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April 4, 1941.

Confidential

MEMORANDUM for Commissioner Collier:

Under date of February 12, 1941, the Solicitor addressed a memorandum to the Commissioner of Indian Affairs in connection with a proposed secretarial order defining the use-rights of the Hopi Indians on the 1882 Moqui Reservation. In this memorandum the Solicitor made certain statements which will, in my judgment, have disastrous results on Indian administration if they are formally handed down as an opinion.

The Definition of an Indian reservation as set out on page 2 in the last paragraph of the Solicitor's memorandum is potentially loaded with dynamite. The Solicitor says, "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 occupancy of Indians." The 1927 Act restricts this definition to executive order reservations by the proviso, "that this (changes in the boundaries of Indian reservations) shall not apply to temporary withdrawals by the Secretary of the Interior." However, the Solicitor's opinion on the same page vetoes this congressional proviso by the statement, "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."

Does this dictum of the Solicitor give Senator Chavez and the Grazing Service an opportunity to attack the validity of the secretarial order giving the Commissioner of Indian Affairs the administration of the public domain in the eleven townships for Indian use? According to the Solicitor's memorandum, this secretarial order establishes an Indian reservation in New Mexico. The same objection could be raised by Senator Chavez to the proposed secretarial order turning over to the Commissioner of Indian Affairs certain withdrawn lands adjacent to District 7 in the Rio Puerco area, for Navajo use. This definition of what constitutes an Indian reservation may also endanger the Hualapai lands relinquished by the Santa Fe; already the Grazing Service is intimating that these lands are public domain and, therefore, cannot be added to a reservation in Arizona without congressional action.

In conjunction with the Act of June 30, 1919, (41 Stat., 34) which prohibits the withdrawal of public land for Indian reservations, except by act of Congress, the definition of the Solicitor apparently will be the Grazing Service' legal reasons for preventing the establishment of an Indian grazing unit covering the Ute Extension Area, except as part of the established Utah Grazing District No. 8. As an independent unit outside of the grazing district, the Solicitor's definition of an Indian reservation, which definition seemingly nullifies the secretarial withdrawal provisions of the 1927 Act, would make this unit an Indian reservation and its establishment would be contrary to law.

The proposed secretarial order defining the boundaries of the Hopi use-area need not have provoked the Solicitor's discussion of the prohibitions of the 1918 and 1927 acts. The protection of the rights of the Hopis as set forth in part 2 of the memorandum would have been entirely sufficient to prevent the promulgation of the proposed secretarial order. In part 2 the Solicitor points out that the Secretary has no right to deprive the Hopi Indians of any rights which they have in the total Moqui Executive Order Reservation outside of the area which was proposed to be set aside for their exclusive use.

In view of the far reaching consequences that may follow the official promulgation and publication of this Solicitor's memorandum as a formal opinion, I suggest that we confer with the Solicitor and request him to confine the discussion of the proposed Hopi-Navajo boundary order to part 2 of the memorandum. Part 2 also points out a specific procedure for the accomplishment of the boundary definition objectives without sacrificing the Hopi rights to the balance of the reservation area. I am preparing material along the lines suggested by the Solicitor.

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