaint,
- (b) by the Secretary of the Interior,
- (c) pursuant to the Executive Order of December 16, 1882,
- (d) before the Act of July 22, 1958,
- (e) and that their claims are just and fair in law and equity.

The Act provides this exclusive basis for a claim in this action. Plaintiff's motion to dismiss the counterclaim, motion to strike and motion for more definite statement are all predicated upon the statute. <sup>2/</sup> Plaintiff contends that the counterclaim must allege the elements set forth in the statute, or failing to do so, no claim is asserted against plaintiff upon which relief can be granted. It is further contended that these necessary allegations must be clearly and definitely stated to afford plaintiff a reasonable opportunity to reply and that matters immaterial or impertinent to these allegations have no rightful place in the pleadings.

#### MOTION TO DISMISS COUNTERCLAIM

Plaintiff's motion to dismiss the counterclaim is based upon the defense that defendant, Paul Jones, has failed to state a claim upon which relief can be granted. This defense may be made by motion, at the option of the pleader. <sup>3/</sup>

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<sup>2/</sup> Act of July 22, 1958, 72 Stat. 402

<sup>3/</sup> Rule 12(b) "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted. . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Plaintiff's grounds for raising this defense to the counterclaim are two-fold:

1. The counterclaim does not adequately allege the necessary elements, set out above, to establish a claim under the act authorizing this suit.

2. The counterclaim contains averments repugnant to the necessary allegations of such a claim.

1. The counterclaim narrates the Navaho views of an ancestral home, and asserts dominion and control by the Navahos over a specific portion of the Hopi Reservation. Under the Act any Indians seeking to share the reservation with the Hopi Indians must allege and prove they were settled on the reservation by the Secretary of the Interior pursuant to the Executive Order. Comparative population data and gratuitous statements on the passively resistant nature of the Hopi people are not elements of a valid claim as defined by Congress, nor does the statute make any reference to assimilation or boundary lines within the reservation. While the pleader has thrice made reference to so-called Secretarial approval of Navaho self-settlement on the Hopi Reservation, the counterclaim in its entirety does not allege settlement by the Secretary pursuant to the Executive Order as the basis for a claim in the reservation.

2. As will be hereinafter shown it is a fundamental principle in Indian law that Indians cannot claim benefits in more than one reservation. Settlement upon the reservation by the Secretary of the Interior bestows all the rights, benefits and privileges of that reservation upon those settled thereon. It will be noted that defendant makes the following allegations:

"The Navajos living within said area participated in all tribal affairs, elected delegates to the Navajo tribal council, shared benefits which accrued to Navajos in other parts of the Navajo Reservation, and in all other respects regarded the areas of occupancy as part of the Navajo Reservation." 4/

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4/ Paragraph 12 of Counterclaim, page 10, lines 18 to 23.

"Both the Executive and Legislative Branches of the United States Government have continued to recognize and approve the use and occupancy to the present day by members of the Navajo Tribe of all of the Executive Order area, except for Land Management District 6 as re-defined and wrongfully extended by the Bureau of Indian Affairs in 1943, and the inclusion of Navajos using and occupying the said area as a part of the tribe sharing like other Navajos on the reservation in all benefits of tribal income or appropriations and participating in tribal organization." <sup>5/</sup> (Emphasis ours)

Under this law these allegations are repugnant to allegations of Navaho settlement by the Secretary of the Interior on the Hopi Reservation.

It is also fundamental in Indian law that a reservation, whether it be created by treaty, an act of Congress or by Executive action, is tribal property and as such belongs to the tribe. The individual Indian's interest in the tribal property exists by reason of his membership in the tribe. In speaking of the title to the lands of the Creek Nation, the court in *Shulthis v. McDougal*, 170 F 529 (CA-8), affirmed 225 US 561, said:

"The tribal lands belonged to the Tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or the seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as a home for the tribe, but as a home for each of the members."

The rights of each member of a tribe in the tribal property were aptly illustrated by an Indian witness, quoted by the court in *Seufert Bros. Co. v. U. S.*, 249 US 194, who compared a river in which there was a common right to fish to a "great table where all Indians came to partake". Each Indian, by virtue of his membership in a tribe, can partake of the tribal table.

The Navaho Indians have a reservation of their own created by the Treaty of June 1, 1868, <sup>6/</sup> which was extended westward in 1878 to the 110th degree of longitude west. <sup>7/</sup> This west line, by the Executive Order of 1882, became the east boundary of the Hopi Reservation. Later the Navaho Reservation was extended to surround the Hopi Reservation. This was accomplished by an Act of Congress which contained this noted exception, "Nothing herein contained shall affect the existing

<sup>5/</sup> Paragraph 14 of Counterclaim, page 11, lines 2 to 11.  
<sup>6/</sup> 15 Stat. 667  
<sup>7/</sup> Executive Order dated October 29, 1878 - I Kappler 875

status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882."<sup>8/</sup>

As noted, the counterclaim alleged that the Navaho Indians residing upon the Hopi Reservation have maintained their tribal membership in the Navaho Tribe and the rights in the Navaho Reservation which go with that membership, such as tribal income, appropriations and participation in tribal organization.<sup>9/</sup>

The laws of the United States authorize the head of each department to prescribe regulations, not inconsistent with law, for the government of his department.<sup>10/</sup> The Secretary of the Interior long ago established a regulation relating to per capita payments, which regulation has been contained within the Code of Federal Regulations since its inception in 1928.<sup>11/</sup> It is as follows:

"Part 224 -- Annuity and Other Per Capita Payments  
"Sec. 224.4 Election of Shareholders. An Indian holding equal rights in two or more tribes can share in payments to only one of them and will be required to elect with which tribe he wishes to be enrolled and to relinquish in writing his claims to payments to the other. In case of a minor the election will be made by the parent or guardian."

Decisions of the Interior Department have reflected this principle in other fields.

In the case of Josephine Valley (1-23-94) (19 L.D. 329), it was held that an Indian may not be a member of two tribes in a sense that will entitle him to secure lands from two tribes under the provisions of the Allotment Act of February 8, 1887. The opinion states, in part, as follows:

"It seems to me to be very clear that Congress never intended to confer a dual privilege upon any one Indian and no tribal arrangements or relations will receive such a construction as to give one person a twofold interest in a beneficent provision of a statute manifestly intended to treat all individuals affected thereby, in the same manner."

A similar view to that expressed in the Josephine Valley case, supra, was taken by the Department in the Niels Esperson case (21 L.D. 271), wherein the Department cancelled one of two allotments issued to an Indian on the ground that a double allotment could not be allowed.

<sup>8/</sup> June 14, 1934, 48 Stat. 960.

<sup>9/</sup> Paragraphs 12 and 14 of Counterclaim.

<sup>10/</sup> 5 USCA 22.

<sup>11/</sup> 25 CFR (1949 Ed) 224.4

Also, in Hagstrom v. Martell, (39 L.D. 508), the right of an Indian to claim a dual benefit under a law passed by Congress was denied. The Department opinion stated:

"Considering the evident purpose of the Act of April 21, 1904, which was to give to those members of the Turtle Mountain band selections on the public domain where they are unable to secure them on the reservation, it is not to be supposed that when the members have already received 160 acres out of the public lands, it was intended to also give them another selection out of such lands under said act."

The courts have reached the same conclusion regarding dual benefits to Indians. In Mandler et al vs. U. S., 52 F 2d 713, (CA-10) the case was before the court on a petition for rehearing. The original opinion may be found in 49 F 2d 201. The court held that Congress intended to adopt and to hold a uniform policy of restricting an Indian to an allotment as a member of one tribe only. The court points out that the passage of a statute relating to the Five Civilized Tribes "manifests the policy to limit an Indian to one allotment". The court after citing the Josephine Valley case (supra) decided on January 23, 1894, said:

"Since that date the Interior Department has uniformly held that an Indian is not entitled to an allotment as a member of more than one tribe."

The court also said:

"I think the foregoing clearly shows that Congress intended to adopt and to follow a uniform policy of restricting an Indian to an allotment as a member of one tribe only."

Further:

"The case of Nan-pe-chee Polecat does not fall within any of the exceptions provided for in the treaty. We think it was the intent of the treaty provisions, referred to above, to exclude Indians who had received allotments as members of other tribes. If this be true, when the Interior Department allotted a tract of land to Nan-pe-chee Polecat as an absentee Shawnee and issued a patent therefor to her, it exhausted its power in the premises. Any subsequent allotment to her as a member of any other Indian tribe was without authority of law, void and subject to collateral attack."

The same position was taken by the Solicitor of the Department, Nathan R. Margold, who, in a memorandum opinion dated November 24, 1936, was considering the rights of various Indian tribes, in the Colorado River Reservation which was created "for the Indians of the Colorado River and its tributaries." Solicitor Margold pointed out that the Navahos, among others, qualified for occupancy of

this reservation, but that the Navahos refused to move to it while other tribes, which had been placed thereon, left and returned to their old haunts. Thereafter, separate reservations were created for the Navahos and these other tribes. With respect thereto Solicitor Margold's opinion states:

"The reservations so set aside for the Yumas, the Hualapais (Walapais) and the Navajos have uniformly been regarded administratively and by Congress as separate and distinct from each other. The tribes occupying one of the reservations have not been recognized as having any rights whatsoever in the lands of the other reservations. (Emphasis ours)

"Clearly there was no intent to create or vest rights in Indians such as the Yumas, the Hualapais and the Navajos who refused to locate on the Colorado River Reservation, obtained reservations elsewhere and received allotments or other benefits there. Now to permit such Indians to receive tribal benefits on the Colorado River Reservation would be in direct contravention of the rule long recognized by this department and recently approved by the 10th Circuit Court of Appeals, in Mandler vs. U. S. 52 F 2d 713, that no Indian is entitled to receive dual tribal benefits. While the decision in the Mandler case and departmental decisions recognizing the rule had to do with allotments made to Indians as members of different tribes, or on different reservations, the reasons for the rule apply with equal force to other tribal benefits such as land assignments, etc." (Emphasis ours)

Solicitor Margold, in his memorandum on the Colorado River Reservation, mentioned supra, in considering a suggestion to the effect that since the act of Congress which established the said reservation created authority to place other Indians on the reservation, such authority continued until withdrawn, stated:

"Even if this premise be sound, the authority would not for the reasons hereinbefore stated extend to Indians such as the Yumas, the Hualapais, and the Navajos for whom separate reservations have been created. Other Indians for whom no reservation was created might be located on the reservation provided they are of the class defined by the act of 1865, and the authority so to do still continues. In my previous memorandum it was suggested that the authority had become exhausted in view of the administrative action taken thereunder. This conclusion is not unreasonable and is fortified by subsequent Congressional legislation." (Emphasis ours)

Allegations that the Navaho Indians in all respects regarded the major part of the Hopi Reservation as a part of the Navaho Reservation <sup>12 /</sup> do not alter or amend the Act of July 22, 1958 declaring "That lands described in the Executive Order dated December 16, 1882 are hereby declared to be held by the United States

12 / Paragraph 12 of Counterclaim.

in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive Order." The counterclaim should be dismissed for failure to allege the requirements of the statute.

MOTION TO STRIKE

The federal rules provide that upon motion made by a party before responding to a pleading . . . or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, 13/ immaterial, impertinent or scandalous matter.

Paragraphs 2 and 3 of the counterclaim contain partisan statements of matters alleged to have occurred long prior to 1882. The Constitution of the United States places the authority to dispose of public lands exclusively in Congress. 14/ There can be no doubt about the plenary power of Congress to determine for whom it holds the title in trust. This it has done by the Act of July 22, 1958, leaving to this court only the determination of what Indians, if any, were "settled" on the Hopi Reservation after December 16, 1882 by the Secretary of Interior pursuant to the Executive Order dated December 16, 1882. The matters alleged in paragraphs 2 and 3 are long recitals and digressions, altogether unnecessary and totally immaterial to the issues in this case.

Paragraphs 6, 7, 8 and 9 concerning failure in assimilation, population statistics, attempts to create a boundary line, allotment programs and the generous willingness of the Navahos to accept the lion's share of the Hopi Reservation by way of division are immaterial, impertinent and do not constitute a short and plain statement of the claim showing that the pleader is entitled to relief 15/ under the statute.

Paragraph 9 is subject to further objection. The statement that a majority of the Hopi share the opinion of the Navahos as to the desirability of a boundary line in the Hopi Reservation is patently wrong and contrary to good manners. 16/

13/ Rule 12(f) FRCP

14/ Article IV, Section 3, Cl. 2

15/ Rule 8(a)(2) FRCP

16/ "Scandal" in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual or stating anything contrary to good manners or anything unbecoming in the dignity of the court to hear. 3 West Federal Forms, Chapter 31, Sec. 2527, Page 115. (Emphasis ours)

Under these circumstances counsel has no alternative but to move that the statement be stricken on the ground that it is scandalous and alleged for the purpose of creating prejudice against the plaintiff.

That portion of paragraph 10 commencing with the word "while" on line 9 of page 8, and all of paragraphs 11 and 13 are immaterial and impertinent.

The real issue in this case is whether any Navahos have ever been settled upon the Hopi Reservation by the Secretary of the Interior pursuant to the Executive Order. If they have been, defendant can so allege in a plain and concise statement. The trial of the case can be materially shortened by the framing of the issues clearly and concisely.

MOTION FOR MORE DEFINITE STATEMENT

When a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. 17/

The counterclaim of defendant, Paul Jones, is so vague and ambiguous that the plaintiff cannot reasonably be required to frame a reply unless a more definite statement is made by said defendant as to the following matters:

1. Whether an interest in the Hopi Executive Order Reservation is claimed on behalf of certain individual Navaho Indians by reason of settlement of said Indians upon said Hopi Executive Order Reservation by the Secretary of the Interior pursuant to such Executive Order, and if so, on behalf of what Indians is the claim made.
2. Whether it is claimed on behalf of the Navaho Indian Tribe that said Navaho Indian Tribe has been settled upon the Hopi Executive Order Reservation by the Secretary of the Interior pursuant to such Executive Order.
3. Whether it is claimed that the boundaries of the Navaho Reservation have been extended to include a part of the Hopi Executive Order Reservation, and if so, the manner in which such extension was made.

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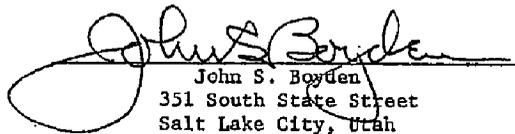
17/ Rule 12(e) FRCP

Plaintiff does not request that identifying data to the point of unreasonableness be alleged concerning what Indians defendant claims have been settled on the reservation. But at least some identifying information enabling plaintiff to answer allegations of settlement on the reservation of those for whom a claim of settlement is made will make it possible for plaintiff to reply specifically, raising the ultimate questions of law and fact.

It is evident from defendant's counterclaim that some tribal claim is asserted on behalf of the Navahos. We are unable to determine whether such claim is made on a theory of settlement, extension of the Navaho Reservation or otherwise. The reply of plaintiff can sharply draw the true issues only if we are permitted to know the basis of defendant's claims.

The combination of a motion to strike and a motion for a more definite statement results from the alleging of too much of what is not pertinent and not enough of what is really pertinent.

If the parties litigant are required and enabled to clearly come to issue on the matters to be determined within the purview of the statute, much expense and much time will be saved. With this aim in mind these motions are respectfully submitted.

  
John S. Boyden  
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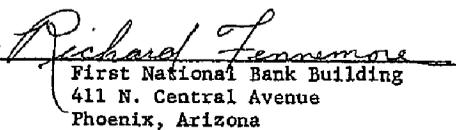
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One copy of the foregoing Brief of Plaintiff Supporting Motion to Dismiss Counterclaim, Motion to Strike and Motion for More Definite Statement mailed with postage prepaid this 14th day of February, 1959, to:

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