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UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

Feb. 12, 1941

MEMORANDUM for the
Commissioner of Indian Affairs.

The Indian Office has submitted for the signature of the Secretary an order which would define within the Hopi Reservation created by the Executive order of December 16, 1882, an area which is to be for the exclusive use and occupancy of the Hopi Indians. This area is referred to in this memorandum as the Hopi Unit. The remainder of the 1882 reservation outside the Hopi Unit is to be for the exclusive use and occupancy of the Navajo Indians. It is proposed to accomplish this delimitation by fiat of the Department without expression of assent on the part of the Indians and without statutory authorization. The authority which is relied upon for this action is the wording of the Executive order of 1882 which created the reservation for the Hopi Indians "and such other Indians as the Secretary of the Interior may see fit to settle thereon."

I am returning this proposed order as I find it to be

1. Contrary to the prohibitions against the creation of Indian reservations without statutory authority, contained in the acts of May 25, 1918 (40 Stat. 570, 23 U. S. C. A. sec. 211), and March 3, 1927 (44 Stat. 1347, 25 U. S. C. A. sec. 398d);

2. In violation of the rights of the Hopi Indians within the 1882 reservation; and

3. Not in conformity with the provisions of the Hopi constitution approved December 19, 1936.

Because of the gravity of the practical problems involved, I am adding to this statement certain suggestions for legal procedures which may be useful in meeting, at least partially, the immediate problems.

1. Prohibitions of the 1918 and 1927 acts

The act of 1918 provides:

"Section 211. Creation of Indian reservations. No Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."

The relevant provision of the act of 1927 is contained in section 4 of that act and reads as follows:

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"Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: Provided, That this shall not apply to temporary withdrawals by the Secretary of the Interior."

As the definition of an area for the use and occupation of a group of Indians is a definition of a reservation, these statutes prevent the proposed action by the Department without legislature athority.

An "Indian reservation," as recognized in the 1927 act, itself, may be defined as an area set apart by the Government for the use and occupation of Indians. United States v. McGowan, 302 U. S. 535. The right of use and occupancy is the Indians title to land which the creation of an Indian reservation establishes or recognizes, unless, as in rare instances, a different title is specified. This is true whether the reservation is created by treaty, statute, or Executive order, Johnson v. McIntosh, 8 Wheat, 543; Mitchell v. United States, 9 Pet. 711, 745; United States v. Cook, 19 Wall. 591; Leaven worth etc. R. R. Co. v. United States, 92 U. S. 733, 742; Seneca Nation v. Christy, 162 U. S. 283, 288-9; Doscher v. Wetherby, 95 U. S. 517, 523; Minnesota v. Hitchcock, 185 U. S. 373, 388 et seq.; Lone Wolf v. Hitchcock, 187 U. S. 553; Jones v. Meehan, 175 U. S. 1; Spalding v. Chandler, 160 U. S. 394; McFadden v. Mountain View Min. & Mill. Co., 97 Fed. 670, 673; Gibson v. Anderson, 131 Fed. 39. In the McFadden case, supra, the court explained that the effect of an Executive order "was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion on the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes." Even a setting apart by the Secretary of the Interior of lands for Indian use amounted to the creation of a reservation, as the Secretary was deemed to be acting for the President. United States v. Walker River Irrigation Dist., 104 F. (2d) 334. Since the effect of an order creating a reservation is to give the Indians the use and occupancy of the land, an order giving certain Indians the use and occupancy of a designated area of land is, in effect, the creation of a reservation. This conclusion is true a fortiori where the effect is to give a tribe of Indians an exclusive right of use and occupancy in an area which was part of a larger area in which they had the right of use and occupancy in common with other Indians settled thereon.

The 1927 act was passed in order to make certain that the rights of use and occupancy within the reservation created by the executive branch of the Government were the same as those recognized in the case of treaty or statutory reservations, and particularly the right to receive the proceeds from minerals within the reservation. The intent of the act was to confirm the opinion of the Attorney General in 1924 that the Indians of Executive Order reservations had the same property rights as the Indians of other reservations (34 Op. Atty. Gen. 181). That opinion of the Attorney General left open the question whether the President might abolish part of a reservation created by him. It is clear that section 4 of the act, above quoted, was intended to settle this question by providing that the President could not alter the boundaries of reservations already created. It has been suggested that section 4 was intended to relate simply to additions to Indian reservations. No such intent appears in the legislative history of the act, and if such were the

intent, the section would have been largely unnecessary in view of the act then in existence prohibiting the withdrawal of public lands as an Indian reservation except by act of Congress (act of June 30, 1919, 41 Stat. 34). However, resort need not be had to the legislative history of section 4 of the 1927 act, since there is no ambiguity in the prohibition upon any type of change of the boundaries of an Indian reservation.

The proposed order would not only change the boundaries of the 1882 reservation but would also, in effect, create a Hopi Reservation where no reservation exclusively for the Hopis had previously existed, and would thus violate the prohibition in the 1918 act against the creation of any reservation within the limits of the State of Arizona except by act of Congress.

These statutory prohibitions were apparently recognized by the Department in the period from 1930 to 1934 when an attempt was made to obtain passage of the Navajo boundary bill with a provision included to authorize the Secretary of the Interior to define a boundary between the Navajo and Hopi Indians. This attempt was abandoned and the bill was finally passed containing a provision that nothing in the act would affect the status of the 1882 reservation. (Act of June 14, 1934, 48 Stat. 940.) The files of the Department show that this result occurred because of the protests coming from both the Navajo and Hopi Indians. (Indian Office files No. 308.2 Pts. 1 and 2, 8970, 1930.)

2. Rights of the Hopi Indians in the 1882 reservation

The 1882 reservation was created for the use and occupancy of the Hopi Indians, together with such other Indians as the Secretary might settle thereon. Although their rights were not exclusive, the Hopi Indians were thus given the right of use and occupancy throughout the 1882 reservation. This right, as previously indicated, is the usual Indian title to land. An order forbidding the Hopi Indians from using and occupying a portion of the 1882 reservation would be an alienation of their property right in that portion of the reservation. No citation of authority is necessary for the fundamental statement that the Secretary of the Interior is not privileged to alienate Indians lands without authorization from Congress, whether the alienation is to other Indians or to non-Indians. The privilege placed in the Secretary of the Interior at the time of the creation of the 1882 reservation to settle other Indians within the reserve permitted him to allow non-Hopis within the reservation. The privilege does not extend to the exclusion from the reservation of the Hopis themselves.

There is one case which states that where, under an Executive order and a statute, the Secretary has authority to settle other Indians upon a reservation created for designated tribes, the designated tribes have only the "right to reside" thereon and no "definite title" to the land. Crow Nation v. United States, 81 ct. Cls. 238, 278. The question before the court was not the title of the Indians to the land but the tribal recognition given to the River Crow Indians. The case contains no authority upholding the right of the Secretary to remove a tribe from a reservation for whom the reservation was created, even though the tribe might have less than ordinary Indian title to the land. In the Crow case, moreover, the River Crows had voluntarily abandoned the reservation and claimed no title thereto.

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However, it has been the settled opinion of the Department that where a statute or Executive order creates a reservation for a designated tribe or tribes, such tribes have the usual Indian title of use and occupancy, even though the Secretary is privileged to settle further Indians upon the land. There have been at least 25 such Executive orders and 6 such statutes, many of which relate to tribes which are now organized under the Indian Reorganization Act. In no case have these tribes been considered as having less than the usual tribal property rights. Their rights have even been deemed to have become exclusive where over a long period of time there has been no action by the Secretary to introduce other Indians into the reservation. Memoranda of the Solicitor, September 15 and October 29, 1936 (Colorado River Indian Tribes). I do not maintain that in this case the rights of the Hopis have become exclusive rights since there were Navajos upon the reservation at the time the 1882 order was promulgated, and Navajos have continued within the reservation in increasing numbers.

My conclusion on this point is that, while the Secretary may control the settlement upon the reservation of the Navajo Indians, he may not deny the use and occupancy of any part of the reservation to the Hopi Indians without their voluntary action, as such denial would be an alienation of their property beyond the authority of the Secretary.

3. Hopi Constitution

At least three provisions of the Hopi constitution bar action by the Department to limit the use and occupancy of the Hopi Indians to the proposed Hopi Unit without the assent of the Hopis. Article I, defining the jurisdiction of the Hopi Tribe, provides that the authority of the tribe shall cover the Hopi villages "and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe." This provision was intended to provide, and clearly does provide, for the defining of a boundary to the land of the Hopis by agreement of all parties concerned. Article VI, section 1(c) embodies the provision in section 16 of the Indian Reorganization Act that organized tribes may prevent the disposition of their property without their consent. Article VII places in the Hopi Tribal Council supervision of farming and grazing upon the lands beyond the traditional clan and village holdings.

Available Legal Procedure

As I have presented the legal objections to the method proposed by the Indian Office to meet the serious threat to the welfare of the Hopi Indians from Navajo encroachment, I should like to proceed with certain constructive suggestions as to possible legal procedures available to meet the urgent problem.

I understand that the problem is economic and psychological. The increasing infiltration of the Navajo Indians farming and grazing livestock within the 1882 reservation threatens to choke the Hopi economy,

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particularly as the Hopis are turning more to the grazing of livestock and the range land is deteriorating. Neither tribes is willing to agree to a reservation boundary. The Hopis believe that such an agreement would embarrass their traditional claims to large areas of land. The Navajos wish the privilege of utilizing the entire 1882 reservation as far as possible. The core of the matter is land use for farming and grazing. I believe it possible to take effective action to control farming and grazing without defining a separate Hopi reservation.

Proposal for grazing segregation

The Secretary of the Interior has the undoubted authority to regulate the use of range land to protect the land from waste and to prevent unfair and unreasonable monopolization by individuals. This authority was established in the Navajo grazing cases (United States v. Hege, D. C. Arizona, unreported, D. J. File No. 90-2-6-24-3). In so far as the 1882 reservation is concerned, the power is also based upon statutory expression in section 6 of the Indian Reorganization Act. The present Navajo and Hopi grazing regulations (25 CFR Pt. 72) regulate the number of units which each family may place upon the range in the light of the carrying capacity of the range. To administer these regulations the Secretary of the Interior has established grazing districts based upon the social and economic requirements of the Indians, one of which, No. 6, is designated as the Hopi Reservation for the purposes of grazing administration. 25 CFR sec. 72.13(g). Within this Hopi grazing reservation the regulations are to be executed in so far as they are compatible with the provisions of the Hopi constitution and in cooperation with the Hopi Tribal Council (secs. 72.4, 72.6 and 72.9).

It would be possible for the Indian Office to show, I believe, that it is necessary for the proper protection of the range from destruction and for the effective enforcement of the regulations that Hopi and Navajo grazing be separated. It is apparent that the Hopi Tribal Council can control its own members better than it can the intruding Navajos who are ancient enemies. The presence of the Navajos within the Hopi grazing district is a deterrent to constructive action by the Hopis to protect the range. The friction between the two tribes makes the enforcement of the regulations difficult. If it can be shown that there is a direct relation between the protection of the land from waste and the separation of tribal use, an amendment can be made to the grazing regulations providing that no Navajo shall be issued permits within the Hopi grazing district and no Hopi shall be issued permits within the remainder of the 1882 reservation. A further amendment might be included to enlarge Grazing District No. 6 to include all of the proposed Hopi Unit, which is a slightly larger area.

The Hopi constitution recognizes the regulatory power of the Secretary over the range land provided in section 6 of the Indian Reorganization Act. However, since the suggested regulation would not only regulate the use of the range but would exclude Hopis from the use, for grazing purposes, of the land outside the Hopi Unit, the regulations must have the assent of the tribe. The distinction between the regulation of a property right and the

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denial of the exercise of a property right as a basis of the affirmance or disaffirmance of the power of the Secretary is apparent in the two cases of United States v. Hern, supra, and Mason v. Sams, 5 F. (2d) 255 (D. C. W. D. Wash., 1923). In the latter case the regulations of the Secretary which denied fishing privileges to tribal members without the consent of the tribe were held invalid.

It is possible that the assent of the Hopis will be obtained if three considerations are kept in mind:

(1) The regulations does not create a reservation boundary, since the Hopis would remain entitled to all beneficial use, including the right to any proceeds, within the remainder of the 1882 reservation.

(2) The regulations would be to the practical advantage of the Hopis since they would apparently obtain greater grazing areas than they have the effective use of at present.

(3) A formal agreement or the signing of a document by the Hopi Tribal Council is not necessary if they are reluctant to take such positive action. If the tribal council will assist in the execution of the regulations through the issuance of permits within the Hopi Unit and in such other ways as may be appropriate, their acquiescence will be sufficiently demonstrated.

If the rights of the Hopis are thus recognized, I see no objection to the Navajo superintendent issuing grazing permits to Navajos within the remainder of the 1882 reservation under the authority of the Secretary to settle non-Hopis within the reserve.

Farming Segregation

As there are some Navajos farming within the Hopi Unit who may remain there in spite of the fact that they can no longer graze their livestock, and as their presence would be a continuing source of friction because of the need of the Hopis for additional agricultural land, it would be possible for the Secretary of the Interior to use his authority over the settlement of non-Hopis within the reserve to remove those Navajo farmers from the Hopi Unit. However, as these farming settlements were made with the knowledge of the administrative officers of the Department, the investment of the Navajos should be respected, either by assisting them in resettling elsewhere on land of equal value or by providing other compensation.

The Secretary does not have the power to remove the Hopi farmers who may be located outside the Hopi Unit but within the 1882 reservation in view of the use and occupancy rights of the Hopis in that area. There are no farming regulations adopted under section 6 of the Indian Reorganization Act, and if there were, and these were assented to by the Hopis, it would probably be more difficult to relate soil erosion prevention through the control of farming practices to the separation of the tribes than in the case of Grazing regulation. However, it is possible that the Hopis outside the Hopi Unit could be attracted into the Unit by assistance in resettlement.

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If adjustment in the use for farming and grazing purposes of the 1882 reservation is effected in some such way as I have outlined, and if this adjustment proves to be to the general satisfaction of both tribes, it is possible that agreement may then be obtained from the two tribes for legislative action to define a reservation boundary.

(Signed) Nathan R. Margold

Solicitor

Attachment

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