

Cohen, Felix S. (Acting Solicitor, Dept. of Interior), 6-11-1946, Ownership of the Mineral Estate in the Hopi Executive Order Reservation. In U.S. Dept. of the Interior, Decisions of the Department of the Interior vol. 59 (Jan. 1945-June 1947): 248-54. Copy from Transcription in Healing v. Jones case Defendant's Exhibit 224. John S. Boyden Collection, MSS 343, Box 42, vol. 3, L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, UT.

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OWNERSHIP OF THE MINERAL ESTATE IN THE HOPI EXECUTIVE ORDER RESERVATION

Executive Order Indian Reservations--Indian Title--Indian Use and Occupancy--Tribal Mineral Ownership--Tribal Mineral Leases--Departmental Recognition of Indian Tribal Representatives.

The Executive order of December 16, 1882, set aside certain lands for the use and occupancy of the Hopi Indians "and such other Indians as the Secretary of the Interior may see fit to settle thereon." At that time, and for years prior thereto, the lands were occupied by the Hopi Indians and by Navajo Indians, and Navajos continued thereafter to settle within the area. Funds appropriated for Federal services, such as the education of Indian children, have been used throughout the years for the benefit of Hopis and Navajos living within the area, and the Secretary has regulated the grazing of the livestock on the reservation belonging to Hopis and Navajos, no action being taken to prevent the further settlement of Navajos until the Secretary declared that Navajo Indians would not be permitted to settle on the reservation after the date of ratification of the Hopi constitution.

The historical background shows that the intention of the Executive order was to create the reservation for the Hopi Indians and for the Navajo Indians then living within the area, with the further settlement of Navajos to be permitted in the discretion of the Secretary. Under this construction, it is held that the Hopi Indians and those Navajos within the area who settled in good faith prior to the date of ratification of the Hopi constitution have coextensive rights with respect to the natural resources of the reservation, including the mineral estate.

Under the act of May 11, 1938 (52 Stat. 347; 25 U. S. C. secs. 396a-f), lands within the Hopi Executive Order Reservation may be leased for mining purposes, with approval of the Secretary, by authority of the Hopi Tribal Council and the duly authorized representatives of the Navajos having rights within the reservation. The preparation of a roll identifying the individual Indians entitled to participate in the mineral estate is unnecessary unless it is intended that the proceeds of mineral leasing be individualized.

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M--33821

June 11, 1946.

The Secretary of the Interior.

My Dear Mr. Secretary:

The Commissioner of Indian Affairs has requested that you obtain my opinion on the following question:

Is the mineral estate in the Hopi Executive Order Reservation the sole property of the Hopi Tribe; and if not, what is the extent of the interest of the Hopi Tribe, and what is the extent of the interests of the non-Hopi Indians who are legally occupying part of the Hopi Executive Order Reservation?

The so-called Hopi Executive Order Reservation embraces some 2½ million acres in northern Arizona, having been created out of the public domain by an order of the President, dated December 16, 1882, which set aside the area "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." The Hopi Indians have occupied this general area as their ancestral home for centuries, living, for the most part, in villages located on the high mesas. At least since the early part of the nineteenth century, however, Navajo Indians have also lived within the area, and the Indian population has steadily grown from approximately 2,000 in 1882 to over 7,000 today.¹ The two Indian groups have retained their separate tribal affiliations and have never been able to agree on a reservation boundary or a division of land use. The reservation is heavily overgrazed, and as the population has grown the dispute between the Hopis and the Navajos within the area has reached serious proportions.

Any determination of the comparative rights of the two Indian groups must, of course, take into consideration the historical background of the ancient dispute between them. The problem out of which that dispute has grown, however, is largely one of economics,² and its solution depends upon factors that are primarily administrative rather than legal. No attempt will be made to solve it in this opinion. I understand that the Commissioner's request for my views was prompted by inquiries he has received as to the procedure to be followed in offering the lands for mineral development under the act of May 11, 1938 (52 Stat. 347; 25 U. S. C. secs. 396a-f), which provides that the "unallotted lands within

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any Indian reservation * * * may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians * * *." This question of leasing procedure may be decided upon legal grounds.

In an opinion of February 12, 1941, Solicitor Margold considered and ruled upon the question of whether the Department could, without the consent of the Indians, define a reservation boundary between the Hopis and Navajos living within the Executive order area, thereby creating grazing districts for the exclusive use of the respective groups. It was there held, specifically, that the definition of such a boundary would be in violation of legislation which prohibits the creation of Indian reservations or changes in the boundaries of existing reservations without authority of Congress. It was also held that the definition of such a boundary would violate the rights of the Hopi Indians within the 1882 reservation area and would violate the provisions of their constitution, which was approved on December 19, 1936. In discussing the rights of the Hopi Indians, it was demonstrated in the opinion that under the Executive order they acquired the usual Indian title which could not be divested by departmental fiat, but that their rights were not exclusive. It was also shown that Navajo Indians were living within the area when the reservation was created in 1882 and that Navajos in increasing numbers have continued to settle there. Although I believe it is implicit in the opinion mentioned that the individual Navajos have rights within the reservation, the extent of those rights, as compared to those of the Hopis, was not discussed, and, since there appears to be considerable confusion on the point among the Indians and others, I believe it desirable that the Department clarify its position on the matter now.

The Executive order of 1882 was promulgated upon the recommendation of this Department. The records of this Department are, therefore, the most trustworthy source of acceptable evidence as to the meaning and effect of the order. Cf. Sioux Tribe of Indians v. United States, 316 U. S. 317 (1942). When the records relating to events leading to the creation of the reservation are considered together with those showing the course of administrative action thereafter taken, the meaning and effect of the Executive order becomes reasonably plain. At the time the reservation was created in 1882 the Secretary was well informed as to conditions among the Hopis and the Navajos by reports he had received from United States Indian Inspectors and from the Commissioner of Indian Affairs.³ By a treaty of June 1, 1868 (15 Stat. 667), a reservation had been established for the Navajos in an area lying to the east of the 1882 Executive order area. The Navajo Tribe relinquished under that treaty their tribal claims to lands outside the treaty reservation and agreed to assist in resettling within the treaty reservation the large number of individual

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Navajos living outside those boundaries. Little or no success was had, however, in effecting the removal of these individual Navajos, and since the usable portion of the treaty reservation was far too small to support the rapidly growing Navajo population, no serious effort was made to accomplish the resettlement. Instead, an attempt was made to handle the administrative problem by a series of Executive orders making additions to the Navajo Reservation.⁴

The reports show that during all this period prior to 1882 the Hopis were complaining of the encroachments and depredations of the Navajos and non-Indians in their midst. As their forefathers had done before them, the Hopi Indians lived in their villages high on the mesas, coming down into the more fertile valleys only to tend stock and to tend small farming units. All efforts to remove them to the valleys met with failure, and their traditional habits of life made it difficult, if not impossible, for them to protect themselves against the encroachments of the whites and the Navajos. The Indian agent who had jurisdiction over the Hopis and Navajos within the area was handicapped in dealing with the situation because the land was part of the public domain. In a report of May 1, 1879, Agent Mateer reported numerous intrusions by the whites and asked if there were not "some law by which the Indians can be protected in their rights to lands which they have cultivated for a century or more." In comprehensive reports covering the entire Navajo-Hopi area, submitted in July and November 1882, Inspector Howard estimated that the Navajos living in Arizona to the west of the Navajo Reservation numbered 8,000 and the Hopis numbered some 2,000. As to the capacity of the Navajo Reservation to sustain all of the Navajo Indians, he stated that if those living in Arizona outside the Navajo reservation were crowded back on the reservation, "it would become necessary for the United States Government to feed them." He recommended the establishment of a new reservation for the Arizona Navajos and the Hopis combined, with a separate agent for these two groups. He concluded that if his recommendation were adopted and the lands were given a reservation status, the encroaching whites could be excluded, and with a combined agency the agent could umpire the controversies between the Hopis and the Navajos, possibly issuing certificates of title to the settlers within the area from both tribes.

implied

The matter finally came to a head as a result of the activities of certain white persons. In a letter to the Commissioner of November 11, 1882 (21371/1882), Agent Fleming reported open defiance of his authority by a group of white settlers, and a resultant loss of his prestige and influence with the Indians. He strongly urged that corrective action be taken, failing which he would tender his resignation. In response, the Commissioner instructed Agent Fleming to submit a description of boundaries for a reservation that would include the Hopi villages and the agency site

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and be "large enough to meet all needful purposes and no larger." After the land descriptions were submitted, the Commissioner recommended to the Secretary the transmittal to the President of an order setting aside the area described "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." In making this recommendation the Commissioner pointed to the peaceful habits of the Hopi Indians and to the difficulties encountered in dealing with the white settlers due to the want of reservation status for the lands. It was the order thus recommended that the President signed on December 16, 1882.

The factual situation delineated above shows clearly, in my opinion, that it was the intention in creating the reservation to set aside the lands for the use and occupancy of the Hopi Indians and for the use and occupancy of the Navajos then living there, and to permit the continued settlement of Navajos within the area in the discretion of the Secretary. Had there been any intention of disturbing the Navajos then occupying the area, it would have been a comparatively simple thing to draft the Executive order so as to create a reservation exclusively for the Hopis. But that was not done. The prime need at the time was to provide Indian reservation status for lands long occupied by Hopis and Navajos alike, and to retain administrative authority over the further settlement of Navajos within the area. This was precisely what the Executive order of 1882 accomplished.

The foregoing views are borne out by the history of subsequent events. Except for action taken by the military in 1890-1891 to protect the Hopis in their peaceful occupation of the traditional village areas,⁵ and the action taken by the Department in more recent years in connection with the necessary conservation of the range, no action was taken to prevent the settlement of Navajos within the 1882 reservation until the Department took the position in a letter to the Superintendent, on January 8, 1942, that Navajos would not be allowed to settle on the reservation after October 24, 1936, the date of ratification of the Hopi constitution. I do not mean to imply that the Navajos could acquire rights in the reservation through the Secretary's inaction or through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Secretary has sought and obtained funds from Congress which have been used for the education of the children of Hopis and Navajos alike, and the grazing of the livestock of both groups has been permitted and regulated by the Secretary. This, to my mind, is conclusive evidence that the settlement of the Navajos on the reservation has been sanctioned and confirmed by the Secretary, and that their settlement is therefore lawful, resulting in the necessity of recognition of their rights within the area.

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The Executive order of 1882 provided that the lands were set aside for the "use and occupancy" of two classes of Indians, namely, the Hopis and others settled by the Secretary. As Solicitor Margold pointed out in the opinion of February 12, 1941, this was a usual form of Indian title, carrying with it the rights normally incident to such title. It would be a violation of the clear language of the Executive order to distinguish between the quality of estate acquired by the two groups, and I therefore hold that the rights of the Navajos within the area who settled in good faith prior to October 24, 1936, are coextensive with those of the Hopis with respect to the natural resources of the reservation. It is settled by now, of course, that the mineral estate is in the Indians. See the act of March 3, 1927 (44 Stat. 1347; 25 U. S. C. sec. 398a), and cf. United States v. Shoshone Tribe of Indians, 304 U. S. 111 (1938).

As previously stated, the act of May 11, 1938, supra, provides that the unallotted lands of an Indian reservation may be leased for mining purposes, with the approval of the Secretary, "by authority of the tribal council or other authorized spokesmen for such Indians." The term "such Indians" obviously refers to the Indian owners of the reservation. The fact that the Indian owners are of different tribal or ethnic groups should be no obstacle to leasing under the act. The Hopi Indians have a Tribal Council which is empowered by Article VI, section 1 (c), of their approved constitution to handle such matters. But the Navajos having rights within the reservation are not members of the Hopi organization, and the Hopi Tribal Council would, therefore, have no authority to represent them. It is my understanding that these Navajos are represented on the Navajo Council for certain purposes, but whether such representation would suffice for the purpose of approving mining leases, or whether a special council should be called to designate representatives of the Navajos of the Hopi Reservation, are administrative questions which should be considered in the first instance by the Indian Service. Any lease executed as authorized by the Hopi Council and the representatives of the Navajos concerned would, upon approval by the Secretary, satisfy the requirements of the 1938 act and bind all of the Indian owners of the reservation. No necessity would arise for the preparation of a roll identifying all of the individual Indians entitled to participate in the mineral estate unless it were intended to individualize and distribute among the Indians the proceeds derived from mineral leasing.

FELIX S. COHEN,

Acting Solicitor.

Approved:
OSCAR L. CHAPMAN,
Acting Secretary.

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[Footnotes]

1 In 1882, the population consisted of approximately 1,800 Hopis and "a few hundred" Navajos. (See the Commissioner's letter of December 13, 1882, to the Secretary, recommending creation of the reservation.) Today there are 3,000 Hopis and 4,000 Navajos living there. (See the report of the Hopi Agency for March 1944, entitled "Long Range Program for the Hopi Tribe.")

2 The Congress is fully cognizant of the dispute between these Indians and the economic aspects thereof. See part 18 of the Survey of Conditions of the Indians in the United States, Hearings before the Senate Subcommittee on Indian Affairs, 71st Cong., 3d sess. (1931); Hearing before the Senate Committee on Indian Affairs, 72d Cong., 2d sess. (1932), on Boundary, Navajo-Hopi Indian Reservation; and Hearings before the House Committee on Indian Affairs, 79th Cong., 1st sess. (1945), on the Hopi Tribe.

3 E. g., the reports of Inspector Vandever, September 25, 1873 (1385/1873); Inspector Daniels, August 16, 1874 (117/1874); Inspector Vandever, for 1877 (1731/1877); Inspector Howard, July 31, 1882 (15060/1882); Inspector Howard, November 29, 1882 (1403/1882), and the Annual Reports of the Commissioner of Indian Affairs.

4 Extension of the Navajo Reservation boundaries has continued by sundry Executive orders and statutes, the last being the act of June 14, 1934 (48 Stat. 960). Today the Hopi Executive Order area lies wholly within the exterior boundaries of the Navajo Reservation, and since the latter is still insufficient for the needs of the Navajos, the problem of resettlement of the excess population living within the Hopi area is thus immeasurably complicated.

5 See Indian Office files, Letters Received, files Nos. 2914/1891; 4417/1891; 6567/1891; 25561/1891.

6 As previously stated, the reservation is now overpopulated. Since it was undoubtedly not intended that the settlement of non-Hopis continue beyond the "saturation point," it was perfectly proper for the Secretary to recognize that the point had been reached and to declare that the further settlement of Navajos would not be permitted.

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