Hopi Tribe, 1955, Petition for Reconsideration of the Opinion of the Solicitor of the Department of Interior dated June 11, 1946…, re: Ownership of the Mineral Estate of the Hopi Executive Order Reservation. Copy from Tribal Government Services, Hopi Tribe, Kykotsmovi, AZ.

PETITION

to

The Secretary of the Interior

by

The Hopi Tribe, Arizona

for

RECONSIDERATION OF THE OPINION OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR DATED JUNE 11, 1946, M 33821

RE: OWNERSHIP OF THE MINERAL ESTATE OF THE HOPI EXECUTIVE ORDER RESERVATION

Brief for the Petitioner

JOHN S. BOYDEN,
General Counsel for Petitioner

BRYANT H. CROFT
KENNETH R. MADSEN
BOYDEN, WILKINSON, TIBBALS, STATEN AND CROFT
WILKINSON, BOYDEN, CRAGUN AND BARKER
of Counsel for Petitioner

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PETITION

to

The Secretary of the Interior

by

The Hopi Tribe, Arizona

for

RECONSIDERATION OF THE OPINION OF THE SOLICITOR OF THE DEPARTMENT OF INTERIOR DATED JUNE 11, 1946, M 33821

RE: OWNERSHIP OF THE MINERAL ESTATE OF THE HOPI EXECUTIVE ORDER RESERVATION

Brief for the Petitioner

OPINION OF SOLICITOR

On June 11, 1946 Honorable Oscar L. Chapman, Acting Secretary of the Interior, approved an opinion (M 33821) of the Office of the Solicitor, signed by Felix S. Cohen, Acting Solicitor, concerning the ownership of the mineral Estate in the Hopi Executive Order Reservation.

In this opinion, the Solicitor concluded that it was the intention of the Executive Order of December 16, 1882, 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

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the Secretary. The Solicitor further concluded 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 co-extensive rights with respect to the natural resources of the reservation, including the mineral estate.

REQUEST FOR RECONSIDERATION

A request was made on December 15, 1952 to the Secretary of the Interior by petitioner for reconsideration of the Solicitor's Opinion. On January 6, 1953, Maston G. White, Solicitor, notified counsel for petitioners that he would be pleased to give attention to the matter upon the receipt of the memorandum proposed to be filed in support of the request for reconsideration. This Petition is submitted pursuant to leave thus given.

EXECUTIVE ORDER INVOLVED

The Hopi Reservation was established by Executive Order (1 Kappler 805), as follows:

> "Moqui (Hopi) Reserve.
>
> EXECUTIVE MANSION, December 16, 1882.
>
> "It is hereby ordered that the tract of country in the Territory or Arizona lying and being within the following-described boundaries, viz, beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36 degrees and 30 minutes north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35 degrees and 30 minutes north, thence due east to the one hundred and tenth degree of longitude, and thence due north to place of beginning, be, and the same is hereby, withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.
>
> CHESTER A. ARTHUR."

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QUESTION PRESENTED

The question presented is whether the opinion of the Solicitor in concluding that certain Navajo Indians have co-extensive rights with the Hopi Indians in the natural resources of the Hopi Executive Order Reservation, including the mineral estate, was in error and should be modified or reversed.

LIMITATION OF QUESTION PRESENTED

Grazing rights upon the Hopi Executive Order Reservation that may have been acquired by Navajo Indians are not within the scope of this petition. Many facts and circumstances have arisen which create an independent question concerning grazing rights. This question is not considered herein.

STATEMENT AND ARGUMENT

1. The Navajos have no rights to minerals of Hopi Reservation.

We agree with the Solicitor that "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."[1] It is believed that any determination of this question must also take into consideration the historical dealings of the government with Indians generally in order to determine executive intent.

A chronological development of the facts preceding the establishment of the Executive Order Reservation seems most desirable as a basis for discussion of the problem. From the assumption of governmental control by the United States over the Moqui or Hopi Indians, the departmental records now on file in the archives are replete with evidence of transgressions upon the Hopi by their Indian neighbors, and particularly the more aggressive Navajo. Reference will be made to some of this correspondence and other documentary evidence for the purpose of illustrating that the establishment of the reservation in 1882 grew out of a

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necessity to protect the Hopi people against the aggression of others, including the Navajo Indians.

In a letter of August 22, 1856, from Fort Defiance, New Mexico, Agent Kendrick suggests the appointment of an Indian agent for the Zuni and Moqui Pueblo Indians, and makes the following comment:

> "In fact the Moquis, from their complete isolation, their timidity and ignorance, which make them the prey of the rapacious wild tribes which entirely surround them, as well as by their numbers, their agricultural habits, the hope of their improvement and the important effect which the reaction of that improvement would have upon the Utahs, Coyoteros, Cosmimas, Yampais, Gilenos, Pinalenos, and Navajos—indeed from every philanthropic consideration—call most loudly for the services of a faithful Indian agent."

In a prior letter, dated June 12, 1856, Agent Kendrick, in discussing the Moqui Indians and their need for help, stated "The Navajos ride over them roughshod."

In a letter written in April, 1865, from the Pueblo Agency in New Mexico, Agent John Ward reports that Moqui Indians had come to his agency for assistance, even though they belonged to the Arizona Territory Agency, and makes the following comments concerning the Moquis:

> "The very fact that most of them, men, women and children, have come on foot a distance of at least 300 miles through deep snow during one of the most severe winters known for many years for the purpose of procuring something to eat and what little they can pack to their homes is of itself sufficient evidence of their deplorable condition and fully warrants the charity which has been extended to them.
>
> "In connection with the foregoing, it may not be out of place to state for your information that one of my first official acts after receiving the appointment of Indian Agent in 1861 was to make a

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trip to the Moqui Pueblo (villages) at which time I visited every one of the seven pueblos. I found them very poor and badly in need of assistance. They had scarcely any implements worthy of the name, they had no hoes, no spades that I could see. The corn which is usually their main crop they planted by the aid of sticks by digging holes in the ground into which they dropped the seed. They principally depended on the rain for their crops, having no permanently running water in their vicinity. Thus they are, comparatively speaking, at the mercy of the seasons. *A short time previous to my visit to them they had been attacked and robbed by the hostile Navajos,* and to make their condition worse, the independent campaigns from this territory against the Navajos had also gone to their village and had taken from them even the very corn they had in store for their subsistence. This was done, as I afterwards learned, under the plea that the Moquis were in league with the Navajos against us.

"All these facts as well as their true condition I reported on my return to the then superintendent and did all in my power to impress upon him the necessity of relieving their wants, but strange to say, my honest appeals in their behalf had no effect whatever and nothing was done towards it.

"The only succor worthy of notice which these people have received from this superintendency, so far as I am aware, is that which has been extended to them during this winter. I can safely say that there never was a tribe of Indians so completely neglected and so little cared for than these same Moqui Indians. Indeed, for some time they seemed to have belonged nowhere.

"From personal observation and the best of my judgment the aggregate population of these Indians do not exceed 3,000 souls. *Their location and circumstances make them an easy prey for their more formidable and warlike foes, Navajos and* Southern Paiutes, by which they are surrounded." (Emphasis ours.)

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A copy of Agent Ward's letter was enclosed with a letter dated April 21, 1865, to William P. Dole, Commissioner of Indian Affairs, and written by M. Stecke (Superintendent, Indian Affairs) wherein the following comment is made concerning the Moqui villages and Indians:

> "*These villages are entirely surrounded by wild Apaches and Navajos who have done much to reduce them to their present destitute condition,* but this, in my opinion, is not the chief cause of their poverty and rapid decline; their supply of water for irrigation is evidently failing from causes beyond their control according to the report of Colonel Carson and others." (Emphasis ours.)

On August 19, 1867, at Prescott, Arizona Territory, Agent Junior C. Dunn addressed a communication to the Honorable S. C. Pomeroy which read, in part, as follows:

> "Presuming that any information in reference to the condition of the Indians in this country would be interesting to you, I submit a few statements in regard to a tribe whose condition demands that some immediate action be taken by those in authority to ameliorate their condition. And I do this more readily because they may be made useful to the white settlements as a barrier protection against the infernal Apaches.
>
> "I refer to the Moca Indians who have ever been and are now friendly with the whites. * * * Their villages are about 200 miles north from Prescott where they were once prosperous and well to do pueblo Indians. At present they are very poor and destitute, the causes of which condition are several. *The Navajo Indians have for years past been their inveterate enemies and they have robbed them and now they have to contend against the incursions of the White Mountain, Mescalero Apache and other hostile Indians.* Their lands are worn out and their water courses have failed. Now their habitation is a desert.
>
> "Their numbers which are now about 2,000 must,

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in their present condition continue to decrease, for though industrious and frugal, they can obtain from their lands only a scanty supply. If there are any friendly Indians who deserve assistance at the hand of the general government they are the Mocas." (Emphasis ours.)

A notation was written on the back of this letter, as follows:

"This letter is most respectfully referred to the Honorable Secretary of the Interior. I am well acquainted with the writer and give full confidence to his statements. S. C. Pomeroy. October 17"

The position taken by the Navajo Indians as to land claims in the vicinity of the Executive Order Reservation is pretty well set out in a letter dated July 24, 1875, to Honorable Edward T. Smith, Commissioner of Indian Affairs, from the then U. S. Indian Agent *of the Navajo Indians,* W. F. M. Arny, wherein he reported that he had examined the lands contiguous to the Navajo Reservation and outside of the lands claimed by the Atlantic and Pacific Railroad Company, with a view of satisfying the Navajo Indians. He discussed in detail the land to the east of the then Navajo Reservation, and gave a description of land which he proposed should be given to the Navajos. It was then stated that the Navajos were agreeable to receiving the land east of their reservation, but insisted that they must have more lands adapted to cultivation and urged that they should have the lands lying west of their then reservation, including a spring called Trout Spring. The Moqui Indian Agency was then established at Trout Spring. He stated that the nearest village of the Mosquis to Trout Spring was fifteen miles and that the establishment of the agency there had caused trouble and complaints between the Moqui Agent, the Navajos, and the Moqui Indians.

It was further reported that just previous to the last council of the agent with the Navajos, the Indians had threatened to tear down the buildings at Trout Springs, but

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that he had induced them to delay action until he could submit to the government a proposition for an addition to their reservation on the west, which he then marked on a map. An examination of the map shows that the proposed reservation extension to the west had as its west boundary the 110th degree of longitude, which later became the east boundary of the Executive Order Reservation of 1882. The Agent's letter specifically stated:

> "This leaves out the disputed spring to be occupied by the Moqui Agency, which agency, however, in my judgment, should be moved to one of the seven Moqui villages where a school could be established accessible to the children and maintained with much less expense to the government."

Three years later, on October 29, 1878, by Executive Order (1 Kappler 875), President R. B. Hayes extended the Navajo Reservation westerly to the 110th degree longitude west, the line proposed by Agent Arny, withdrawing this new addition to the Navajo Reservation from sale and settlement.

On September 25, 1876, W. B. Truax, U. S. Agent to the Moqui Indians, wrote a letter to the Commissioner of Indian Affairs, which, in part, reads as follows:

> "Since my last communication to you, dated September 16, 1876, I am deeply impressed with the conviction that this Agency should not be entirely abolished just now. It would be similar to the abandonment of a family of children by their parents, and leaving them in the midst of dangers. *The Navajo Indians would very soon drive them from their best agricultural and grazing lands on the east, and in various ways impose upon them. They have for some time manifest a disposition to do this but have been restrained by the presence and influence of the agent."* (Emphasis ours).

By letter dated May 13, 1878, addressed to the Honorable E. A. Hayt, Washington, D. C., William R. Mateer,

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U. S. Indian Agent at the Moqui Agency, wrote in part, as follows:

> "The Navajos are thickly settled around this agency and it is not safe to leave the buildings alone even for a few hours when they know there is anything of value in them. * * *
>
> "The Moquis seem greatly rejoiced that they have some protection here from the Navajos this year. * * *
>
> "*The Navajos are spreading all over this country within a few miles of the Moqui villages claiming it as theirs and picking out the only spots of land where there is water that is worth cultivating.* (Emphasis ours).
>
> "The government ought in justice to these Moqui Indians set them off a reservation taking in at least 30 miles along the Little Colorado River so that they could have plenty of water for irrigating purposes."

Agent Mateer later wrote a letter to the Commissioner of Indian Affairs at Washington, D. C., dated September 1, 1878, in which he stated:

> "I would suggest for your honorable consideration the importance of early action in the matter of setting apart a reservation for the Moqui Pueblo Indians. ***"

Chronologically it is noted, as hereinbefore set out, that on October 28, 1878, less than two months after Agent Mateer urged consideration of the establishment of a Moqui reservation, the Navajo Reservation was extended to the 110th degree longitude west by Executive Order. Then, even as in modern times, successful expansion too often resulted from pressure and aggression rather than as a matter of justice or right.

On August 14, 1879, the Commissioner of Indian Affairs demonstrated clearly that he was interested in establishing a reservation for the Moqui Indians in order to protect them against Mormon settlers, who were in the area,

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and against their more powerful neighbors, the Navajo Indians. We quote from the Commissioner's letter to William R. Mateer, Esq., U.S. Indian Agent, Moqui Pueblo Agency, Arizona, under the above date:

> "With a view of establishing a suitable reservation for the Moquis Indian, and to prevent further encroachments upon the lands which they occupy and cultivate, I have to request that you will, at the earliest date practicable, report by letter to this office.
>
> " 1. The approximate area of land occupied by the Moquis.
>
> " 2. About what proportion of the lands occupied can be cultivated without irrigation.
>
> " 3. About what proportion of the lands will produce crops by irrigating the same.
>
> " 4. Can water be obtained in sufficient quantities to irrigate these lands, and if so, at what labor and expense?
>
> " 5. Are the tracts of agricultural land in a compact body, or are they scattered, in small patches, and remote from your agency?
>
> " 6. Does the country supply sufficient fuel and water for the wants of the Moquis, and what distance do they convey the same?
>
> " 7. What proportion of the land is fit for grazing purposes?
>
> " 8. About how large a reservation (give area in square miles) would it require to embrace sufficient agricultural and grazing land for the Moquis in their present location?
>
> " 9. State as near as possible, the extent of such a reservation from north to south, and from east to west, giving some of the natural and artificial monuments, such as mountains, streams, canons, meridians, etc.
>
> "10. What is the character and value of the build-

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ings and other improvements belonging to the Indians?

"11. Can they be made self-supporting, in their present location?

"12. Are they subject to encroachments or intrusions and annoyances from the close proximity of their more powerful neighbors, the Navajoes?

"In your annual report dated August 24, 1878, you state that 'after a careful survey of the country, you have recommended the removal of the Moquis Pueblo Indians and agency to some point on the Little Colorado River between Meridians 110° and 111° for reasons therein specified'. You will designate more definitely by streams, mountains, meridians, and other natural and artificial monuments, the exact location of the lands last above referred to, and give the estimated area. You will also report the character of the soil; the amount of agricultural land, whether supplied with timber and water sufficient for the wants of the Indians, and whether the Moquis are willing to remove to the location designated, should it be set aside for them in a reservation.

"You will embrace in your report on the 'Little Colorado River' location, all the facts necessary to show its advantages over the present location for a reservation."

In a letter written from the Moqui Agency by E. S. Merrett to the Commissioner of Indian Affairs on February 23, 1880, it is urged: "They, the Moquis, absolutely require reservation and action should not be delayed". He also stated that the Moquis were unwilling to be moved to the Little Colorado River and "cannot be moved without force". The capacity of Mr. Merrett in writing the letter is not apparent from the communication; however, it is noted that he had lived among the Moquis for twenty years.

In approaching the date of the establishment of the

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Executive Order Reservation (December 16, 1882), it is believed that the correspondence immediately prior to such establishment should be very carefully scrutinized, and, therefore, correspondence pertaining to the matter will be set out in full.

"United States Indian Service
For Moquis Pueblo Indians
at Navajo Indian Agency

March 20th, 1880

"Hon. Commr. of Indian Affairs
Washington D. C.

"Sir,

"Believing that the Mormons are about to settle on land that ought to be embraced in a Moquis Pueblo Indian Reservation, I cannot await the tardy appearance of the expected new agent for these Indians, but feel impelled to press their necessity upon your attention and request that you do immediately call the Executives notice to their wants, to-wit., that a tract of land be set off as a Reservation for the Moquis Pueblo Indians bounded as follows, viz.

"*Commencing on the west line of the Navajo Indian Reservation* where the 36° parallel of latitude intersects the 110° (degree) of west longitude in the Territory of Arizona, thence due west 48 miles, thence due south 24 miles - thence due east 48 miles to the west line of the Navajo Indian Reservation, and thence north along said line to the place of beginning. (Emphasis ours).

"The enclosed may will show "O" at the proposed corners of said proposed Reservation and that it covers no water courses, consequently only *desert* and grazing country except "Canon Carisa" which runs past the Agency and to the Mesas upon which these Indians have erected their villages. The Moquis Indians cannot be persuaded to leave their Mesa villages and settle in the valley of the Little Colorado as was proposed by their former agent, neither do I sanction such a measure and have there-

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fore recommended in accordance with the plan that will enable them to enjoy their ancient habitations and have the benefit of adjacent pasturage also the fertile canon connecting their mesas with the agency.

"Please return this map after you shall have examined and called the President's attention to the same.

Yours with Respect.

Galen Eastman
U. S. Indian Agent"

The opinion of the Solicitor makes reference to reports of Inspector Howard and Agent Fleming submitted in 1882 prior to the establishment of the reservation. These reports are as follows:

"Letter No. 15060, Office of Indian Affairs
Received Aug. 17, 1882.

United States Indian Service
Office of U. S. Indian Inspector
Santa Fe, N. M., July 31, 1882

"Hon. H. M. Teller
Secretary of the Interior

"Sir:

"I do not think it wise for me to defer one or two matters until I shall have completed my full report of recent inspections of the Navajo Agency and of the situation and prospects of the Navajos.

"The complaints of citizens more or less contiguous to the reservation as to depredations of the Indians and the encroachments by their flocks are so numerous and strenuous that something ought to be promptly done.

"I am disposed therefore at once to recommend some general policy which shall at least put in motion agencies to remove the evils. First, instead of there being some half dozen parties off the Reservation as represented by Governor Sheldon, such bands should be counted by hundreds. They are to

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be found at distances ranging from 5 to 150 miles. They consist both of roving families or tribes who are doing little in the way of agriculture and who live by herding and others who have fixed farms and have lived upon them for 2, 3, and even as long as 9 years. After very careful inquiry of all persons best informed and after visiting different parts of the reservation on horseback so as to reach land that would otherwise be inaccessible and after going over large tracts of country extending 50 miles or more to the West of the Reservation I have come to the conclusion that considerably upwards of one half the entire Navajo people are living off the reservation.

"There are at least 8000 Navajos off the Reservation in Arizona. *Second*: I also made careful inquiry of the capacity of the Reservation to sustain all of these Indians. I have no hesitation in saying that if they should all be crowded back on the Reservation it would become necessary for the United States Government to resort again to feeding them. At every important council held the Indians themselves complained that they had not, even as now situated, sufficient room for their flocks and herds. Men, who themselves are practical herders and who have been on the Reservation for more than 10 years, military officers in the vicinity who have had a good chance to observe, and intelligent citizens living near the Reservation, all agree that there is not any too much grazing land on the present Reservation to support the herds and flocks now located there and that if the present rate of increase goes on a more diversified industry will become necessary or pastuarge must be sought elsewhere.

"Third: At the same time it seems to me a necessity that all those Navajos who are off the Reservation to the North, to the South, and to the East and who live exclusively by pastoral habits and especially as they are pretty likely to couple with them more or less of stealing of cattle and sheep from the whites and are very certain to come in contact with whiskey saloons—always to be found

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outside the Reservation—should be compelled to return to their Reservation.

"My proposition in view of these facts is two-fold, first: I recommend that the agent be required to ascertain the whereabouts of every party of Navajos off the Reservation in New Mexico and Colorado and what they are doing for a livelihood and that he instruct the wandering bands that *they must return at once and keep within the bounds of the reservation* and that he furnish passes, in some specified form, upon printed blanks to be made known to the Military, to those Indians who are in good faith cultivating land and particularly to such as have been living two or more years upon their present farms and express a desire to remain there and that the agent be instructed promptly to take measures to enter homestead claims for the Indians of this class as soon as it shall be made practicable, and that the District Commander (not the Militia) be informed of these regulations and be requested by the Department to co-operate in enforcing these instructions.

"Second: I would recommend that a new reservation be set apart for the Arizona Navajos, extending 100 miles to the West of the present Reservation and contiguous thereto, its northern boundary to be boundary between Utah and Arizona, its Southern boundary to be the continuance of the Southern boundary of the present Reservation, it Western boundary to be a straight line parallel with the Western boundary of the present Reservation. It should be distinctly noted that this new Reservation would include the seven villages of the Moqui Indians. In my full report of recent inspection I shall dwell particularly upon the wants of these Indians and especially the necessity of including them in some Government Reservation unless the Department is willing that the farms that they have tilled for many years—even centuries—shall be taken from them by the encroaching white settlers, their rights constantly over ridden by their more powerful Navajo neighbors, and they be crowded

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back from self-support to a pauperizing dependancy upon the Government for food.

'If there were one agent for the two tribes with one reservation as suggested,—having in his care the 8,000 Navajos and 2,000 Moquis—the rights of both could be properly cared for. Of course it would not be expected to find an agent for $1,300—the salary of the present agent for the Moquis,—who would be competent for such a responsible position. But the Executive Proclamation forming the new reservation should be issued in conjunction with sending out the other instructions to regulate this whole matter of absenteeism.

"Proper provision for a new agent might be a subject for subsequent action.

"In this plan for providing for the return of the Navajos and for the creation of a new reservation I may add that I have the approval of the District Commander, of the more intelligent citizens interested, of the Governor of the Territory, and of other army officers commanding posts in the vicinity. But, as this plan would require the action of an active and energetic agent, physically able to visit many difficult and remote localities on horseback and would need a harmonious cooperation with the military and their hearty support, it is more important that my previous recommendation for the relief of the present agent should be promptly acted upon.

Very respectfully,
Your obt. servant,
W. H. Howard
U. S. Indian Inspector"

"Letter No. 21371, Office of Indian Affairs
Received Nov. 27, 1882.

United States Indian Service
Mosquis Pueblo Agency, A. T.
November 11th, 1882

"To the Hon. Com. of Indian Affairs,
Washington, D. C.

"Sir:

"* * * (Discusses the presence of two undesira-

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ble white men.)

"I would, therefore, very respectfully inquire if the Government has control over these indian (sic) pueblos sufficient to cause the arrest and removal of a man or set of men who evidently stand in the way of the civilization of these people. The indians (sic) are the wards of the Government, and, it would seem to me, as such, the Department has a legal right to say who shall live at their pueblos. If so, I would earnestly request specific instructions as to how to proceed in the premises, and I will endeavor (sic) to execute the wishes of the Department to the letter. If there is no remedy by which this can be accomplished, I shall tender my resignation as agent of the Moquis, believing, as I do, that it would not be right for me to remain here simply to draw my salary with no hopes of accomplishing anything.

"I would respectfully request a speedy answer as the matter is of the utmost importance. I would suggest, if it meet your approval, that your office send me a telegram containing instructions in brief, followed by more specific directions by mail.

Very Respectfully
J. H. Fleming
U. S. Indian Agent"

"Special Case 147, Office of Indian Affairs,
Letter No. 22383, 1882. Received December 12, 1882.

United States Indian Service,
Mosquis Pueblo Agency, A. T.
December 4, 1882

"To the Hon. Com. of Indian Affairs
Washington, D. C.

Sir:

"Your telegram of Nov. 27, 1882, directing me to 'Describe boundaries for reservation that will include Moquis villages and agency, and large enough to meet all needful purposes and no larger,' and to 'forward by mail immediately' is at hand,

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and I cheerfully submit the same prefacing the following remarks.

"The lands most desirable for the Moquis, and which were cultivated by them 8 or 10 years ago, have been taken up by the Mormons and others so that such as is enclosed in the prescribed boundaries, is only that which they have been cultivating within the past few years. The lands embraced within these boundaries are desert lands, much of it worthless even for grazing purposes. That which is fit for cultivation even by the Indian method, is found in small patches here and there at or near springs, and in the valeys (sic) which are overflowed by the rains, and hold moisture during the summer sufficient, to perfect the growth of their peculiar corn.

"The same land cannot be cultivated a number of years in succession, so that they change about, allowing the land cultivated one year, to rest several years, I think that the prescribed boundaries, embraces sufficient land for their argricultural and grazing purposes, but certainly not more. I am greatly encouraged by the hope of securing this reservation as it will render the condition of this people more settled and protected.

"In addition to the difficulties that have arisen from want of a reservation with which you are familiar, *I may add that the moquis are constantly annoyed by the encroachment of the Navajos, who frequently take possession of their springs, and even drive their flocks over the growing crops of the moquis.* Indeed their situation has been rendered most trying from this cause, and I have been able to limit the evils only by appealing to the Navajos through their chiefs maintaining the rights of the moquis. *With a reservation I can protect them in their rights and have hopes of advancing them in civilization.* Being by nature a quiet and peacable (sic) tribe, they have been too easily imposed upon, and have suffered many losses. (Emphasis ours.)

"The following are the lines that Iwould suggest,

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after carefully consulting such maps as I can command, in connection with my knowledge of the prescribed territory.

"Make the N. E. Corner at the intersection of 36° - 30′ with the 110° meridian - running thence west to 111° - thence south to 35° 30′ - thence east to 110° - thence north the place of beginning.

"These boundaries are the most simple that can be given to comply with the directions of your telegram, and I believe that such a reservation will meet the requirements of this people, without infringing upon the rights of others, at the same time protecting the rights of the Moquis.

"Hoping that an order may be secured for this grant at an early date I remain

Very respectfully
/s/ J. H. Fleming
U. S. Indian Agent

"(Enclosed Map. Filed Archives Map 911.)"

The statement of the Solicitor, "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 number some 2,000"[2] suggests that Inspector Howard's November letter was considered in drawing up the Executive Order. Records indicate that only the July letter, and the two letters of Agent Fleming were considered by Mr. H. Price, the Commissioner of Indian Affairs, when he wrote the Secretary of Interior on December 13, 1882, recommending the establishment of a reservation. It will be noted that the recommendations of Howard and Fleming, as made in the foregoing three letters, are entirely different in nature and that the recommendations of Fleming were adopted by the Commissioner in his letter to the Secretary of Interior which is as follows:

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"Letter No. 2304, Department of the Interior, Indian Division,

Received Dec. 14, 1882.

"Refer in reply to the following: L

15060	1882	Department of the Interior
21371	"	Office of Indian Affairs
22383	"	Washington, Dec. 13th, 1882

"The Honorable

The Secretary of the Interior

"Sir:

"I have the honor to transmit herewith, a draft of an Executive Order withdrawing certain lands, in the Territory of Arizona, from the mass of the public domain, for the use and occupancy of the *Moqui* Indians, and such others as the Secretary of the Interior may see fit to settle thereon and to request that the same be laid before the President for his signature.

"In this connection, I would respectfully state that the conditions are such, that it has been found impossible to extend to these Indians the proper and needful protection to which they are entitled. They have no reservation, but are living in Pueblos or villages, cultivating the soil within easy reach.

"They are temperate and industrious, are given to agricultural pursuits which they follow to no inconsiderable extent, and are distinguished for their honesty, for their politeness towards each other, and for their friendship toward the whites; in short they are described as an exceedingly interesting and deserving people.

"They number according to last report 1813 souls. Having no vested title to the lands they occupy—which fact it seems is well understood, they are subject to continual annoyance and imposition, and it is not difficult to see, that it is only a question of time, when, if steps are not taken for their protection they will be driven from their homes and the lands that have been held and cultivated by them

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for generations, if not centuries, will be wrested from them, and they left in poverty and without hope.

"Even the Agency itself is unprotected, and the agent declares himself powerless to do good as matters now are. He finds it impossible to arrest and punish mischiefmakers. They openly and insolently defy his authority, and he is forced to submit.

"He frankly says, 'If there is no remedy, I shall tender my resignation as Agent of the Moquis, believing as I do, that it would not be right for me to remain here simply to draw my salary, with no hope of accomplishing anything.'

"That these people should be separated from the evil example and annoyances of unprincipled whites who appear determined to settle in their midst is a truth that needs no argument, and I know of no way by which the desired end can be reached, other than by withdrawing the lands indicated in the Order herewith presented from white settlement.

"The estimated area of land cultivated by these Indians is 10,000 acres. Owing to the poor quality of the soil, they seldom plant the same patch two years in succession. Hence they are scattered over a considerable area of country, and the estimated area of their cultivated lands includes all the lands held by them for cultivation.

"I earnestly urge the withdrawal of the lands as proposed.

"I endorse, herewith, an official map of Arizona, upon which the lines of the proposed reservation are drawn, I respectfully request the return thereof to the files of this Office.

Very respectfully,

Your obedient servant
/s/ H. Price
Commissioner

Larrabee."

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It will be noted that in the upper left-hand corner of the Price letter the following appears:

"Refer in reply to the following: L

15060 1882
21371 "
22383 "

These three numbers refer to the three letters previously set out and received by the Office of Indian Affairs relative to the need of a reservation for the Hopi, or for the Hopi and Navajo combined, and show that these letters were considered in making the recommendations for the reservation as finally made in the foregoing letter to the Secretary. No mention is made of the November letter from Inspector Howard.

Letter No. 15060, received by the Office of Indian Affairs August 17, 1882, is the report to the Secretary of the Interior from W. H. Howard, U.S. Indian Inspector. In this letter Inspector Howard discussed in great detail the status and problems of the Navajo Indians and then made recommendations for a new reservation for the Arizona Navajos that would include the Hopi villages, (and this in spite of the Inspector's own comment that the Hopi rights were "constantly overridden by their more powerful Navajo neighbors.")

It is this recommendation which the Acting Solicitor refers to and from all appearances purports to completely cover by saying, "He recommended the establishment of a new reservation for the Arizona Navajo and the Hopis combined. . ."[3] and infers, by not mentioning the later recommendations of Agent Fleming, which were ultimately followed, that this recommendation of a joint reservation was the one which was later carried out when, in fact, not one of the provisions in this recommendation, i.e., the joint

[3]Page 5 of Opinion

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reservation of vast size, a new agent of sufficient competence to handle the administration of both tribes, or instructions to regulate absenteeism, were ever adopted.

Following the reference to Inspector Howard's recommendations, the opinion glosses over the intervening correspondence and states that the reservation was set up for the Hopi and other Indians and concludes that the phrase "other Indians" meant the resident Navajos on the Hopi lands.[4]

That the Acting Solicitor's presentation of the events leading up to the Executive Order is misleading in its tenor can be clearly established by referring to the other two letters cited in the Commissioner's letter to the Secretary of the Interior recommending the reservation be set apart. Letter No. 21371, dated November 11, 1882, is mentioned by the Solicitor briefly in his opinion,[5] but the third letter, No. 22383, is completely ignored except for his statement as follows:

> "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'."[6]

This letter, No. 22383, so briefly mentioned in the opinion and then only indirectly, was received by the Office of Indian Affairs on December 12, 1882 just four days before the Executive Order. It contained, as can be seen, far more than mere boundaries for a reservation, as suggested by the Solicitor's opinion, and no recommendation for a mixed reservation, as inferred by that opinion. It sets out Agent Fleming's reasons for designating the boundaries as he did and the purpose he intended to further by having the

[4]Pages 6 and 7 of Opinion
[5]Page 6 of Opinion
[6]Page 6 of Opinion

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reservation set up according to his recommendations. These matters are completely ignored by the opinion. They must be considered in full if the true intent is to be discovered.

Starting out his letter of December 4, 1882, Agent Fleming refers to the telegram of instructions received from the Office of Indian Affairs, as follows:

> "Your telegram of November 27, 1882, directing me to 'Describe boundaries for reservation that *will include Moquis villages and agency, and large enough to meet all needful purposes and no larger.*' . . . is at hand. . . ."

In the second paragraph of this letter, Agent Fleming states:

> "The lands most desirable for the Moquis and which were cultivated by them eight or ten years ago, have been taken up by the Mormons and others so that such as is enclosed in the prescribed boundaries, is only that which they (obviously, from the context, meaning the Hopi) have been cultivating within the past few years."

In the next paragraph, Agent Fleming continues his discussion as to why he designates the boundaries as he does, stating:

> ". . . I think that the prescribed boundaries, *embraces sufficient land for their* (the context clearly shows he means Hopi, no other Indians having been mentioned) *agricultural and grazing purposes, but certainly not more.* I am greatly encouraged by the hope of securing this reservation as it will render the condition of this people (again clearly meaning the Hopi) more settled and protected." (Emphasis added).

Agent Fleming then continues to discuss the reasons for setting forth the boundaries as he does. He first refers to the trouble with white men, previously mentioned, and then states:

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> ". . . I may add that the moquis are constantly annoyed by the encroachments of the Navajoes, who frequently take possession of their springs, and even drive their flocks over the growing crops of the moquis. Indeed their situation has been rendered most trying from this cause, and I have been able to limit the evils only by appealing to the Navajoes through their chief maintaining the rights of the moquis. With a reservation I can protect them (obviously the Hopi) in their rights and have hopes of advancing them in civilization."

Thus it is clear that one of the two prime purposes for setting up the reservation described by Agent Fleming was to protect the Hopi from the encroachment of the Navajo, and protect their (the Hopis) rights.

Agent Fleming then sets forth the boundaries of the reservation that these facts have led him to recommend—a small area set off by straight east-west and north-south lines enclosing the villages and lands of the Hopis. These boundaries were adopted and used in the Executive Order. He then concludes his letter of recommendation with the following statement:

> "These boundaries are the most simple that can be given to comply with the directions of your telegram, and I believe that such a reservation will meet the requirements of this people (the Hopi), without infringing upon the rights of others, at the same time protecting the rights of the Moqui."

Thus it is evident that in recommending the establishment of the Hopi Reservation to the Secretary of the Interior, the Commissioner of Indian Affairs had before him and considered two alternative plans. The one, submitted in July, 1882 by Inspector Howard for a large joint Navajo-Hopi Reservation, and the other, submitted by Agent Fleming in December, 1882, for a smaller reservation for the Hopi only and designed specifically to protect the Hopi from the Navajo. There can be little doubt as to which

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plan the Commissioner adopted and as to what his intent was in recommending the reservation be set apart.

Of significance and in further support of our contention that from these letters it is evident that Inspector Howard's recommendations set out in his letter of July 31, 1882 were not adopted, are the notations appearing upon the letters (or their folders) following their receipt by the Department. Inspector Howard's letter of July 31, 1882 contained these notations:

> "Dept. of Int. 8/16/82
>
> "Respectfully referred to Comisr. of Indian Affairs for Remarks.
> /s/ Geo. M. Lockwood
> Chief Clerk"
>
> "Sante Fe, N.M.
> July 31/82
>
> "Inspector Howard
>
> "Rel. to Navajos off their reserve. A reservation for them & the Moquis. Appo. of New Agent." (Synopsis of contents.)
>
> "Regarding Moquis—see report to Sec'y. enclosing draft of Ex. Order Dec. 13, 1882. Also see 21,371 and 22383-1882.
>
> L. B. 104-438-489
> Secy"

The use of the words "Regarding Moquis" by the Department employee placing the notation thereon is significant. Obviously, it means that with reference to the Moquis, the action recommended in the letter was handled by the report to the Secretary of the Interior enclosing a draft of the Executive Order of December 16, 1882. The numbers referred to are the numbers of the two letters written by Agent Fleming and heretofore set out and discussed. This is a clear demonstration that the Department considered the Executive Order of 1882 creating the reservation to be for the Moquis and not for the Navajos, and that if Inspector Howard's recommendations were followed,

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it was only to the extent that he recommended a reservation for the Moquis.

A notation appearing on Agent Fleming's letter of November 11, 1882 (No. 21371), received by the Office of Indian Affairs on November 27, 1882, reads as follows:

> "See telegram to Fleming, Nov. 27, 82 and report to Secry. enclosing draft of Ex. Order. Dec. 13, 1882. See also 15060 (Inspector Howard's letter) and 22383 (Agt. Fleming's letter of 12/4/82)
>
> L. B. 104-483"

> "See Ex. Order dated Dec. 16/82
> 23017
> ———
> 1882"

The notation appearing on Agent Fleming's letter of December 4, 1882 (No. 22383), received by the office of Indian Affairs on December 12, 1882, states:

> "See rept. to Sec. enclosing draft of Ex. Order - December 13, 1882. Also see 15060, 21371-1882.
>
> L. B. 104-483-489."

> "See Executive Order dated Dec. 12/82
> 23017-1882
>
> L. B. 104-489"

Both of these notations indicate that the recommendations of Agent Fleming were handled by the report to the Secretary, enclosing the draft of the executive order and by the Executive Order itself. As we consider the notes written upon all three of the letters, and interpret them collectively in light of what actually happened, added strength is given to the individual analysis as above set out.

We recall with interest the comment made by the Solicitor in his opinion that "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." When one considers the foregoing

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historical background of the disputes and difficulties that traditionally existed between the Navajos and Hopis, as these letters point out, it becomes extremely difficult to understand how it can now logically be stated that it was the executive intention in creating the Hopi Reservation to place the aggressive Navajo and the meek Hopi upon the same reservation with equal rights thereon.

Referring to the letter of December 13, 1882 to the Secretary of the Interior recommending that the reservation be established, one finds no mention of the Navajo although, as the discussion above discloses and the reference notes on the letter itself point out, the Commissioner was fully aware of their presence.

Endorsed on the back of this letter following the receipt stamp of the Department of Interior is the following notation:

> "Dec. 13, 1882.
>
> "Encloses draft of Ex. Order for reservation for Moquis in Arizona."

Here, also, reference to the Arizona Navajo is conspicuously absent.

In this letter the reservation is to be set apart for the "Moqui Indians and such others as the Secretary of the Interior *may see fit to settle thereon. . .* " The latter phrase regarding other Indians being a standard phrase used in most reservations[7] and no mention being made of any Indians already settled thereon. It describes the Indians for which the reservation is intended as having "*no*

[7]The Executive Order of 11-26-84 (1 Kappler 860) establishing the Northern Cheyenne Reservation used the phrase "and such other Indians as the Secretary of Interior may see fit to locate thereon." When the Duck Valley Reservation was established by Executive Order of 5-4-86 (1 Kappler 866) the words "and such other Indians as the Secretary of the Interior may see fit to settle thereon" were used. These words are identical with those employed in the Hopi Executive Order.
This seems to have been the phraseology of the times since both of these reservations and the Hopi reservation were established in the 1880's.

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reservation" and as *"Living in pueblos or villages"* — statements which could never apply to the Navajo. It further describes them as "temperate and industrious", "distinguished for their honesty, their politeness toward each other, and for their friendship towards the whites;" again words that fail to suggest the Navajo of that time.

The letter also states that the Indians for whom the reservation is intended are in need of protection and "number according to the last report 1,813 souls." Still further reference to the Hopi only and clearly excepting the Navajo, who according to Inspector Howard, then numbered 8,000 within the area.[8] The Commissioner's letter proceeds to mention some of the conditions reported by Agent Fleming as presenting the need for the reservation and recommends the reservation exactly as set out by Agent Fleming. Not in one instance does it mention or even suggest any intent to set land aside for the Navajo but rather, as already pointed out, displays quite the contrary intent.

If there were any reasonable doubt as to the purpose of the reservation after reviewing this correspondence prior to the Executive Order, it is completely resolved by a telegram sent by the Commissioner of Indian Affairs to Agent Fleming after the Executive Order was signed. That telegram reads as follows:

> "President issued order, dated sixteenth, *setting apart land for Moquis recommended by you.* Take steps at once to remove intruders."[9] (Emphasis added.)

That Agent Fleming so understood the Executive Order is shown by his letter of December 26, 1882, acknowledging the Commissioner's telegram, wherein he states, in part, as follows:

> "I have the honor to acknowledge the receipt

[8]Howard letter of July 31, 1882.

[9]Letter Book 105, Correspondence, Land Division, Volume 53, Office of Indian Affairs, page 145.

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of office telegram of the 21st inst. informing this office that the President set appart *land for a Moquis Reservation as per recommendation from this office,* and that, I was therein directed to take steps at once to remove intruders from the reservation."[10] (Emphasis added.)

With the foregoing facts in mind, the opinion of the Acting Solicitor as stated on page 6, clearly demonstrates that the conclusions of the opinion are based on a false premise. Here the opinion reads:

> "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 Navajoes within the area in the discretion of the Secretary. Had there been any intention of disturbing the Navajo 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. . . ."

Lest it be thought that our deductions are colored by an advocate's fervor, we adopt the conclusion of the author of "The Establishment of the Hopi Reservation and Some Latter Developments Concerning Hopi Lands",[11] wherein he states at page 18,

> "The phrase in the Executive Order 'and such other Indians' was a conventional one usually included in such orders. *There is no indication that there was in mind any specific intention of placing other Indians with the Hopi.*" (Emphasis ours.)

The author of this statement is Volney H. Jones, Curator of Ethnology, Museum of Anthropology, University of Michigan.

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[10]Special Case 147, Office of Indian Affairs, Letter No. 373,1883.
[11]Plateau, Museum of Northern Arizona Vol. 23, No. 2, page 17, October 1950.

See also T. Donaldson Extra Census Bulletin. 1893 pg 9 "... were tacitly recognized by Pres. Arthur in his proclamation of Dec. 16, 1882 which he "forever withdrew from the protection of a reservation to keep off the white people and the Navajos"

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As to the Acting Solicitor's statement that "it would have been a comparatively simple thing to draft the Executive Order so as to create a reservation exclusively for the Hopis",[12] could it not be more logically and forcibly stated that since the Secretary and President knew there were Navajos within the area, if they had intended to allow them to share in the Executive Order reservation, they could have employed words similar to those used by the same President, *just six days later,* in the Executive Order establishing the Gila Bend Reserve (1 Kappler 804), to-wit:

> "Papago *and other Indians now settled there,* and such other Indians as the Secretary of the Interior may see fit to settle thereon." (Emphasis ours.)

The Executive Order establishing the Kaibab Indian Reservation, Arizona (IV Kappler 1003), used the following words, to-wit:

> "for the use of the Kaibab *and other Indians now residing thereon,* and for such other Indians as the Secretary of the Interior may locate thereon." (Emphasis ours.)

In the treaty with the Sauk and Fox Indians of 1830 (7 Stat. 328) lands were ceded

> "*to the Tribes now living thereon,* or to such other Tribes as the President may locate thereon for hunting, and other purposes." (Emphasis ours.)

The treaty with the New York Indians in 1838 (7 Stat. 550) provided that the Senecas should have

> "for themselves and their friends, the Cayugas and Onondagas, *residing among them,* the easterly part of the tract set apart for the New York Indians." (Emphasis ours.)

Article 2 of the Comanche and Iowa Treaty of 1865 (14 Stat. 717) provided for

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[12]Page 7 of Opinion.

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"*such other friendly tribes as have heretofore resided within said limits,* or as they may from time to time agree to admit among them."

It is not without significance that the government has repeatedly found it advisable to refer to the other Indians residing on the reservation plus the general language to which the Acting Solicitor attaches so much importance.

It was quite common for the United States to establish reservations for a tribe "and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them,"[13] but we find no precedent for the establishment of an arena for hostile tribes to fight it out among themselves.

Further indication that the executive intent was to create the Executive Order Reservation of 1882 for the Hopis, and that the Department so construed it following its establishment, can be found in reports and writings made subsequent to 1882. No report or writing was found that gave support to the Navajo claim of equal rights on the Hopi Reservation or to the Solicitor's opinion. On the other hand, the following is submitted in support of the Hopi position:

An article by Mischa Titiev entitled, "Old Oraibi, A Study of the Hopi Indians of Third-Mesa," found in the Papers of the Peabody Museum of American Archaeology and Ethuology, Harvard University, Vol. XXII, No. 1, contains a report of a visit by Hopi Chiefs with the President of the United States to discuss means of stopping Navajo infiltration onto the Hopi Reservation. In that report we find no suggestion that the executive considered that the Navajos had equal rights with the Hopi on the reserva-

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[13]Ute Treaty of 1868 (15 Stat. 619)
Navajo Treaty of 1868 (15 Stat. 667)
Eastern Shoshone and Bannock Treaty of 1868 (15 Stat. 673)

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n. The following comment on that visit is reported by tiev (page 72):

"Loloma's conversion to Americanism occurred early in the Eighteen Eighties. *At that time the Navaho were a constant source of worry to the Hopi as they kept filtering into the latter's reservation.* To discuss ways and means of stopping the Navaho, a party of Hopi Chiefs was taken to Washington by Thomas Keam, one of the first traders to become established on Hopi territory. Loloma was a member of Keam's group and took part in a conference with the President of the United States. While they were in Washington, the Hopi chiefs 'were asked to try to bring their people down off their mesas and advised to get them to spread about and form other small communities in the country nearby, as a means of checking the Navaho spread.'"

The Annual Report of the Secretary of the Interior or the fiscal year ending June 30, 1883, contains a discussion of the Navajos and the problem of keeping them on heir own reservation. The Report, on page 23, states:

"It is found very difficult to keep these Indians (Navajos) on the reservation (Navajo), for as the grass becomes scarce they leave their reservation and go on to the adjoining lands and there come in contact with the stockmen and farmers of the adjacent regions. It is very desirable that an efficient police should be provided for, either out of the fund before mentioned or by a general appropriation."

The 1884 Annual Report of the Commissioner of Indian Affairs contains a report of Agent John H. Bowman which points out the continuing aggressive trespasses of the Navajos as follows:

"Quite frequently trifling quarrels arise between members of these two tribes (Hopi and Navajo); these are usually caused by careless herding of the young Navajos who allow their herds to overrun these outlying Moki gardens. The Navajos are

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almost invariably the aggressors". (Page 137.)

In his annual report of 1888, the Commissioner of Indian Affairs includes therein at page 191 a report on the Navajo Agency submitted by Agent S. S. Patterson, under date of September 1, 1888, and which includes a paragraph concerning the "Navajos on the Moqui Reservation." This report reads in part, as follows:

> "During the past two years many of the Indians residing out of their own country, chiefly in New Mexico and Arizona, have been induced by the advice of the agent, to return, but there is still from ¼ to ⅓ of the tribe remaining permanently off the reservation, having done so for the past 20 years or more. Some of these have permanent locations near springs and watering places, with their herds, while others are congregated along the railroad.
>
> "Early in July last, under your direction, I called a council of the Navajos for Special Agent H. S. Welton, for the purpose of laying the matter of restoring these Indians to their own country before them, and to allow those of them who desire to remain permanently outside to take up homes under the severalty land act. At this council there were present about two hundred chiefs and representative Indians. Their proposition to the special agent was that if the Government would give them land on the South side reaching to the railroad, 10 miles on the East side, and 10 to 15 miles on the West to the Little Colorado River, they would bring them upon the reservation. This proposition I deemed absurd and impracticable. With the present reservation limits there is sufficient territory to accommodate the entire tribe for years to come. I am heartily in accord with the policy of the Indian Office, encouraging the Indians to take up land who remain off the reservation.
>
> "Navajos on Moqui Reservation
>
> "For many years a considerable number of Navajos resided upon what is known as the Moqui Reservation, attached to this agency. The Moquis

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sometimes complain of depredations made upon their crops and stock. There has been, however, fewer such troubles the past year than formerly. These troubles are scarcely ever of serious character and are always easily adjusted. While there is not a very friendly feeling existing between the two tribes, they get along remarkably well together. The efforts of the agent have been constantly directed towards keeping the Navajos away from the Moquis' farms and watering places; yet when the independent and roving character of the Navajo Indian is considered, it is no easy task for one man to accomplish.

"It would be better if the Navajoes could be excluded entirely from the Moquis reserve, but that would be a more difficult problem even than the question of bringing the outside Indians upon the Reservation."

Also in this report, Agent Patterson makes his third annual report on the Moquis under his charge, wherein he states in part, as follows:

"Like the Navajos they have enjoyed a peaceful and quiet year, nothing happening to disturb the even tenor of their ways except an occasional wrangle with some neighboring Navajos, growing out of trespass upon stock, crops and watering places. These troubles, however, are usually of slight character and easily adjusted. There were fewer disturbances this year than last. Heeding the advice of the agent, the Navajos are learning the respect of the Moquis' rights. As a means of preventing these occurrences, it might be better if the Navajos could be excluded from the Moquis country altogether, but this would be a difficult thing to do. For years a considerable number have lived there with established homes and farm improvements, which they are loath to leave."

This report points out the difficulty the government agents were faced with in either getting the Navajos back on their own reservation or keeping them there. In this report Agent Patterson also recognizes the difficulty of

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getting the Navajos off the Hopi Reservation, but in none of his report does he suggest that the Navajos have equal rights on this reservation with the Hopis.

A year later, the Commissioner in his annual report (1889) includes a report of C. E. Vandever, U.S. Indian Agent, under date of August 9, 1889, on the Navajo and Moqui Indians. In his report the agent goes so far as to recommend that the eastern five miles of the Hopi Reservation be added to the Navajo Reservation as a means of settling the problem created by trespasses. In it we find no suggestion that there was at that time any departmental position that the Navajos were considered as having equal rights with the Hopis on the latter's reservation. Agent Vandever, in his comments on the Navajo Agency, states: (Page 261)

> "In the past year there has been very little trouble with the Moquis, and then only with the Navajos. The Moquis are a very peaceable people who try to avoid difficulties of all kinds. Sometimes, however, their stock wanders over on the Navajo reservation and sometimes the Navajos stock wanders over on the Moqui reservation. It has been no uncommon occurrence for each tribe to accuse the other of stealing, but the difficulties are usually settled between themselves in the customary manner. If the boundary line were changed as I sometime ago recommended, I believe all these troubles would cease at once, and the change would be agreeable to all parties concerned."

The report of W. R. Centerwall, Associate Regional Forrester, reporting under the direction of Commissioner of Indian Affairs John Collier, (dated July 29, 1942), makes reference to an occasion in 1888 when the government took steps to exclude the Navajos from the Hopi Reservation. Specific reference is directed to the following language from page 3 of the Centerwall report:

> "After the return of the Navajos, grazing dis-

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putes between the Navajos and Hopis became so acute that in the year 1888, Col. E. A. Carr from Fort Wingate sent a detachment of militia into the then created Executive Order Reservation for the purpose of removing the Navajos found trespassing on Hopi lands. Due to inclement weather the mission was not entirely completed."

While the zeal with which this project was undertaken may be questioned in view of the fact that the game was apparently called at the end of the first inning because of rain, nevertheless, it discloses a clear recognition of a legal duty and moral obligation to protect the Hopi in his newly established reservation. The token performance was at least a demonstration of administrative intent and is convincing evidence that at that time—just six years after the reservation was created—the United States Government recognized no rights of any Navajos upon the Hopi Reservation.

In the annual report of the Department of Interior for the Fiscal Year ending June 20, 1899, we find a clear and convincing report supporting the Hopi position that the Navajos had no rights on the Hopi Reservation. Superintendant Charles E. Burton's report of September 24, 1899, is set out in said annual report and reads in part, as follows: (P. 382-4).

"I have the honor to submit this my first annual report of the Moqui Training School and the Moqui Reservation. Having taken charge July 1, 1899, I can give but a brief account of the things as I see them.

"Trespassing. — Many Navajos from the Navajo Reservation have settled along the water courses and at the watering places on Moqui land. Why this has been allowed I cannot understand, as the Navajo Reservation is the largest in the United States and the Moqui Reservation is comparatively small. These places taken by the Navajoes are the very best ones on the reservation and control most of the water supply. The two tribes are bitter ene-

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mies, and there is constant friction, stealing of horses, destroying of each other's crops, fighting, and murder going on among them. When a difficulty arises and the superintendent tries to settle the matter the Navajo says the superintendent is not their agent, and refuses to be governed by his decisions or by his wishes. This is a condition not conducive to peace or civilization, and I earnestly recommend that this matter receive your early attention, and the Navajo be returned to his own reservation or placed under the control of the superintendent. . ."

The same attitude and position is again forcefully stated by Superintendent Burton in his report dated September 1, 1900, and which is set out in the Commissioner's Report on Indian Affairs and is contained in the Annual Reports of the Department of Interior for 1900. Superintendent Burton's comments, set out on page 476, are as follows:

> "The Hopi are a very submissive and law-abiding people and seldom give any trouble save when the Navaho, who are domineering and aggressive, seek to impose on them. The Navaho have been allowed to encroach upon the Hopi Reservation for years, taking possession of the best watering places, best farming and best pasture land, and a great deal of trouble grows out of this. It should not be tolerated for a day. I have done something in the way of teaching these Navahos to respect the rights of others, and hope to do more this year. . . ."

About ten years after the creation of the Hopi Reservation, even the Navajo Indian Agent recognized that the Navajos had no rights on the Hopi Reservation, for Thomas Donaldson, in the Extra Census Bulletin for 1893, which contains a report on the Moqui Pueblo Indians of Arizona, makes the following report. (Page 56):

> "La-lo-la-my said the Navojos trespassed so much upon their watering places that it was difficult for them to find sufficient water for their own herds; that the Navajos were stronger, and took

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advantage of them by not only appropriating the water of their springs, but often stealing their corn, melons, and other fruit, their sheep, goats and even horses; *that the Navajo agent, Vandever, had repeatedly promised to drive the Navajos back upon their own reservation, but his promises were always forgotten, at least never fulfilled. He was assured that the Navajos would be compelled to move off across the Moqui line and to remain upon their own territory,* and then, through Chee, notice was given to those Navajos who were present that they must not interfere with the rights of the Moquis in any of the things complained of." (Emphasis added.)

Of interest on the Navajo attitude towards the Hopi Indians and their rights is a comment found in Coolidge's work on "The Navajo Indians" published in 1930, wherein he makes this interesting comment: (Page 137).

> "Strangers from other tribes drifted in and were adopted, for the Navajos have always been hospitable, and after centuries of warfare and wandering they can boast many outlander clans. There is the Mexican Clan, the Zani Clan, the Comanche, the Ute, and the Geronimo or Chiricahua Apache Clan; but though both Hopi and Paiutes have been taken into the tribe, the Navajos will not acknowledge them as clans....."

From the foregoing reports it can be seen that during the two decades following the establishment of the Hopi Reservation in 1882, the administrative position, when taken or shown, was clearly that the Navajos had no rights upon the Hopi Reservation. The most that can be said is that the Secretaries of the Interior and the Commissioners of Indian Affairs, based upon reports of the Agents, were aware of the difficulty of keeping the Navajos on their own reservation because of their aggressive and nomadic habits and so did little to correct the situation.

In December, 1932, the Senate Committee on Indian Affairs held a hearing on a proposed Bill to define the

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exterior boundaries of the Navajo Indian Reservation (and for other purposes).[14] Attached to the report of the hearing were the minutes of a series of meetings conducted by two representatives of the Indian Bureau, Mr. Stewart and Mr. Radcliffe, with the Hopi Indians at the various Hopi villages. While these two representatives of the Indian Bureau took a view that the Executive Order Reservation was created for the joint benefit of the Hopi and Navajo Indians without any satisfactory explanation as to why they took that view, Mr. Stewart in one of his meetings with the Hopis, did make one statement in answer to a question concerning the Hopi Reservation that undoubtedly had historical support and is of importance in considering the question herein discussed. The question and Mr. Stewart's answer thereto appears in the report on the hearings on page 57 as follows:

> "*Otto*: *Lomavitu.* Now, the second question I wish to ask is this. According to the clause 'As Secretary of the Interior may see fit to settle thereon' may I ask: Have these people ever been officially settled there; if so, was there an official action taken which would be necessary and at what time?
>
> "*Mr. Stewart*:. To my knowledge there has never been any official movement of these Navajos from one part of this country; any movement by the government taking them from outside, do you mean?
>
> "*Otto*: *Lomavitu.* Yes.
>
> "*Mr. Stewart*: No, there has never been, to my knowledge, in fact our records do not show that. It is just a matter that has come about by itself. Those Navajos were there and they have come in since that Executive Order. *There has been no official movement by the government moving them in. They have been there and come in*

[14]Hearing before the Committee on Indian Affairs, United States Senate, 72nd Congress, Second Session, December 7, 1932.

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there on their own initiative." (Emphasis added).

In establishing the reservation the executive order did not provide that the reservation was created for the Hopi's and the Navajo's residing thereon, nor did it provide that it was created for the Hopis and such other Indians as the Secretary of Interior may see fit to allow or permit to settle or remain thereon. It provided that the reservation was for the benefit of the Hopis and "such other Indians as the Secretary of the Interior may see fit to settle thereon." As Mr. Stewart pointed out, there has never been an official step taken by the government "to settle" the Navajos on the Hopi Reservation. The Navajos have "come in there on their own initiative." The Solicitor in his opinion did say,

> "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."[15]

The full impact of this statement of the Solicitor may not be readily recognized, but let us with some particularity analyze the meaning of this decision. Here the Secretary has taken no official act to settle the Navajo Indians upon this reservation, but, on the contrary, it may be said that if anything has been done it has been in the nature of discouraging the Navajos from infiltrating into this area and attempting to keep them within the bounds of their own reservation. The Secretary has asked for money and

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has used money for the purpose of educating Navajo children living upon the Hopi Reservation and has attempted to control grazing upon the reservation. These actions on the part of the Secretary emanated from the exigencies of the occasion rather than as a result of a deliberate attempt of the Secretary to settle the Navajos upon the reservation. When Navajo children were actually upon the Hopi Reservation, no humanitarian approach would permit the Secretary to refuse the Navajo children permission to attend the Hopi schools, particularly in view of the fact that sufficient schools were not available for the Navajo children in other places. We find instances in the records of the Department, indicating that action taken with respect to grazing rights was particularly intended to exclude any implication that there was a settling of legal rights to be implied from the action of the Secretary. For example, in the letter of instructions from John Collier, Commissioner, on April 18, 1942, authorizing the W. R. Centerwall report, the following language was used:

> "In interpreting the needs of the Hopis consider primarily their present range use areas and those upon which they have established grazing rights as of the date that District 6 was established rather than the *legal or traditional aspects* that may be introduced." (Emphasis ours).

That same report of W. R. Centerwall under date of July 29, 1942, expressly stated:

> "Necessarily disregarding traditional and *legal aspects*, and basing final decision on the necessity for action in order that the Hopi Indians and personnel can proceed along the sound basis in their livestock enterprise, it becomes imperative that boundary determinations become effective in the immediate future. . . ." (Emphasis ours).[16]

It will be noted that as late as 1942 the handling of the

[16]Page 40 of Centerwall Report

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grazing rights was based on the "necessity for action in order that the Hopi Indians and personnel can proceed along a sound basis in their livestock enterprise", and explicitly it is said that necessarily traditional and legal aspects are disregarded. It is under these circumstances that the Solicitor refers to the action of the Secretary as conclusive evidence that the settlement of the Navajos on the reservation has been sanctioned and confirmed by the Secretary.[17] The final matter that should be seriously considered in evaluating the conclusion of the Solicitor is the fact that the Navajos upon this reservation have not been required to sever their tribal ties, have been denied none of the tribal advantages of the Navajos, but have according to the Solicitor, been given additional rights upon a reservation established for the Hopi Indians. Such procedure not only can be questioned from the standpoint of legislative intent, but the authority of the Secretary to perform such an act under such circumstances is indeed subject to serious question.

The Supreme Court of the United States has stated that "the right of the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is as sacred as that of the United States to the fee." (Shoshone Tribe v. United States, 299 U.S. 476, 81 L. Ed. 360). That right of occupancy carries with it the right to the minerals within the reservation - with this the Solicitor agreed.[18] How can it then be said that the Navajo Indians, who entered the reservation "on their own initiative," and not because the Secretary saw "fit to settle" them thereon, are entitled to share in the "sacred" right of occupancy granted to the Hopis by the Executive Order of 1882. Certainly it cannot be said that it was intended by the executive order to give equal rights with the Hopis in the reservation to any other Indian or Indians who took it upon

[17]Page 8 of Opinion
[18]Page 8 of Opinion

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themselves to trespass upon the Hopi Reservation and remain thereon, and particularly the Navajos whose own reservation has been enlarged time and again to take care of the Navajo needs.

The inescapable result is that the reasoning of the Solicitor holds 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, the opinion of the Solicitor attempting to negative such implication to the contrary notwithstanding.[19]

No one would presume to say that once a reservation is created for a tribe of Indians, either by treaty, by statute or by executive order, that the Secretary of the Interior would thereafter have the authority or the power to move those Indians from the reservation, deprive them of their rights therein and place them elsewhere on another reservation, even if he he saw fit to do so. Nor could he do so with the Navajos and thereby create concurrent rights in both reservations. Can it be assumed that if the Solicitor's opinion is upheld, that the Navajos claiming rights upon the Hopi Reservation will lose, forfeit or surrender their rights which they now have on the Navajo Reservation as members of the Navajo tribe? In memorandum opinion dated February 12, 1941, Nathan D. Margold, then Solicitor in the Department of the Interior, discussed the rights of the Hopi Indians in the 1882 Reservation. In considering the case of Crow Nation v. U. S., 81 Ct. Claims, 238, 278, Solicitor Margold made the comment that:

> ". . . . the case contains no authority upholding the right of the Secretary to remove a tribe from a reservation for whom the reservation was created."

Lacking any right to move the Navajos from their own reservation, how can it then be said that the Navajos have

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equal rights with the Hopis in the minerals on the Hopi Reservation for the Secretary could not and never has "seen fit to settle" the Navajos on that reservation?

II. - Navajos cannot share in the minerals estate of two reservations.

The Solicitor's opinion, in concluding that it was the intention of the Executive Order to create a reservation for the Hopi Indians and the Navajo Indians then living within the area, with the further settlement of Navajos to be permitted in the discretion of the Secretary, and in holding that the Hopi Indians and those Navajos within the area who settled in good faith prior to the date of the ratification of the Hopi constitution, have coextensive rights with respect to the natural resources of the reservation, including the mineral estate, has ignored the time honored principle and rule that Indians cannot secure benefits in or upon two different reservations, or from two different tribes. This policy has been followed by the department and upheld by the courts.

The Navajo Indians living upon the Hopi Reservation have, since the establishment of the reservation, been an integral part of the Navajo tribe, have enjoyed full rights with other members of the tribe, have voted and placed members upon the Navajo Tribal Council and have an equal interest with other Navajos in tribal property and in the extensive Navajo reservation.

It is 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

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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 Seifert Bros. Co. v. U. S., 294 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. Residence upon the tribal property is not a necessary condition to the continued enjoyment by the member of such right. (Cohen's Handbook of Federal Indian Law - chapter 9, Section 3).

The Navajo Indians residing upon the Hopi Reservation have maintained their tribal membership in the Navajo Tribe and the rights which go with that membership. Furthermore, the tribe itself has not only considered the Navajo Indians residing on the Hopi Reservation to be members of the tribe, but it has gone so far as to attempt to exercise jurisdiction over the lands occupied by Navajos upon the Hopi Reservation. For example, in February, 1953, the Navajo Tribal Council published a document prepared by the advisory committee, purporting to cover rules and procedures to be followed in the establishment of grazing committees. It was then proposed to restrict eligibility to obtain grazing permits through negotiation as follows:

"(b) In District 3 and 7 some grazing permits have been issued to Hopi Indians. In these two districts, Navajos may acquire grazing permits from

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Navajos and Hopis, but Navajos may not sell permits to Hopis."[20]

The Hopis strenuously objected to this proposed rule and ultimately it was not approved.

In March, 1953, the Hopi Tribal Council learned that the Navajo Tribe was collecting fees from traders upon the Hopi Executive Order Reservation outside of District 6 pursuant to its ordinance requiring payment of fees for the privilege of doing business upon the "Navajo Reservation". On March 17, 1953, a delegation of Hopis called upon the area director at Window Rock, Arizona, to protest this action. The Hopis asserted that this action on the part of the Navajo Tribal Council was ultra vires and extraterritorial in nature. Their protest addressed to the Area Director was reduced to writing on April 6, 1953, closing with the following significant paragraph:

> "It is our sincere hope that all our differences with the Navajo may soon be amicably adjusted. However, the nature of this controversy requires a firm Hopi position. Perhaps a full realization that the peaceful and tolerant Hopi people do not intend that they shall be further stripped of rights or property by reason of their sufferance will have an ultimate beneficial effect. Your immediate action is earnestly solicited."

It is understandable, too, that the moderate and temperate Hopi did have his ire roused when the pamphlet "Welcome to Navajoland", published over the signature of the Chairman of the Navajo Tribal Council and the Area Director, contained this statement:

> "5. Special scenic and archaeological attractions of the Navajo country include Canyon de Chelly, *the Hopi Indian villages,* the isolated Lukachukai mountain country, Betatakin, Monument

[20]Page 9—Navajo Reservation Grazing Committees—Their Duties and Responsibilities—1953.
Parts of both Districts 3 and 7 are within the Hopi Reservation.

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Valley, Coal Canyon near Tuba City, Chaco Canyon, Mesa Verde and the Window Rock Area." (Emphasis ours)

The Solicitor's opinion itself states that "the two Indian groups have retained their separate tribal affiliation",[21] and the writer thereof, referring to the Navajos living on the Hopi Reservation, makes the additional comment that "It is my understanding that the Navajos are represented on the Navajo Council for certain purposes."[22]

How, then, can it be said that these Navajos have "coextensive rights with respect to natural resources" of the Hopi reservation, "including the mineral estate", when, as stated above, it has long been held that Indians cannot secure benefits from two tribes or upon two separate reservations? This question was not discussed in the opinion.

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.[23]

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.[24]. 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 relinguish 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 principal in other fields.

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[21]Page 1 of Opinion
[22]Page 9 of Opinion
[23]Section 22, Title 5, USCA
[24]Title 25, CFR (1949 Ed) 224.4

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e case of Josephine Valley (1-23-94) (19 L.D. was held that an Indian may not be a member of bes in a sense that will entitle him to secure lands wo tribes under the provisions of the Allotment Act bruary 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."

It would not be fair either to the Hopis or to the Navajos living elsewhere than on the Hopi Reservation to permit the Navajos who were living upon the Hopi Reservation at the time of the ratification of the Hopi Constitution to enjoy the benefits in and reap the profits to be gained from the mineral resources of both the Navajo and Hopi Reservations.

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.

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 Departmental 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."

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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

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and its tributaries." Solicitor Margold pointed out that the Navajos, among others, qualified for occupancy of this reservation, but that the Navajos 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 Navajos 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).

It is to be noted that the Solicitor's opinion itself points out that by the Treaty of June 1, 1868 (15 Stat. 667) a reservation was established for the Navajos in an area lying to the east of the 1882 Executive Order Reservation and *that the Navajo Tribe relinquished under that treaty their*

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tribal claims to lands outside the treaty reservation and agreed to assist in resetting within the treaty reservation the large number of indivdual Navajos living outside those boundaries.[25] (Emphasis ours).

This the Navajo tribe failed to do and subsequent extensions were made to the Navajo Reservation. 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 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).

We submit that not only was it beyond the power of the Secretary to place Navajos on the Hopi Reservation because a reservation had already been set up for them, but such Navajos could not remain or go upon the Hopi Reservation and obtain coextensive rights with the Hopis on that reservation in violation of the long established principle sustained by the Department, as well as the courts, that no Indian is entitled to receive dual tribal benefits.

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[25]Page 4 of Opinion

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CONCLUSION

The opinion of the Solicitor of which we complain was rendered and approved on June 11, 1946. It then attempted to confine its application to those Navajos who had settled on the Hopi Reservation prior to October 24, 1936, the date of ratification of the Hopi Constitution.[26]

The reasoning of convenience therein employed attempted to justify the position upon the ground that the Secretary had just then acted to prevent the further immigration of non-Hopis beyond the "saturation point."[27] The Hopi people desire to know what was done to stop them then. Supersaturation has followed to equal density with the Navajo Reservation. The individual Navajos have made no distinction between the lands they have apparently acquired by trespass and suffrance of the owner and the lands that have been legally acquired by the Navajo Tribe with approval of the Congress. During the summer of 1954 livestock of Navajo people trespassed even upon District 6. Horses were impounded and special meetings were held in an attempt to meet the new crisis.[28] The Navajo tribe does not effectively discipline its members in their trespasses against the Hopi, but responds to the everlasting Navajo clamor for more territory by attempting to exert its political jurisdiction to the Hopi Reservation.

Historically, there is no group of Indians more deserving of fair treatment by the government than the Hopis. Their plea here is limited to preservation of their mineral estate, and simple justice cries aloud for aid to this oppressed people. This hour requires no rationalizing to preserve the status quo, but American honor demands clear vision to see the right and courage to speak the truth. As the Hopi tribal stand is firmed, will anyone listen to its

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[26]Page 7 of Opinion
[27]Page 7 of Opinion, Footnote 6.
[28]See minutes, horse-trespass meeting. Keam's Canyon, Arizona, Nov. 3, 1954.

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earnest plea or must its tribesmen retreat to the tops of the mesas to become an eternal "scenic attraction of Navajoland"? With implicit confidence that our government will respond, keeping faith with an aggrieved but honorable people, in accordance with its highest ideals and traditions that justified its birth, this petition is,

Respectfully submitted.

JOHN S. BOYDEN,
General Counsel for Petitioner

BRYANT H. CROFT
KENNETH R. MADSEN
BOYDEN, WILKINSON, TIBBALS, STATEN and CROFT
WILKINSON, BOYDEN, CRAGUN and BARKER
of counsel for Petitioner

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