PLAINTIFF'S EXHIBIT 226

Sekaquaptewa v. MacDonald
Civil No. 74-842 Prescott

U.S. Dist. Court
Dist. of Arizona
Healing v. Jones
No. Civil 579 Prescott
Appendix to Opinion
September 28, 1962

APPENDIX

NARRATIVE ACCOUNT OF HOPI-NAVAJO CONTROVERSY

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1.

Introduction

The following chronological account of the Hopi-Navajo Indian reservation controversy is based upon the evidence received in *Healing v. Jones,* Civ. 579, Prescott, tried in the United States District Court for the District of Arizona in the fall of 1960. In its separately-prepared findings of fact entered in this case the court has not only appraised the evidence reviewed in this account, but has also considered a vast amount of additional evidence which is not referred to herein. In its accompanying opinion discussing questions of fact and law the court has referred to and commented upon some of the evidence summarized in this narrative recital.

The marginal notations refer to the record and documents in the case. "Plf.," and "Def.," refer to the bound books of documentary exhibits introduced by plaintiff and defendant. "Prop. F.F.," refers to proposed findings of fact submitted by the parties. "Object.," refers to objections filed against proposed findings of fact. "R." refers to the transcript of the testimony. "Plf. Ex." and "Def. Ex." refer to exhibits other than bound books of documentary exhibits. "Br." refers to the briefs filed by the parties.

2.

Early History and Way of Life of the Hopis and Navajos

The Hopis are a remnant of the western branch of the early house-building race which once occupied the southwestern table lands and canyons of New Mexico and Arizona. Before 1300 A.D., and perhaps as far back as 600 A.D., the ancestors of the Hopis occupied the area between Navajo Mountain and the Little Colorado River, and between the San Francisco Mountains and the Luckachukas. Def. 88 Plf. 299 Def. 318

No Indians in this country have a longer authenticated history than the Hopis. As early as 1541, a detachment of the Spanish Conqueror, Coronado, visited this region and found the Hopis living in mesa villages, cultivating adjacent fields, and tending their flocks and herds. In 1692 another Spanish officer, Don Diego De Vargas, visited the area where he met the Hopis and saw their villages. American trappers encountered the Hopis in 1834. Plf. 299 Def. 61 Plf. 7 Plf. 1

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In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under the jurisdiction of the United States.

Plf. 42
Def. 85
Def. 310
Plf. 27

In 1882, the Hopis numbered about two thousand and lived for the most part in seven villages situated on three mesas in northeastern Arizona. The level summits of these mesas are about six hundred feet above the surrounding sandy valleys and semi-arid range lands. These lands are at an elevation of from six thousand to seven thousand feet above sea level.

Def. 89
Def. 103
Def. 62

In the nearby valleys the Hopis maintained vegetable gardens, grain fields and orchards to the extent of about six or seven thousand acres. The Hopis also raised livestock, then numbering about 10,500 head, which were grazed on the range lands but close enough so they could be driven back each night to the walls of the mesas.

Def. 837

The Hopis did not hold the farm lands adjacent to their villages in individual ownerships, but by a clan block system which amounted to communal ownership. There were a number of named clans, the first one established being the Bear clan, settled near the spurs of the first and second mesas. Within the clan, authority to grant use of land was vested in the "clan mother," who allotted planting areas and settled disputes. Land disputes between clans were presumably settled by the Kikmongwo, who were usually members of, or affiliated with, the Bear clan.

The clan block system was the predominant pattern until late in the 1800's. The pattern of land use changed considerably after 1900, although there were still traces of clan land holdings in the Oraibi Wash as late as 1906.

Def. 119
Plf. 255
Def. 61
Def. 89
Def. 6
Plf. 25

The village houses, grouped in characteristic pueblo fashion, were made of stone and mud, two, three, and sometimes four stories high. Water had to be brought by hand from springs at the foot of each mesa. The Hopis were a timid and inoffensive people, peaceable and friendly with outsiders. They were also intelligent and industrious although their working time was frequently interrupted by lengthy religious ceremonials and tribal dances.

Def. 62

The Hopi men tended the gardens, fields and orchards, and took care of the livestock and poultry. They did some hunting, mainly for rabbits. The Hopi women ground corn, did the cooking and other household tasks, hauled most of the water, repaired

the houses, and made pottery. Both the men and women did weaving and knitting.

Throughout the entire area which was later to be designated as the 1882 reservation the Hopis had numerous ceremonial shrines and several ceremonial fox trapping areas, which they had maintained and visited for hundreds of years. Some Hopi shrines, moreover, were to be found far beyond this area, and as far away as the San Francisco Peaks, to the west, and Chevalon Creek, southeast of Winslow to the south. These remote shrines, however, were for the most part abandoned over the course of the years. Plf. Ex. 244 Def. 678

These Hopi shrines were of two kinds, the Kachina shrines and the Eagle shrines. The Kachina shrines were the same for all Hopi mesas and clans, but the Eagle shrines belonged to one or the other of the clans of the different pueblos. Def. Prop. F.F. p. 286

Eagle shrines were associated with the collection of young eagles from the eagle nests in the cliffs, at least one eagle always being left in the nest. The hunting of eagles was accompanied by rituals involving the use of corn pollen and prayer sticks, conducted at a particular site before the young eagles were seized. The young eagles were then taken back to the villages, raised to a certain size when they were killed, and the feathers used for ceremonial purposes. Def. 679 R. 282

A government agency, with headquarters at Keams Canyon, twelve miles east of the nearest Hopi village, was established for the Hopis in 1863. They had no reservation prior to December 16, 1882. Plf. 7 Def. 1 Def. Object. p. 2, 7

The recorded history of the Navajos does not extend as far back as that of the Hopis. They were apparently not seen by the Spanish explorers of the Southwest in the sixteenth century. During this early period they may have been scattered agricultural tribes or they may have migrated to the Southwest somewhat later with the Apaches from the north. They are mentioned in preserved journals for the first time in 1629. From all historic evidence it appears that the Navajos entered what is now Arizona in the last half of the eighteenth century. Def. 300

By 1854 there were at least eight thousand Navajos residing on the tributaries of the San Juan River, west of the Rio Grande and east of the Colorado, and between the 35th and 37th parallels of north latitude. In 1863 Col. Christopher ("Kit") Carson led Plf. 4

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a force which rounded up several thousand Navajos and interned them at Bosque Redondo, on the Pecos River, near Fort Sumner, in New Mexico.

In 1868, the United States entered into a treaty with the Navajos (15 Stat. 667), under which the latter were granted an extensive reservation to the east of what was to become the executive order reservation of December 16, 1882. The Navajos therein agreed to relinquish all rights to occupy any territory outside that reservation, but retained a limited right to hunt on unoccupied contiguous lands. The Navajos were thereupon released from their internment near Fort Sumner and moved to the newly-created reservation. Added to those who had escaped internment there were then between twelve and thirteen thousand Navajos. By 1882 the population of the Navajos had grown to about sixteen thousand.

Plf. 13

Def. 300
Plf. 79
Def. 28, 35, 45, 51

Def. 903

In the treaty of 1868, the western boundary of the Navajo reservation was not defined with precision. This was accomplished, however, by an executive order issued on October 29, 1878, the western line being fixed as ". . . the one hundred and tenth degree of longitude west. . ." This line was later to become the eastern boundary of the December 16, 1882 reservation. Additional land was added to the southwest corner of the Navajo reservation by another executive order issued on January 6, 1880. With this addition, the Navajo reservation amounted to about 11,875 square miles, or eight million acres.

Plf. 30
Def. 80
Plf. 31

Def. 95

Despite the vast size of the Navajo reservation at that time, this semi-arid area was considered incapable of providing support for all of the Navajos. Moreover, except for one or two places, the boundaries of the Navajo reservation were not distinctly marked. In addition, the new treaty obligations and increased pressure by white immigrants from the Rio Grande valley had forced the Navajos to abandon, to a large degree, their old territory in the Mount Taylor-Chaco Canyon region.

Def. 20
Def. 38

Def. 839

It is therefore not surprising that great numbers of the Navajos wandered far beyond the paper boundaries of the 1868 reservation as enlarged by the executive orders of 1878 and 1880. By 1882, Navajos comprising hundreds of bands and amounting to about half of the Navajo population had camps and farms outside the reservation and as far from it as 150 miles. Some Navajo groups which had pressed westward because

Def. 19, 20
Def. 37

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of droughts were attracted to the Hopi country to trade for corn and melons. These groups settled in the Jeddito Valley and on Black Mesa, where water was available.

The Navajos were originally of an aggressive nature though not as warlike as the Apaches. It was because they had become embroiled in a series of fights with white men, including forces located at United States Army outposts, that they were banished to Fort Sumner in 1863. By 1882, however, they had curbed their hostility to the Government and to white men and, in general, were peaceably disposed. As hereinafter described, however, there was little abatement of their proclivity to commit depredations against the Hopis, although such activities were not ordinarily accompanied by violence.

Pif. 4

Def. 28, 35, 57

Desert life made the Navajos sturdy, virile people, industrious and optimistic. They were also intelligent and thrifty and some pursued trades which made them wealthy.

Def. 312
Pif. 57

Some Navajos established farms which held them to fixed locations. In the main, however, they were semi-nomadic or migratory, moving into new areas at times, and then moving seasonally from mountain to valley and back again with their livestock. This required them to live in rude shelters known as "hogans," usually built of poles, sticks, bark and moist earth. It was their practice to keep these hogans on a permanent basis and to return to them when this was practicable.

Def. 37
Pif. 57
R. 298

The Navajos as well as the Hopis had sacred places both within and without the area which later became the 1882 reservation. These were, for the most part, eagle-catching shrines, but the Navajos probably had less need than the Hopis for the use of eagle feathers in their ceremonials.

Def. Prop. F.F. 285

The Navajos maintained closely-knit families and each member identified himself with the hogan in which he was born according to the Navajo ceremonial called the "Blessingway." As Navajos moved from place to place their belongings were usually carried on pack ponies. This kind of life necessarily curtailed agricultural pursuits, but many nevertheless were able to grow corn, wheat and other farm products.

Def. Br. 48
Pif. 57
Pif. 3, 4

While hunting was a principal activity in earlier days, by 1882 it was not extensively engaged in by the Navajos. Their prime means of livelihood was the raising of livestock. In the

Def. 35

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Def. 103
Plf. 4

early 1880's they were said to own 800,000 sheep, 250,000 horses, and 300,000 goats. The Navajos manufactured their own clothes, principally from wool, and were expert at blanket making.

3.

Establishment of Executive Order Reservation of December 16, 1882

Def. 1

The first suggestion that a reservation be created which would include any of the lands here in question came from Alex G. Irvine, who was then United States Indian Agent at Fort Defiance, Arizona Territory. On November 14, 1876, he recommended to the Commissioner of Indian Affairs of the Department of the Interior that a reservation of fifty square miles be set apart for the Hopis. His reason for making this recommendation was the necessity of protecting the Hopis from Mormon pressure from the west and south, and of providing more living space because of increasing Hopi and Navajo population.

Def. 6

On May 13, 1878, William R. Mateer, then United States Indian Agent for the Hopis, at Keams Canyon, recommended that a reservation extending at least thirty miles along the Colorado River be set apart for the Hopis. Neither of these recommendations drew any response from the Office of Indian Affairs.

Def. 6, 7

In his annual report of August 24, 1878, Mateer recommended the removal of the Hopis to a point on the Little Colorado River which was outside of what later became the reservation of December 16, 1882. He stated as his reason for making this recommendation the fact that the Navajos were spreading all over that country within a few miles of the Hopis and were claiming, as their own, the only areas where there was water and which were worth cultivating.

Def. 10
Def. 11

A year later E. A. Hoyt, Commissioner of Indian Affairs, asked Mateer to make an early report with the view of establishing a suitable reservation for the Hopis. Mateer resigned soon after these instructions were received and his requested report was never forthcoming.

Def. 15

On March 20, 1880, Galen Eastman, Mateer's successor as Hopi Indian Agent, wrote to the Commissioner, urging that a reservation forty-eight miles east to west and twenty-four miles north to

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south, embracing the Hopi villages, be set aside for the Hopi Indians. In his communication Eastman rejected, as impracticable, Mateer's suggestion that the Hopis be moved to a new locality. Eastman expressed the view that the Hopis needed a reservation because the settlement of Mormons in the vicinity was "imminent." Def. 16

Nothing came of Eastman's recommendation and another two years were to pass before the matter of establishing a reservation in this area again became active. On March 27, 1882, J. H. Fleming, then the United States Indian Agent at the Hopi Agency, wrote to the Secretary of the Interior recommending that a "small" reservation which would include the Hopi pueblos, the agency buildings at Keams Canyon, and sufficient lands for agricultural and grazing purposes, be set aside for the Hopis. He stated that such a reservation was needed to protect the Hopi Indians from the intrusions of other tribes, Mormon settlers, and white intermeddlers. Def. 17 Def. 17

In the summer of 1882, United States Indian Inspector C. H. Howard visited the general area in the course of an investigation of Navajo problems. On July 14, 1882, he wrote to the Secretary of the Interior stating that he would have important recommendations to make concerning the combination of the Hopi and Navajo Agencies, especially with reference to the "immense" number of Navajos living off of their reservation. Def. 19

Two weeks later, on July 31, 1882, Howard wrote to the Secretary recommending that a new reservation be set aside for the "Arizona Navajos," and for the Hopis whose seven villages would be encompassed by the proposed new reservation. On October 25, 1882, Howard made an extensive report to the Secretary, renewing his suggestion that a joint reservation be established for the western Navajos and Hopis. A third Howard report, renewing this recommendation, was not completed until December 19, 1882, and so could not have been considered in drafting the Executive Order of December 16, 1882. Def. 25, 39 Def. 58, 74

The reservation envisioned by Howard was a much larger one than Fleming had in mind. His stated reason for including the Arizona Navajos in the reservation was to contain, within newly-created boundaries, the great number of Navajos who were then roaming far beyond their then established reservation. His reasons for including the Hopis were to protect them from en- Def. 21

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croaching white settlers and from being "constantly overridden by their more powerful Navajo neighbors."

Plf. Prop. F.F. 8, p. 9

Howard's assertion that the Hopis were "constantly" overridden by the Navajos is borne out by authentic reports extending back to 1846. In that year and in 1850, 1856, 1858 and 1865, civil and military officials reported instances in which Navajos had trespassed upon Hopi gardens and grazing lands, seized and carried away livestock and committed physical violence.

Plf. 1, 2, 6, 9

None of the recommendations for the establishment of a new reservation were immediately acted upon. In the meantime, however, Fleming wrote to the Commissioner under date of October 17, 1882, advising that he had expelled one Jer. Sullivan, a white meddler, from the Hopi villages, and requested authority for soldiers to expel E. S. Merritt, another white meddler. A notation added to this letter after it reached Washington called attention to the fact that the Hopis were not on any reservation and that there was apparently no authority to take steps against Sullivan or Merritt.

Def. 23

Def. 24

The Commissioner accordingly replied to Fleming advising that Sullivan should be allowed to gather his crops and no steps should be taken against Merritt. On November 11, 1882, Fleming reported that Sullivan had returned to the Hopi area and had asserted that the Government could not remove him because the pueblos were not on a reservation. Fleming stated that if a way could not be found to get Sullivan and Merritt away from the Hopi villages, he would tender his resignation.

Def. 54, 55, 56

On November 27, 1882, Commissioner H. Price sent a telegram to Fleming asking him to describe boundaries "for a reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger, . . ." Fleming responded by letter dated December 4, 1882, specifying, as the boundaries of the proposed reservation, the lines which were later described in the Executive Order of December 16, 1882.

Def. 57

The proposed reservation thus described was much smaller than had been suggested in the joint reservation proposal of Howard. In his letter of December 4, 1882, Fleming said, among other things:

Def. 21

> "The lands most desirable for the Moquis, & which were cultivated by them 8 or 10 years ago, have been taken up by

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the Mormons & others, so that such as is embraced 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 & there at or near springs, & in the valleys which are overflowed by rains, & 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 agricultural & 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 & 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 encroachments of the Navajos, who frequently take possession of their springs, & even drive their flocks over the growing crops of the Moquis. Indeed their situation has been rendered most trying from this cause, & 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 & have hopes of advancing them in civilization. Being by nature a quiet and peacable [sic] tribe, they have been too easily imposed upon, & have suffered many losses."

. . . .

"These boundaries are the most simple that can be given to comply with the directions of your telegram, & 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."

At that time there were about eighteen hundred Hopis, and according to Centerwall's report of July 22, 1942, "a few hundred" Navajos living within the boundaries recommended by Def. 77 Def. 903

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Plf. 431 Fleming. In 1945, Dr. Harold S. Colton, then Director, Museum of Northern Arizona, placed the Navajo population on the 1882 reservation in 1882 as "only 300 . . ." On May 2, 1945, the new Commissioner, William A. Brophy, wrote Senator Wheeler that in 1882 "several thousand Navajos were already using a large part of the area." If Brophy was speaking of just the 1882 reservation he was almost certainly mistaken since, as late as September 1, 1900, when the first census was taken, the Navajo population on the 1882 reservation was only 1,826 as compared to 1,832 Hopis.

Plf. 428, 430

Def. 205

R. 178 As revealed by extensive archeological studies, there were over nine hundred old Indian sites, no longer in use, within what was to become the executive order area but outside of the lands where the Hopi villages and adjacent farm lands were located. Most of these were Navajo sites. Tree ring or dendrochronological studies show that of a total of 125 of these Indian sites within the executive order area for which data was successfully processed, the wood used in the structures was cut during a range of years from 1662 to 1939. A considerable number of these specimens were cut and presumably used in structures prior to 1882. There is no convincing evidence of any mass migration of Navajos either into or out of the executive order area at any time for which the tree ring data were available.

R. 206

R. 208

R. 221

Def. 77 On December 13, 1882, Commissioner Price wrote to the Secretary of the Interior, transmitting a draft of an executive order withdrawing certain lands in the Territory of Arizona from 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 . . ." (italics indicate underscoring in the original letter). Price requested that the order be laid before the President for his signature.

Def. 78 The Commissioner enclosed with this letter a marked map showing the boundaries of the proposed reservation as they had been suggested in Fleming's letter of December 4, 1882. The material part of this letter reads as follows:

> "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.

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"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 toward 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 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."

On December 15, 1882, H. M. Teller, Secretary of the Interior, forwarded Commissioner Price's letter and draft of executive order to President Arthur, stating that he concurred in the Pit. 46

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Def. 82 Commissioner's recommendations. On the following day the order, set out below, was signed and issued by the President:

> "It is hereby ordered that the tract of country, in the territory of 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° 30′ north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35° 30′ north; thence due east to the one hundred and tenth degree of longitude west, 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."

Def. 83 On December 21, 1882, Price sent a telegram to Fleming advising: "President issued order, dated sixteenth, setting apart land for Moquis recommended by you. Take steps at once to remove intruders." This was confirmed by a letter of the same date in which the following additional statements were made (italics indicating underscoring in original):

Def. 85

> "By telegram of this date, you were advised that a reservation has been established, by Order of the President, for the use and occupancy of the *Moquis*.
>
> "I now transmit to you a copy of the order, by which you will see that your recommendations, as contained in letter to this office, dated December 4th (instant), have been followed as regards the boundaries of the same.
>
> "The establishment of the reservation will enable you hereafter to act intelligently and authoritatively in dealing with intruders and mischiefmakers, and as instructed in telegram before mentioned, you will take immediate steps to rid the reservation of all objectionable persons."

4.

From the Executive Order of December 16, 1882, to the Beginning of the First Allotment Period in 1892

Plf. Prop. F.F. 17, p. 20

Plf. 51

Before the end of 1882, Hopi Agent Fleming tendered his resignation and it was accepted. As soon as Fleming could wind up his affairs the Hopi Agency at Keams Canyon was closed. Beginning April 30, 1883, the Navajo Agent at Fort Defiance,

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New Mexico, was charged with responsibility for the Hopi Indians.

Howard had recommended that one Agent handle both Navajo and Hopi affairs. His proposal, however, was not that the Navajo Agency at Fort Defiance, more than one hundred miles from the nearest Hopi village, be enlarged to include the Hopis, but was that the Hopi Agency at Keams Canyon be enlarged to include the western Navajos. The Hopi Agency was not to be reëstablished until 1899.

Def. 22, 39

Def. 101

Plf. Prop. F.F. p. 38

In September, 1884, John H. Bowman, the Navajo Indian Agent, who also had responsibility for the Hopi Indians, reported to the Commissioner of Indian Affairs that the Hopis continued to live in their mesa villages with nearby gardens and orchards. He reported that "the best of good feeling" generally existed between the Navajos and Hopis in that year, noting that members of the two tribes "constantly mingle together at festivals, dances, feasts, etc. . . ."

Def. 90

Def. Prop. F.F. 2A

Bowman did, however, call attention to the fact that there were frequent "trifling" quarrels between individual Navajos and Hopis. He stated that this was usually caused by careless herding by the Navajos who allowed their herds to overrun outlying Hopi gardens. Bowman commented: "The Navajos are almost invariably the aggressors."

In January, 1886, Thomas V. Keam, a pioneer of the area, recommended to the Commissioner of Indian Affairs that the Hopis be encouraged to move down off of their mesa tops to the nearby valleys so that they would be closer to their farms and sources of water. To assist in this it was Keam's suggestion that the government supply the Hopis with building materials to enable them to build wood houses in place of their adobe pueblo dwellings. Reporting that Navajos as well as Hopis were occupying the executive order area, Keam recommended that both the Hopis and Navajos be provided with schools. Accompanying Keam's letter was a petition signed by twenty Hopi chiefs and priests asking for help of the kind recommended by Keam.

Def. 94-97

Def. 95

Def. 103-104

Keam's recommendation and the accompanying Hopi petition were referred to S. S. Patterson, the Navajo Indian Agent, for a report. He visited the Hopi villages and called a council of Hopi and Navajo Indians. On August 26, 1886, Patterson re-

Def. 97

ported that the young Hopis favored moving down to the valleys but that the older ones held "fast to the rockbound dwellings of their fathers." Patterson thought that over a period of years the Hopis could be encouraged to move down off of the mesas and recommended that any Hopis who were willing to do so be supplied with building materials.

Def. 97, 99

Def. 97, 98, 101

In this letter, and in his regular monthly report dated September 1, 1886, Patterson told of appointing a general council of Indians which was held at Keams Canyon in August. In addition to Hopi representatives from five of the villages, thirty to forty Navajos living in the vicinity of Keams Canyon were in attendance.

At this council meeting Patterson adjusted a few cases of horse stealing and other differences existing between the Hopis and Navajos. He reported, however, that he "found a general good feeling prevailing between the two tribes and a disposition to be friendly in their relations toward each other."

Def. 101

Def. 98

Patterson reported that at this council meeting the Hopis were favorable to the establishment of a school at Keams Canyon, and promised to send sixty to seventy children from the villages. A few Navajos living in the neighborhood also said they would send their children to such a school. Patterson expressed the view that "a good and large school for the Moquis children can be made a success under proper management. . ." Such a school was opened at Keams Canyon later in 1887, but it is not known how many Hopi children and how many Navajo children, if any, attended at the outset.

Def. 116

In 1888, two Hopi families moved down to the farm lands below the mesas, this representing the first tangible results of the Government's effort to have the Hopis leave their unsanitary mesa villages.

Plf. 61

On September 20, 1888, Inspector T. D. Marcum, who had been investigating the functioning of the Navajo Agency at Fort Defiance, reported that the Hopis were complaining of Navajos "on their reservation," with flocks and herds, destroying Hopi crops and eating their grass. Marcum stated that these complaints were vouched for by white settlers about Keams Canyon. According to the information which Marcum obtained, Navajo Agent Patterson had made several trips to investigate these charges. The

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Hopis, however, told Marcum that nothing effective had been done to stop the Navajo encroachment.

On September 26, 1888, Herbert Welsh, Corresponding Secretary of the newly-founded Indian Rights Association, wrote to William F. Vilas, Secretary of the Interior, telling of his immediately preceding visit to five Hopi villages. He reported that at each of these communities he received complaints from the Hopi concerning injuries inflicted upon them as a result of "the continual intrusions and depredations" of the Navajos. The latter, according to these complaints, were stealing Hopi corn, melons and horses. Plf. 62-63, 65

Many Navajos, it was asserted, were occupying 1882 executive order lands "and treat the Moqui lands as though they belonged to them, making use of the Moqui water springs & driving the lawful owners from them." Welsh suggested that in order to make it possible to proceed with the plan to get Hopi children into schools, arrangements be made to have a military officer, accompanied by a "sufficient" force of soldiers, visit the contiguous Navajo reservations. His plan was to have the leader of this force hold council for the purpose of informing the Navajos that their "depredations" must cease and that in the future the wrongdoer may expect punishment for every offense.

Marcum's report and Welsh's letter were turned over to R. V. Belt, Chief, Indian Division, for consideration. Under date of October 10, 1888, which was apparently the day following receipt of the Welsh letter, Belt wrote a memorandum, apparently addressed to the Secretary of the Interior, summarizing these two writings and expressing approval of Welsh's suggestion concerning military intervention. Belt's memorandum concludes with this statement: "The Moquis reservation was established by Executive Order of December 16, 1882, for the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon. It comprises no lands set apart for the Navajoes and no Navajoes have been settled thereon by the Department." Plf. 64 Def. Obj. p. 19 Def. 64

Upon receipt of the Belt memorandum written earlier the same day, Secretary Vilas wrote to the Secretary of War, transmitting a copy of the Welsh letter and also referring to the Marcum report. Vilas expressed approval of Welsh's suggestion for military intervention and requested the Secretary of War to give the necessary orders to carry it into effect. Plf. 65, 66

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Vilas specifically requested that the company of troops to be dispatched to the area be instructed "to remove all Navajo Indians found trespassing with their herds and flocks on the Moqui reservation and to notify them that their depredations must cease and that they must keep within their own reservation." It will be noted that in requesting removal of all Navajos found trespassing with their herds and flocks, the Secretary of the Interior proposed more drastic action than had been recommended by Welsh or Belt.

Plf. 65

In this communication, Secretary Vilas made the identical statement that Belt had made, to the effect that the reservation in question comprises no land set apart for the Navajos, and no Navajos had been settled thereon. Vilas had then been Secretary about nine months.

Def. Obj. p. 19

Plf. 67
Def. 110

The result was that, on November 15, 1888, Col. E. A. Carr, commanding officer at Fort Wingate, New Mexico, received orders from the Adjutant General, Department of Arizona. These orders were to send an expedition to the reservation area with instructions to prevent Navajo trespassing and keep them within their own reservation. Col. Carr telegraphed the Adjutant General that, in compliance with these orders, Capt. Com. M. Wallace and fifty men, infantry, cavalry and scouts, would be sent on the expedition.

Plf. 70, 72, 69, 76

Col. Carr, however, also reported to the Adjutant General in this telegram that his Navajo interpreter, Henry Dodge, commonly called "Chee," had told him that there were five or six hundred Navajos comprising one hundred or more families, living on the December 16, 1882 reservation. According to Chee, the Hopis did not wish the Navajos removed summarily and would not benefit if this were done during the winter. Chee also told Col. Carr that it would be a great hardship on these Navajo families to eject them from their homes at that time of year.

Plf. 69-70

Col. Carr called the Adjutant General's attention to the fact that Welsh had not suggested removal of Navajos but had proposed only that a council be held and that the Navajos be warned that their depredations must cease. Col. Carr suggested that it would be more just, humane and polite "to hasten slowly and at least hear the Navajos before subjecting them to eviction amid the rigors of winter." He asked whether, in the light of this new information, his instructions would be modified.

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On the following day, the headquarters department of Arizona advised Col. Carr that he was to interpret his previous instructions "in accordance with the letter of Mr. Welsh upon which they were based." Accordingly, Col. Carr was told that the actual removal of any Navajos who have had homes for a long time upon the reservation in question "will be deferred until Spring at least."

Making clear that this limitation applied only as to Navajo use and occupancy which did not interfere with the Hopis, Carr was further instructed: "Should any Navajos be found trespassing, depredating, or in any way doing injury to the persons or property of the Moquis, they should be removed to the Navajo Reservation and required to remain there." A copy of these instructions reached the Commissioner of Indian Affairs early in December, 1888. He instructed his subordinates to "let this rest and see what the military do."

Pif. 70

Def. 113

Col. Carr had planned to have the expedition consisting of Capt. Wallace and forty-eight officers and men, together with ten mounted and armed Indian scouts, leave Fort Wingate, New Mexico on November 17, 1888, and proceed to the border line between the Navajo reservation and the December 16, 1882 reservation. On November 17th, however, he received instructions that "there is no necessity for haste in making the movement," and that the military force should be reduced to thirty men, to be supplied with wagon transportation.

Pif. 72

Pif. 73

The record does not indicate when the expedition got under way. However, by December 5, 1888, Capt. Wallace had progressed sufficiently to send back a report of his operations and observations upon the December 16, 1882 reservation. According to later reports, Capt. Wallace required the Navajos occupying certain springs to move away, instructing them not to live there or drive their herds in that vicinity.

Pif. 75

Pif. 77

After Capt. Wallace left, the Navajos returned to the area from which he had ejected them, and other Navajos moved within eight miles of the Hopis. Col. Carr learning of the latter incident, wrote to Navajo Chief Sam Begody asking him to notify these Navajos that they had no right to move nearer to the Hopi villages. Col. Carr told Chief Begody that these Navajos must move back and stay "at least twelve miles away from the Moquis and please see that they do it." Col. Carr concluded: "I

Pif. 77

Pif. 76

had great trouble to save the Navajoes from being moved, and I hope that they will not take advantage of any kindness to continue to impose on the Moquis."

Def. 116 By 1889, the Hopi population was about 2,100, and there were more children among them in proportion to adults than were then generally found among Indians. In that year several more Hopi families moved down from the mesas to the valleys below, following the example of two families which had pioneered in
Def. 117 this move the previous year. The school at Keams Canyon then had from forty to forty-five Hopi children in attendance.

Def. 114 In July, 1889, Keam wrote to T. J. Morgan, Commissioner of Indian Affairs, reporting that Navajo Indians living on the December 16, 1882 reservation, often drove their herds to watering places within five or six miles of the Hopi villages, greatly to the disadvantage and annoyance of the Hopis. Keam suggested that the Navajo Agent, accompanied by an army officer and a small force, take some representative Hopis and Navajos and show them "some natural boundaries, at a reasonable distance from the villages, say twelve miles, over which the Navajo must not drive his herds or water or graze."

The Commissioner referred this letter to R. V. Belt, Chief of the Indian Division, with the comment: "This suggestion of Mr. Keam seems reasonable. What can I do to carry it out?" The record does not indicate what response Belt made or that anything was done to effectuate Keam's proposal.

Def. 126-127 In 1890 a group of representative Hopis, headed by Chief
Plf. 82 La-lo-lami, were taken on a Government-sponsored trip to Washington, D. C. to confer with administrative officials, and inspect
Plf. 81 schools and agricultural activities en route. This was the first time that any Hopi had been east of Albuquerque, New Mexico.

From the beginning to the end of 1890 complaints concerning
Def. 124 Navajo depredations upon the Hopis continued, although there was also one report that friction between the two tribes was decreasing. It was reported in January of that year that the
Plf. 81-82 largest Hopi village, Oraibi, had sent no children to the school at Keams Canyon because of the Government's failure to protect the Hopis from the Navajos.

In February, 1890, the Commissioner of Indian Affairs, being
Plf. 84 informed of complaints by white settlers against the Navajos, instructed the Navajo Agent at Gallup, New Mexico, to immedi-

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ately take energetic and proper steps, without endangering the peace, "to keep the Indians—with the exception of those who have settled upon lands outside of their reservation for the purpose of taking homesteads—within the limits of their reservation, and to return roving Indians to the reservation." It is not known what steps the Navajo Agent took in response to this instruction.

In the Agent's annual report, dated August 22, 1890, he stated that he had frequently warned the Navajos "not to approach with their herds within certain specified limits, which would give the Moqui ample room for grazing. . ." Def. 124

In October, 1890, Ralph P. Collins, superintendent of the Hopi school at Keams Canyon, reported that there were then only twelve children in school. He had been told by Hopi chiefs that they would not send more children so long as the Navajos' depredations were allowed to continue. In this report Collins told of one incident in which Navajos had attacked Hopis in a Hopi corn field and had beat them unmercifully, leaving one nearly dead. Collins stated that he could see no practical solution but to have enough troops to arrest "these lawless Navajoes and take them to prison, put the others off the Moqui reservation and keep them off and then at the same time force the Moqui to fill their school at once. . . ." Def. 129 Def. 130

Apparently on the basis of Collins' report, Commissioner T. J. Morgan wrote to R. V. Belt, under date of November 17, 1890, summarized the Hopi complaints and stated that "Some vigorous steps should be taken to prevent this state of things. . . ." Morgan also commented that the Hopi reservation is much larger than they use or will ever need, and it would be a great benefit to them if a portion of it could be disposed of and its equivalent were given to them in improvements. Plf. 89

During November, 1890, Superintendent Collins, with two others, went to Oraibi and arrested two Hopis who were threatening to kill others who sent their children to the Hopi school. This had the effect of breaking Hopi oppositions, and by late November Collins was able to respond that fifty-nine Hopi children were attending the school. Collins also reported that several more Hopi families had moved down from the mesas. He told of continued Navajo trespassing, however, and said the Navajo herds had eaten the last vestige of Hopi corn stalks and most of their winter grass. Collins recommended that troops be sent at once to drive the Navajo herds from among the Hopis. Plf. 90

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Def. 138 Collins' November recommendation went unheeded. On December 16, 1890, Special Agent George W. Parker sent a telegram
Plf. 91 to the Commissioner stating that a company of soldiers should be sent at once to remove trespassing Navajos from among the
Plf. 92 Hopis, and to arrest rebellious Oraibi Hopis. Two days later Parker wrote to the Commissioner reporting further Navajo depredations involving the theft of eleven horses.

Plf. 95 Upon receiving Parker's telegram, the Commissioner telegraphed General McCook at Los Angeles to send troops immediately to Keams Canyon. On December 17, 1890, such an expedition was sent on its way. On December 18, 1890, the Commissioner made a full report of developments to the Secretary of the Interior, stating that "It is very desirable that the Navajos should be forced to retire from the Moqui reservation. . . ."

Commissioner Morgan reported in this letter that the Oraibi Hopis had refused to permit a census of their village because "white people were all liars and coyotes and that they would have nothing to do with them." It was the Commissioner's idea
Plf. 94 that the troops would not only protect the Hopis from the Navajos, but their appearance would encourage the Hopis to send their children to the school.

On December 22, 1890, Commissioner Morgan sent instructions to Special Agent Parker to cooperate with the troops and Superintendent Collins "in such way as may be proper to eject the Navajos from the Moqui country to protect the Moquis from
Def. 139 the former. . ." Parker was directed "to exercise proper care and tact not to inflame the minds of the Navajos and endanger an outbreak with them. . ." But Parker was told to assure the Moquis "that this office is determined to protect them fully from the wrongs of the Navajos and to properly protect said school."

The troops reached Keams Canyon on Christmas Eve, 1890. It was then learned that the Hopis of Oraibi village had mani-
Def. 140 fested no intention of sending children to the school and had actually imprisoned their chief, La-lo-lami, who had been friendly
Def. 142 to the school. Accordingly, Lt. Charles H. Grierson, in charge of the troops, marched them to Oraibi and succeeded in getting
Def. 142 these Hopis to agree to send their children to the school, La-lo-lami having already been released.

A census was also taken at that time, 750 men, women and
Def. 141 children being counted. Lt. Grierson reported on December 28,

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1890, that 102 Hopi children were then in the school, forty-two of these from Oraibi.

The officer reported that the Hopis requested protection from the Navajos and commented that the latter have "undoubtedly annoyed the Moquis in many ways, especially during the planting season when the water holes and springs are nearly dry, by their numerous herds of sheep, and have committed depredations to a greater or less degree upon them always." Lt. Grierson stated that he saw no Navajo herds in the vicinity of the Hopi villages.

Lt. Grierson apparently did not have instructions to carry out the Commissioner's plan to have Navajos ejected from the Hopi country. But, on December 31, 1890, Superintendent Collins sent a telegram to General McCook, in Los Angeles, stating that Lt. Grierson, having "completed his instructions" concerning Oraibi school children ". . . should be instructed to remove intruding Navajos from among the Moquis before leaving." Plf. 100

On the same day, and probably without having seen Collins' telegram, Capt. H. K. Bailey at Los Angeles, wrote to Lt. Grierson, calling attention to complaints concerning the Navajos. Stating that ". . . this business, as you are aware, belongs more particularly to the Interior Department," the lieutenant was nevertheless directed to hold interviews with the Navajos who are reported as trespassers upon the Hopi lands and explain to them that they should cease molesting the Hopis. Plf. 102

Lt. Grierson was told that the Navajos and Hopis have intermarried and there is continuous trade between them, and he should therefore be very "guarded" in his action, especially towards the Navajos, "and under no circumstances, if it can be avoided, will any harsh measures be taken towards them at this time." Capt. Bailey further stated that until the boundary line between the Navajo and Hopi reservations is distinctly marked, "only persuasive measures will be used towards the Navajos in this regard."

Thus, as 1890 came to a close, the wish of the Washington office that Navajos who were interfering with the Hopis be removed from the 1882 reservation, had not been fulfilled. But at least the presence of the troops had brought Navajo depredations to a halt and had succeeded in getting full attendance at the Hopi school.

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As 1891 opened, Lt. Grierson was still at Keams Canyon with his detachment. Having received the lieutenant's report of December 28, 1890, Brigadier General McCook, on January 3, 1891, submitted recommendations to the Adjutant General of the Army.

Plf. 104

It was his view that the line of demarcation between the Navajo and Hopi reservations be distinctly marked by indestructible monuments and that the water in the neighborhood of the line and lying east thereof be reserved for the Navajos, and that to the west for the Hopis. General McCook stated that, until this is done it would not be wise to use force to prevent the Navajos from grazing near the Hopi reservation.

Special Agent Parker apparently understood the Commissioner's instructions of December 22, 1890, in which he was ordered to cooperate with the troops in ejecting the Navajos from "the moqui country," as requiring that the Navajos be kept away from the Hopis but not necessarily that they be ejected from the reservation.

Early in January, 1891, he and Agent Shipley, Supt. Collins, Lts. Grierson and Rowell, Keam and Parker decided that "the limits of land reserved for use of the Moquis from which the Navajoes shall not be allowed to enter with their herds, shall embrace a radius of sixteen (16) miles from the village of Mishognivi [sic] (on Second Mesa)." They further decided that they would construct mounds or monuments at different points along this line, and that Navajos would not be permitted to maintain herds within this area.

In reporting this development to the Commissioner on January 7, 1891, Parker stated that the Hopis were well satisfied "with the boundaries we established," and had appointed representatives to help erect the line mounds. Parker reported that the Navajos were also willing to comply with the new plan. In a report dated January 8, 1891, confirming this development, Lt. Grierson stated that there were very few Navajos who had hogans and were living within the lines to be marked.

Def. 150

The Commissioner of Indian Affairs was advised of this plan to mark a "boundary" line, having a sixteen-mile radius, around the Hopi village of Mishongnovi, being told that both the Hopis and Navajos were agreeable thereto. He apparently acquiesced in the arrangement, although it was never expressly confirmed by

Plf. 139

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the Washington office. This 1891 line was thereafter referred to as the "Parker-Keam" line.

Under date of January 30, 1891, the Commissioner reported to the Secretary of the Interior that the affairs between the Hopis and Navajos in the vicinity of Keams Canyon "have been brought to a satisfactory conclusion." The Commissioner recommended, however, that the troops remain temporarily at Keams Canyon as an influence upon the Hopis to accede to the Commissioner's plan to place Hopi children in the school at Santa Fe. This was apparently arranged and the troops remained until the middle of March, 1891.

Pif. 113

Def. 154

Def. 155

By March 18, 1891, Special Agent Parker reported to the Commissioner that the Navajos were obeying the restrictions involving the Parker-Keam line delineated earlier in the year, and that Hopi reports of Navajo horse stealing were false. Parker stated that about 150 deserted Navajo hogans were found within the so-called circular boundary.

Def. 155

According to Parker, the Hopi school at Keams Canyon was also flourishing and the Hopi children had proved to be adept students. In August, 1891, Parker reported that a considerable movement of the Hopis from the mesas to the valleys was in progress and that more than fifty houses were under construction.

Def. 159

5.

From the First Allotment Period in 1892 to the End of the Second Allotment Period in 1911

Early in 1892, the Office of Indian Affairs put into operation a plan to allot lands to individual Indians on the 1882 reservation, pursuant to the Act of February 8, 1887, 24 Stat. 388, as amended by the Act of February 28, 1891, 26 Stat. 794. John S. Mayhugh, Special Alloting Agent, was directed to proceed to Keams Canyon for that purpose. Mayhugh was given specific instructions concerning this work, including the following:

Pif. 116

Pif. 117

> "No person should be allowed an allottment [sic] on said reservation unless the father or mother is or was a recognized Moqui Indian. No allottments [sic] will be made to Indians other than Moquis, as just set forth, except by express authority of this office."

Pif. 118

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Almost immediately, Mayhugh ran into difficulties in carrying out this allotment program. He discovered that most of the Hopis desired to continue living in their villages, that they were satisfied with the existing communal method of working the land, that individual Hopi "families" or "people," such as the Snakes, Eagles, Antelopes, Corn and Tobacco families or peoples desired to have all of their respective lands contiguous and undivided.

Plf. 120, 123
Def. 165

Mayhugh nevertheless persisted in his work after first taking a careful census which produced a population figure of 1,976 Hopi men, women and children. In August, 1892, he reported that the 1891 Parker-Keam boundary plan was still working well and that the Hopis had been thereby encouraged to put more ground under cultivation. He also stated that twenty-two Hopi houses had been constructed in the valleys and that one hundred more were being erected.

Def. 164
Def. 169
Def. 170

In February, 1893, Mayhugh urged the necessity of additional surveys. He also recounted the difficulties he was having with the faction among the Oraibi Hopis known as the "hostiles," led by Hab-be-mer. This group of three hundred Hopis had consistently declined to take their land in severalty, preferring to hold their land in common and to be "let alone" by the white man.

Def. 173
Def. 172
Def. 173

A few days later Mayhugh reported to the Commissioner, for examination and approval, Mayhugh's action in making an allotment to a Navajo Indian, Navajo wife, and one child born on the reservation. This was done because the Navajo man had lived on the reservation since boyhood and claimed that he had become a Hopi. At the same time Mayhugh had refused to give allotments to six children of the Navajo woman, but not of the Navajo man, who had been born off of the reservation. Insofar as the record indicates, the Commissioner made no response to this report.

Def. 175

In the summer of 1893, Mayhugh reported to the Commissioner that he had allotted lands at Jeddito Springs, just outside the Parker-Keam line, to a Hopi at the latter's request, notwithstanding the fact that he found ten Navajo families occupying the land. Mayhugh ordered the Navajos to leave but they failed to do so.

Def. Prop. F.F. p. 19
Def. 177

The Commissioner immediately advised Mayhugh that "it is not deemed advisable to remove them [the ten Navajo families] at this time. The Moquis desiring said lands should make other selections." This is the first instance in which the Commissioner

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had ordered that Navajos be left in undisturbed possession of lands, within the reservation area, sought to be used and occupied by Hopis.

Another incident reported by Mayhugh in the summer of 1893 involved the request of two Navajos that they be allotted specific lands. Being unable to determine whether the land was on the Hopi or Navajo reservation, Mayhugh denied the request, thus again indicating that 1882 reservation lands would not be allotted to Navajos. Def. 130

Navajo encroachments upon the Hopis apparently resumed in 1893. Reporting to the Secretary of the Interior on September 16, 1893, Commissioner D. M. Browning stated that the Hopis were still "exercised over the intrusion of some of their neighbors, the Navajoes, a number of whom have been for some years located upon certain tracts desired by the Moquis. Measures looking to their removal are now being pushed." Def. 179

Two months later, on November 23, 1893, C. W. Goodman, the then Hopi school superintendent at Keams Canyon, relayed to Lt. Plummer at Fort Defiance, a report from Tom Polacca, a Hopi, that some Navajos had settled down on his range and by his springs, with stock. Goodman added: ". . . A great many Navajoes seem to be making themselves very much at home on the Moqui reservation. I hope that something can be done speedily to relieve the Moquis from their fear of intruding Navajoes. . . ." Pit. 137

By October 23, 1893, Mayhugh was able to report to the Commissioner that he had made 1,322 allotments to Hopi Indians, and that it would require about six weeks more to complete the program. Def. 179 Def. 182

In the fall of 1893, one W. Hallett Phillips wrote to the Commissioner complaining, among other things, that the allotment program was endangering the Hopis' title in the lands they occupied. Replying under date of November 11, 1893, the Commissioner reviewed the events leading up to the setting aside of the 1882 reservation and the later commencement of the allotment program. He then stated: ". . . No apprehension need be felt as to the security of their [Hopis] present title to their lands or that the allotment of a portion of them in severalty will have any tendency to weaken that title." Def. 180 Def. 180-183 Def. 183

On February 19, 1894, Mayhugh made his final report on the Hopi allotment project. A total of 1,634 allotments had been Def. 185 Def. 189

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made. A substantial number of Hopis at Oraibi, however (three hundred "hostiles" and ninety-nine "friendlies") had not received allotments. Mayhugh reviewed the difficulties which he had encountered and expressed the view that, because of their lack of knowledge, the Hopis did not comprehend their rights, and benefits gained, under the allotment act. He also expressed concern that if the Hopis became citizens on approval of the allotments their personal property would be endangered because of local tax levies. Mayhugh reported that the Navajos were not encroaching upon the Hopis as much as theretofore, but still did so occasionally.

Def. 191

Def. 190

While the matter of approving the Mayhugh allotments was pending in Washington, Mayhugh told Lt. Plummer, then the acting Indian Agent at Fort Defiance, that he considered it a mistake to allot lands to the Hopis in severalty. On April 10, 1894, Lt. Plummer advised the Commissioner of this conversation and added his own view that if the allotments were confirmed "confusion and trouble will ensue." The difficulty was that the Hopis preferred to hold their lands in common rather than in severalty, and that it is necessary to shift the planting grounds almost yearly. Enclosed with Lt. Plummer's report was a letter by Thomas V. Keam and a petition signed by 123 chiefs and headmen of the Hopi Indian Tribe asking that they be permitted to hold their lands in common according to their accustomed system. They wanted "neither measuring nor individual papers. . . ." In another enclosed petition, signed by Brigadier General McCook and his officers, similar views were expressed.

Plf. 139
Def. 197

Plf. 139

Def. 196

Plf. 141

On May 30, 1894, Lt. Plummer gave written notice "(t)o whom it may concern," that the spring known as "Comah" Spring, "where the old (Navajo) Indian Chief Comah lived," is situated within the 1882 reservation, and all persons were

Def. Ex. 562

> ". . . warned against trespassing on this land or attempting to deprive Indians of the use of the water or of the land thereabouts."

This notice was apparently understood by the Navajos living in that neighborhood as an official designation of this particular area for the exclusive use of Navajos.

Def. 196-197

Acting Indian Agent Plummer, in his annual report of August 17, 1894, renewed the recommendation that, for reasons already cited, the Hopi allotments be not approved. Plummer

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reported that there had been a drop in Hopi school attendance at the Keams Canyon boarding school, but that day schools at Oraibi and at the first mesa were being successfully operated. About fifteen Navajo children were being permitted to attend the Keams Canyon school, this being the first recorded instance in which Navajos on the 1882 reservation were given such Government help. Def. 196

Plummer reported that the project to get Hopis down off of the mesas was not as successful as desired and that many of the houses which they had built in the valleys were unoccupied the greater part of the year. Apparently on the basis of the adverse recommendations which had been received, the Mayhugh allotments were not approved and the first allotment project thus came to an unsuccessful end in 1894. Plf. Prop. F.F. p. 37

After discontinuance of the first Hopi allotment project at the end of 1894, nearly five years went by before further events of significance concerning the Hopi-Navajo controversy occurred. On July 18, 1899, Charles E. Burton, the newly-appointed superintendent of schools at Keams Canyon, wrote to the Commissioner complaining of Navajo encroachments and thievery.

He stated that the Navajos had taken possession of the best springs and valleys, forcing the Hopis to drive their stock long distances to less desirable grass and water. Hopi cattle engaged in these treks occasionally damaged or destroyed Navajo crops, and the Navajos retaliated by killing or stealing strays. Def. 198

Burton stated that he saw no reason why "this trespassing by these Navajos should continue any longer," and recommended that immediate steps be taken "to return the Navajos to their reservation." Burton also complained of the distance between the Hopi village and the agency at Fort Defiance.

When Burton's letter reached the Office of Indian Affairs a notation was added suggesting that the letter be held until Burton became better acquainted with conditions, "as the Navajoes have always trespassed upon the Moqui resn. . . ." Later in 1899, a Hopi Agency was reëstablished at Keams Canyon with Burton as Acting Agent. Def. 199 Plf. Prop. F.F. p. 38

In 1900, average attendance at the Keams Canyon boarding school was 123, representing an increase of more than fifty percent over the preceding year. In addition, three Hopi day schools were operated, with a combined average attendance of Def. 206 Def. 201 Def. 209

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Def. 204
Def. 209

166. A boarding school for Navajo children, with an average attendance of thirty-five, was operated at Blue Canyon, which is in the northwest part of the 1882 reservation, but near the westerly boundary line.

Def. 204

Burton, the school superintendent and Acting Indian Agent at Keams Canyon, in his annual report of September 1, 1900, again reported that the Navajos had been allowed to encroach upon "the Hopi Reservation" for years, taking possession of the best watering places, best farming and best pasture land.

Def. 205

A census completed in June, 1900, showed that there were then 1,832 Hopis and 1,826 Navajos on the 1882 reservation.

Def. 207

In an effort to minimize Navajo encroachments in the 1882 reservation area, Burton recommended that the two traders then doing business on that reservation be restricted in their trade to Hopis only. The Commissioner replied, under date of September 22, 1900, that it was not practical or fair to the traders to ask them to keep the "trespassing" Navajos out by refusing to trade with them, "just because of tribal differences in the buyers. . . ."

Def. 207

The Commissioner also expressed the view, however, that he very much wished "that some means could be devised to protect the Hopi Indians from the oppression of the neighboring Navahos." On October 5, 1900, Burton responded to this communication in very vigorous terms, asking: "What right do these trespassing Navahos have on the Hopi reservation that they may be allowed to intimidate the Hopis so that they will go nowhere to trade?"

Def. 208

At the same time Burton advanced the alternative recommendation that an order be issued requiring every Navajo on the 1882 reservation who wished to trade at the Indian Posts to register, as an evidence of good faith in their conduct towards the Hopis. Two and a half months later Burton received his reply from the then Commissioner, W. A. Jensen. Burton was advised that it was not practicable to adopt his recommendations,

Plf. 152

but that it was hoped that the licensing of two more stores would "do much to remedy matters."

A year and a half later, on July 22, 1902, Milton J. Needham, Superintendent of the Western Navajo School at Blue Canyon, submitted an annual report concerning the operation of this

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Navajo industrial school. As before noted, Blue Canyon is located in the northwest part of the 1882 reservation.

Needham stated in his report that the "Western Navaho Reservation" is made up of the western part "of the Navaho Reservation (Executive Order of 1884) *and a small portion off of the northwest corner of the Moqui Reservation* and the lands embraced in the extension by Executive Order of January 8, 1900, and also Executive Order of November, 1901." (Emphasis supplied.) Def. 212

Another five years were to pass before there were further events of significance. On September 13, 1907, C. F. Larrabee, the then acting Commissioner wrote to the Secretary of the Interior, urging that a new Hopi allotment project be undertaken pursuant to the Act of March 1, 1907, 34 Stat. 1015, 1018. Def. 215

The 1907 Act authorized the Secretary to allot lands in severalty "to the Indians of the Moqui Reservation in Arizona," subject to the provisions of the Allotment Act of February 8, 1887, 24 Stat. 388. On September 16, 1907, the Secretary authorized the undertaking and referred the matter to the Commissioner of the General Land Office, to make the necessary subdivisional survey. Plf. 156

On January 23, 1908, the President appointed Matthew W. Murphy Special Allotting Agent to make allotments to the Hopis. The Commissioner instructed Murphy that he should first allot the Hopis on lands which they were then occupying or that were not in the possession of the Navajos. But the Commissioner added: "However, if there is not sufficient land for the Moquis, it is the intention of the Office to remove the Navajos from the Moqui Reservation." Referring to these last quoted instructions, Murphy wrote to the Commissioner, on July 10, 1908, that it would be necessary to remove certain Navajos from the vicinity of the Moqui villages, if not from the Moqui reservation. Plf. 156 Plf. 158

Murphy added: "I find practically all the springs in the possession of Navajos, and I find Navajos living within three miles of some of the Moqui villages." Murphy requested authority to remove the Navajos himself, or that a special agent be sent to effect their removal before the allotments were made.

The then Commissioner, F. E. Leupp, replied under date of August 26, 1908, stating that before the matter of the removal of Navajos was finally determined, some plan should be evolved "which will effect their removal with the least possible friction." Plf. 160 Def. 222

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Murphy was requested to submit suggestions as to how this might be done. Before receiving the Commissioner's letter, Murphy wrote again under date of August 17, 1908. He stated that in making allotments to the Indians in six Hopi villages, it would be necessary to remove only two or three Navajo families, although there was Navajo grazing which would presumably have to be stopped.

Def. 218-219

On September 5, 1908, Murphy replied to the Commissioner's request for suggestions. It was his idea that the Navajos be permitted to select allotments among the Hopis if this was agreeable to both tribes, otherwise that Navajos make their selections "outside of the lands to be allotted to Hopis." If the Navajos would not agree to either of these courses, Murphy recommended that they "be forcibly returned to the locality from which they came."

On February 25, 1909, the then acting Commissioner, R. G. Valentine, gave Murphy new instructions. The most significant of these was that an allotment "should be made to each Indian on the reservation entitled, irrespective of the fact of whether such Indian is a Moqui or a Navajo."

Def. 222

In explanation of this instruction, the Commissioner referred to the Executive Order of December 16, 1882, quoting the critical language, and the Act of March 1, 1907, 34 Stat. 1021, and stated:

Def. 223

Def. 223

> ". . . There is ample authority, therefore, for making allotments in the areas recommended by you and as specified herein. There is ample authority, also, for making allotments in the Moqui reservation to such Navajo Indians as may be located therein and who intend to remain in the reservation. If the Navajos decline to accept allotments in the Moqui reservation of the areas specified herein they can be removed from the reservation, but, in the interests of all persons concerned the Office trusts that they will agree to accept allotments there."

In clarification of this instruction given on November 29, 1910, Murphy was advised that: (1) any Navajos who met the conditions imposed by those instructions would be entitled to allotments, whether or not they were in contact with the Hopis, and (2) each Navajo must be required to choose whether to take his allotment from the Hopi or Navajo reservation, and may not take part from one reservation and part from the other.

Plf. 171

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Approximately three hundred Navajos residing on the 1882 reservation indicated a willingness to accept allotments, and received allotments subject to approval. Plf. 197

It was also in 1910 that the same difficulties began to develop which brought the first allotment project to a halt, and some new allotment problems, related mainly to the friction between Hopis and Navajos began to appear. Plf. 166, 167-168, 173, 174 Def. 230

One of the allotment problems which developed in 1910 appears to have special significance. A party of about fifty Oraibi Hopis wished to take allotments some fifteen miles from their village, and establish another village. This would require the removal of three Navajo families at Little Burro Spring. S. M. Brosius, Agent of the Indian Rights Association, protested the displacement of these Navajo families. Plf. 167 Plf. 173 Plf. 168 Plf. 177

In a letter to the Commissioner, dated January 24, 1911, commenting on this protest, Hopi Superintendent A. L. Lawshe said, among other things: "As I understand the matter the two tribes now have substantially equal rights, which should be preserved."

Writing to Brosius after receiving Lawshe's report, C. F. Hauke, the Second Assistant Commissioner, stated that since the three Navajo families had occupied and used the lands in the vicinity of the spring in question for many years, "any rights they may have acquired thereby will be respected." The Second Assistant Commissioner then stated: "The Superintendent's [Lawshe's] report indicates that he appreciates the fact that the Navajos and Moquis have equal rights on the reservation and that he will endeavor to exercise justice and impartiality in dealing with the two tribes." Plf. 178 Def. 232

On January 6, 1911, Special Allotting Agent Murphy was directed to suspend further field operations pending a determination of whether the allotment work should be discontinued. On February 14, 1911, Superintendent Lawshe, writing to the Commissioner from Keams Canyon, recommended that the allotment program be abandoned. Def. 235

He gave four reasons, namely: (1) inadequate water supply, making it impracticable for Indians to live on allotments, (2) sandy soil drifts with the wind so that land which is possible of cultivation one year may be too arid the next year, (3) allotments are not needed to keep white settlers out because "no white man would ever undertake to settle on any of the land Def. 233-234

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available for allotment," (4) allotments are not suitable for a tribe such as the Hopis which live under a communal system, and if allotments in severalty were imposed, thrifty Indians would prosper and others would become poverty stricken and public charges.

Def. 235-236 Lawshe's recommendations were accepted and, on March 31, 1911, Murphy was directed to discontinue allotment work. No allotments under this second allotment program were approved.

6.

From the End of the Second Allotment Period, in 1911, to the Act of May 25, 1918

In his letter of February 14, 1911, recommending discontinuance of the second allotment project, Superintendent Lawshe had observed that the only valid argument which could be made in favor of allotments "is that it would put a stop to the gradual encroachment of the Navajos upon the Hopi people." In Lawshe's view, a better way to solve that problem "would be to divide the Reservation itself, setting apart a definite portion of the land for the Hopis alone, assigning the rest to the Navajos."

On March 25, 1911, Lawshe wrote to the Commissioner, calling attention to uncertainties as to the boundaries of the "Moqui Reservation." He stated that several delegations of Navajo Indians had lately visited him at the agency to make inquiries as to the location of the boundary.

Plf. 182

Responsive to this report the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office, under date of April 17, 1911, to request that before the surveyors leave the area because of the discontinuance of the allotment work, they survey and mark out the boundary lines of the "Moqui Reservation." Commissioner Valentine wrote that this work should be done "so as to be able to settle disputes between the Moqui Indians and the Navajo Indians as to the lands."

Plf. 184

Just as the continuance of the second Hopi allotment project brought to light perplexing problems, so did its discontinuance. On November 14, 1911, William E. Freeland, the Hopi school superintendent at Oraibi, wrote to Leo Crane, the then superintendent at Keams Canyon, calling attention to the fact that a number of Hopis of that village, upon the urging of Special

Plf. 186
Plf. 190

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Allotting Agent Murphy, had sought to reëstablish themselves below Burro Springs, about fifteen miles southwest of Oraibi. Def. Ex. 451A

Murphy had given them to understand that the new locations would be allotted to them, and their old lands which they had tilled for generations were given to other Indians. But when these Oraibis tried to build their new homes Navajos who were already there objected and threatened violence. Then the Government discontinued the allotment program and the Oraibis were not awarded the promised lands. On November 20, 1911, Crane wrote to the Commissioner for instructions. As one possible solution he recommended a "marked and definite division of the Moqui Reservation." Plf. 186 Plf. 192

Crane received no reply from the Washington office until February 10, 1912. In a letter bearing that date, Second Assistant Commissioner C. F. Hauke stated that the problem had been under consideration but that more information was needed. He requested that Crane, working with Freeland, submit additional data and detailed recommendations. Hauke told Crane that the Oraibi Hopis in question should be told that Washington "will do its utmost to see to it that they will be allowed to occupy and cultivate the lands assigned to them." Plf. 194-195

Crane was further advised, however, that the Indians should not be told anything "in regard to the proposal to divide the reservation." Hauke also wrote that, in considering this proposal, "due weight should be given to the fact that the reservation was created primarily for the Moqui (Hopi) Indians, though it was also provided that the Secretary of the Interior might in his discretion settle other Indians thereon." Plf. 194-195

In his annual report for 1912, Leo Crane, who had served as Superintendent of the Hopi schools and agency for one year, stated that the Hopi people were surrounded by Navajos, and that "these Navajos were permitted to remain on the reservation, having a right of occupancy when the reservation was created by Executive Order of December 16, 1882." This is the first instance in which any Government official expressed the view that Navajos living in the reservation area at the time the 1882 executive order was issued, thereby gained a right of occupancy. Def. 243

In his 1912 report Crane also noted that the cattle and sheep of such tribes, using common grazing lands, were constantly damaging the cultivated fields of the other tribe. Complaints

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resulted which Crane found most perplexing to solve. He therefore renewed a recommendation which he had previously made, and which Superintendent Lawshe before him had made, that the reservation be divided so that there would be a separation of the Indians' interests.

Def. 243

It was apparent that the old Parker-Keam circle boundary of thirty years earlier had long been disregarded. Crane might not even have been aware of this earlier attempt to divide the reservation. He stated, in connection with his renewed recommendation, that "no separation can be made to conserve to the Hopis sufficient grazing lands and water without the ejectment of Navajos from occupancy rights that have been assumed for years and in some measure recognized by the Department."

Pif. 196
Pif. 199

Nothing came of Crane's latest suggestion that the 1882 reservation be divided. Two years later work was undertaken by the Land Division, to develop additional springs for the Hopis. On May 26, 1914, H. F. Robinson, Superintendent of Irrigation for the Land Division, while engaged in this work, wrote a lengthy letter to the Commissioner of Indian Affairs concerning Navajo encroachments upon the Hopis.

He stated that with the development of wells and springs and the natural increase of their flocks, and because of the worn-out condition of the grazing near their mesas, the Hopis now desired to move out further with their livestock. But they found that the "thrifty and pushing Navajos have preempted their land and water and by gradual but continued encroachments has [sic] hemmed them in. . ."

Pif. 197, 198

In his letter Robinson stated that Navajos were occupying some three hundred choice allotment sites which had been granted to them on the reservation, but which had never been approved. Characterizing the Hopis as peaceful and submissive, Robinson reported that they were discouraged "and feel that they are being crowded to the wall. . . ." Robinson conceded that there were many things in connection with the administration of the affairs of these Indians which he was not acquainted with and that he had no practical remedy to offer.

As one possible solution, however, Robinson suggested that available land and springs to the south be acquired for the Navajos and that they be moved off of the 1882 reservation. The Chief of the Land Division, upon receiving a copy of Robinson's

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letter, wrote a memorandum in which he stated that "This same condition of affairs has been reported to the Office several times during previous years. . ." The Office of Indian Affairs transmitted a copy of Robinson's letter to Superintendent Crane at Keams Canyon, with directions to furnish a prompt report and recommendations. Plf. 199

In his report of June 22, 1914, submitted in response to these instructions, Crane wrote: ". . . The Executive Order of 1882 sets aside specific lands to be used as a reservation for the Hopi Indians *'and such other Indians'* as it may be found necessary to maintain thereon in the judgment of the Secretary of the Interior. Those Navajoes who resided on the reserve at that time, had a right of occupancy, and it is not understood that this right has diminished. . . . The Navajo has been permitted under law to remain thereon, and he must be commended for using and in a comparative sense growing rich on the part of it allowed him;. . . ." Def. 245, 246 Def. 247

Crane in effect stated that the Hopis were to blame for their present troubles, having originally had the same opportunity as the Navajos. Whereas the Navajos had an "industrious pushing nature," the Hopis, through indifference, timidity or superstition, persistently clung to the mesas. This had resulted in the denuding of nearby grazing lands and the Hopi now finds, said Crane, "that to procure good grass he must go onto those lands the Navajo has used for generations and protected by frequent movement of herds." Def. 246 Def. 247

According to Crane the Hopis then had practically all the water and no grazing, while the Navajo had sufficient grazing for his large herds in an almost waterless territory. Crane stated that for thirty years the Government "has lavished its help upon the Hopi and has done practically nothing for the Navajo on this reserve. . . ." He called attention to Lt. Plummer's letter of May 30, 1894, which he interpreted as recognizing that Navajo Chief "Comah" and his people were entitled to the area adjacent to Comah Spring, and stated that, in view of that letter, to drive the Navajos from that location "would mean war." Def. 248

Crane recommended against moving the Navajos from the reservation but suggested, instead, that the Government help them develop water "in the so-called 'Navajo sections' of the Moqui Indian Reservation." Crane expressed the view that the Hopis would probably not use the whole reservation if it was placed Def. 250 Def. 251

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Def. 270, 272 entirely at their disposal. As will later be seen, Crane subsequently changed his mind as to which tribe was to blame for the troubles on the reservation.

Once more a pressing problem, presented from the field, concerning which the Washington office sought and received detailed information, was permitted to go unsolved. Robinson's urgent letter of May 26, 1914, concerning Hopi grazing problems, regarding which Crane had made a detailed report on June 22, 1914, was apparently "pigeonholed."

Def. 253 A year later Crane, apparently now more sympathetic to the Hopis' grazing problem, complained of the failure to issue directions which would bring relief. He stated that the problem
Def. 254 was becoming "acute, as respects the depredations of the Navajo Indians upon Hopi herds, and general differences arising because of over-lapping grazing areas."

Crane suggested that the problem be met by regulating and fixing definitely the areas within the 1882 reservation to be used by the Hopis and Navajos. Crane reported that Navajos were
Def. 254 seriously impeding advancement of the Hopi people in the holding of the best grazing areas.

Def. 254 Crane also recommended that a delegation of Hopis be sent to Washington at Government expense to confer with the Office of Indian Affairs concerning their problems. Crane further suggested that if this was not deemed practicable, a council of Hopis and Navajos be called so that the problems can be discussed "and an equitable fixing of boundaries on the reservation made." Adhering to his understanding of the 1882 executive order, first
Def. 259 enunciated by him in 1912, Crane said: "Owing to the language of the Executive Order creating the reservation in 1882, it would seem there is no authority for the deportation of the Navajoes nor is there any location to which they might be deported."

On July 22, 1915, Assistant Commissioner E. B. Merritt replied to Crane, stating that his suggestion that a council of Hopi
Plf. 210 and Navajo Indians be called was considered advisable. Crane was instructed to submit detailed plans for such a project. For some undisclosed reason no council was called nor was any other solution of the Hopi grazing problem undertaken at that time.

On April 6, 1916, the then Congressman Carl Hayden, wrote to the then Commissioner, Cato Sells, telling of reports he had received concerning unsatisfactory conditions on the "Hopi"

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Reservation. It was his understanding "that the Navajoes are crowding in upon these inoffensive people and are depriving them of the use of considerable areas that are necessary for grazing their flocks." Congressman Hayden expressed the view that "it would be well to have a part of the present Moqui Reservation set aside for the exclusive use of the Hopi Indians."

He further suggested that a representative of the Office of Indian Affairs be sent "into Hopi country with directions to view this problem in all of its phases . . ." Commissioner Sells replied to Mr. Hayden that a "dependable man" would be sent to the reservation for the purpose of making a thorough investigation. Inspector H. S. Traylor was assigned to make this investigation and report. Traylor submitted his report on June 6, 1916. He stated that the Congressman's accusations concerning the Navajos' encroachment upon territory rightfully belonging to the Hopis were true. Calling attention to the arid nature of the area and the fact that springs and wells were sparse, Traylor said that: "To secure this water to supply his flocks and herds the bold Navajo has occupied the greater part of these washes and forced the Hopi back to the mesas upon which he has his villages."

Def. 255

Def. 214, 218

Def. 256

But Traylor placed much of the blame for Navajo encroachments upon territory "rightfully" belonging to the Hopis, upon the Hopis themselves. He characterized the Hopi as "the most pitiable and contemptible coward who now lives upon the face of the earth."

Def. 257

"Were he otherwise than the coward that he is," Traylor continued, "he would prefer to die fighting rather than to surrender the resources of his territory to an enemy." Traylor also reported that the Hopis of those days were weak in other respects. "(T)he Hopi in his love for company, associations, dances, religious rites, and immoral orgies, has preferred the mesa top with its barrenness and lack of sustenance to the watered and grassy valleys of the washes," Traylor stated.

Def. 257

According to Traylor the Navajos were bold, courageous, aggressive, shrewd and keen, good business men, and uncomplaining when the fight went against them, while the Hopis were degenerate in mind and character, cowards, and unprogressive. "(O)ne cannot help sympathizing with the Navajo," Traylor said, but added, "While our sympathies are with the Navajo, it is easily ascertained and recognized that he has made an

Def. 258

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unjust encroachment upon the territory set aside for the Hopi . . ."

Def. 259 Traylor called attention to desirable grazing land lying to the west and south of the 1882 reservation, and suggested that some of the Navajos might be persuaded to move there. He expressed the view that the Hopis needed a territory which reaches from Keams Canyon to fifteen miles west of Oraibi and twenty miles north and south of First Mesa. This would give them a land approximately forty-five miles in length and forty in width, or about half the size of the entire reservation.

Def. 260 Traylor proposed that this area be set aside for the use of the Hopis for ten years. If, at the end of that period, they had not quit the mesa tops and built up their herds and flocks to an extent which would justify them in having that much land, Traylor thought that the Navajos should again be permitted "to occupy and forever keep it."

Def. 256 In his report of June 6, 1916, Traylor evidenced the same understanding as to the 1882 executive order that Supt. Leo Crane had manifested. He stated: ". . . the Executive Order setting aside this reservation states that it was done for the exclusive use of the Hopis and such other Indians as may be residing there. The Navajos were the occupants of at least a part of this territory before the Executive Order was made, and there is no doubt that they are entitled to a part at this time."

Def. 270 On August 11, 1916, Hopi Supt. Crane received instructions from the Commissioner's office in which reference was made to the Traylor report of two months earlier. Until some plan could be worked out whereby the Navajo-Hopi situation might be improved, Crane was told, he and his staff were to use every means at their command "to prevent further encroachment by the Navahos upon the area referred to by the Inspector, but without bloodshed or general disorder."

Plf. 221-222 Crane was also directed to encourage the Hopis to leave the mesa tops for other places on the reservation. These instructions did not constitute a disposition of Inspector Traylor's recommendations of June 6, 1916, as Crane pointed out in a letter to the Commissioner dated January 24, 1917.

Plf. 223 On March 3, 1917, Assistant Commissioner Merritt advised Crane that Inspector Traylor's report was still under consideration, but indicated that the "situation is one of great perplexity."

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Nothing further came of the Traylor report and recommendations.

When the Hopis, encouraged by the Government, began moving down off of the mesas, or at least extending their gardens, friction with Navajos was naturally increased. This was in addition to the friction caused by the extension of Hopi livestock operations. In some instances this caused established Navajo farmers to give way and move back.

Typical of this was the experience which Asdzaan Tsedeshkidni, a ninety-year-old Navajo woman, and her family had. They were living near Beautiful Mountain, she said, and developed a spring close by, "when we have heard the rumbles of the Hopi hoes," as the latter began developing little farms in the area. So she and her family moved across Dinnebito Wash. R. 754, 755 R. 756

In December, 1917, at a hearing before a subcommittee of the House Committee on Indian Affairs having under consideration the current Indian appropriation bill, Congressman Hayden called attention to the Hopi problem and asked whether the Indian Office had considered the advisability of giving the Hopis a definite area of land which they would not have to share with any other tribe. Mr. Hayden disputed Acting Commissioner Merritt's statement at the hearing that the area was set aside primarily for the Hopis, saying "the proclamation said 'for the Moqui and other Indians,' so the Navajo have a right under the law to go in there . . ." Def. 264 Def. 265

At this hearing, Mr. Hayden suggested that the matter be investigated, the tribes consulted in an effort to reach an agreement, and a division of lands be carried out by a new executive order. Assistant Commissioner Merritt stated that his office had "not considered seriously the question of excluding the Navajos from the area," but would now have the matter thoroughly investigated to see what could be done. On January 31, 1918, the Office of Indian Affairs asked Supt. Crane to make such an investigation and submit a full report. Def. 265 Def. 266

Crane's report was submitted on March 12, 1918. Early in the report Crane repeated the same view concerning the objectives of the 1882 order as he had expressed in 1912 and 1914. "The language of the executive order of 1882," he wrote, "practically guarantees to those Navajos or other Indians residing on Moqui at that time equal rights with the Hopi." Def. 266 Def. 268

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Since then, according to Crane, the Hopi population and livestock (except for cattle) had remained practically stationary, while the Navajo population had increased and the Navajo livestock holdings had increased fivefold. Part of the increase in the Navajo population had been due to influx from outside the reservation, according to Crane. Intermarriage between Hopis and Navajos had also occurred, he reported.

Crane stated that a few Navajos had documents issued by former Indian agents "to back their claims." The described circumstances, Crane said, "present the first great bar to any wholesale removal of the Navajo from the Moqui Indian Reservation."

Def. 269

It was Crane's view, expressed in this report, that the Hopis must be strictly ruled or in a decade they would be "back where they were in 1850." The Navajos, on the other hand, "are indifferent to regulations at best, and the younger generations defiant and undisciplined savages."

Stating that thirty years of agency effort had been devoted almost entirely to the Hopis, Crane said that the Navajos had been given only implements. "The Government since 1868 has neither sought to educate or rule them," Crane complained, and added, "I can find but few instances where any Indian Agent at Moqui has been supported in his troubles with the Navajo. The indifference during the past 11 years has been most marked."

Assuming that the whole reservation contained 3,800 square miles, Crane stated that the entire northern half, roughly two thousand square miles, was in Navajo hands. About three hundred square miles of this portion, located in the northwest corner, was under the western Navajo Agent, Crane reported, "and the Hopi would not use (could not) that section if presented with it."

Def. 270

Def. Ex. 439, p. 12

Fourteen years later, in his report of January 1, 1932, H. J. Hagerman confirmed this information concerning administration of the northwest corner of the 1882 reservation. He wrote: "That part of the area described in the 1882 order which is situated in the northwest part of the tract beyond the Dot Klish Canyon is now attached for administrative purposes to the Western Navajo jurisdiction."

Crane stated that, of the remaining 1700 square miles in the northern half of the reservation, about half is so mountainous that it cannot be grazed the year round. Therefore, according to Crane, the Navajos occupying the northern half of the reserva-

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tion "are reduced to about 900 square miles of debatable grazing during the winter," the whole area being available to them in late spring, summer and early autumn.

In the southern half of the reservation, Crane stated, the Hopis utilize about six hundred square miles. He added that this area, having been "used up and ruined by the Hopi because of years of restriction . . . is entirely too small for their immediate needs." As to the rest of the southern half of the reservation, about four hundred square miles was barren or worthless and the rest was occupied by Navajos, Crane stated. Therefore, according to his estimate, the Hopis were using and occupying six hundred square miles and the Navajos twenty-two hundred square miles, including the three hundred square miles in the northwest corner. The remainder was, according to Crane, unusable. Def. 270

Crane expressed the view that the Hopi had been disciplined and advanced and had prospered because he could be reached. The Navajo, on the other hand, "may encroach, rob, kill cattle, etc., and then has 3,200 square miles of most inhospitable country in which to hide away." Thus indicating a rather complete change of position as compared to the views expressed four years earlier, Crane also added that the Navajos "have never respected anything save one thing—the uniform of the United States Cavalry." Def. 272 Def. 273

Speaking with courage to his superiors, Crane stated: "In so far as the law-and-order situation on the Moqui Reservation concerns Navajos, this agency has had absolutely no support from the Indian Office. An official letter stating that 'It is a very perplexing question' is not support." Crane documented this section of his report with numerous references to field requests of the Washington office for support and action, some of which went unanswered, others receiving long-belated and equivocal replies, and none resulting in tangible assistance. Crane spoke of the law-and-order problem because, in his view "It is idle to consider the rearranging of a map if one can not compel the Navajo to respect the map. . . ." Def. 273-275

The solution which Crane seemed to favor was to set aside a block of 1,250,000 acres of the reservation for the exclusive use of the Hopis, as Traylor had recommended. If this were attempted the lines of such an area, Crane stated, should be marked by heavy concrete monuments, and a determined force of range men should exercise surveillance. To further ease the policing Def. 276

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problem, Crane suggested that a complete census of the Navajos be taken and all those who had "drifted in" since 1882, should be compelled to seek their former homes outside the 1882 reservation.

Plf. 250 Crane's comprehensive report was reviewed by personnel in the Washington office. One intra-office memorandum carried the suggestion that Crane be given a surveyor and crew and instructed to mark off a restricted area such as Traylor had recommended. But, again, nothing was done. On May 5, 1918, Crane reported at length concerning Navajo depredations and the need of effective enforcement.

Plf. 236

On May 25, 1918, 40 Stat. 570, 25 U.S.C. § 211, was enacted prohibiting the creation of any Indian reservation or the making of any additions to existing reservations in the States of New Mexico and Arizona, except by Act of Congress.

7.

From the Act of May 25, 1918, to the Act of March 3, 1927

Plf. 236 On August 23, 1918, Crane again reported at length concerning Navajo depredations and the need of effective enforcement. On September 10, 1918, H. F. Robinson, Supervising Engineer at Albuquerque, New Mexico, sent the Commissioner a similar report, stating that the "encroachments of the Navajo Indians on the lands occupied by the Hopi Indians on the Moqui Reservation in Arizona is becoming more acute. . ."

Plf. 244

Plf. 248 In commenting upon Robinson's report, the Chief of the Land Division correctly quoted the wording of the 1882 order and stated:

> "It will be contended that the Navajo Indians who were residing on the Moqui Reservation at the time of the executive order, had a right to remain thereon; and doubtless their numbers have increased by the normal method of increasing population."

Def. 278, 287 On May 18 and 19, 1920, hearings were held at Keams Canyon before a subcommittee of the House Committee on Indian Affairs. Robert E. L. Daniel, who was then the Hopi Superintendent, stated that five day-schools were then being maintained there for the Hopis only. Daniel stated that the only reason he could give

Plf. 252, 253

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for this difference of treatment was that the Navajos were nomadic and could not attend a day school.

Daniel was asked what rights the Hopis had to an enlarged acreage in the reservation. This colloquy then occurred:

"Mr. Daniel. The reservation was created by executive order for the Hopi Indians, and the usual jigger in all matters pertaining to Indian reservations slipped in in the form of 'such other Indians that might belong on the reservation.' Mr. Carter. That lets the Navajo in? Mr. Daniel. That lets the Navajo in. It happened at that time that there were practically as many Navajos on the reservation as Hopis." Def. 279

Daniel was then asked whether the Hopi-Navajo problem was "subject to regulation" by the department without legislation by Congress. He replied in the negative. Congressman Hayden confirmed this view, the following exchange taking place: Def. 279

"Mr. Hayden. No. Congress has recently passed an act to the effect that the President should no longer create or enlarge any Indian reservation without authority of Congress, so that the status of all reservations was thereby fixed, and to create a reservation out of part of another one would require a congressional act. Mr. Elston. When this small reservation, especially for the Hopis, was created and with the 'jigger,' the status of all Navajos within this reservation was fixed, had they a right to be there? Mr. Hayden. Yes." Def. 280

In his annual reports for 1920 and 1921, Superintendent Daniel stated:

1920: ". . . the Navajo population has encroached upon the Hopi Indians until they are confined to less than 600 square miles. The Navajo is aggressive, the Hopi is not: as a result of which the Hopi is gradually being deprived of his water, land and pasturage. Unless positive corrective measures are taken by the Government, the Hopi Indians will soon be a charge upon the Government or objects of charity for the public to consider." Plf. 260

1921: ". . . the Navajo encroachment upon the Hopi continues without any evidence of Government intervention. For years so much has been said on this subject without results,

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it seems a waste of time to repeat the same old information every year."

Plf. 254
Def. 290
Plf. 257
Plf. 254
Def. 290

No action was taken by the Washington office. By October, 1921, the 1882 reservation was said to be occupied by 2,236 Hopis and 2,700 Navajos. Government schooling was then being provided for 563 of the 648 Hopi children at five day schools on the reservation, and at non-reservation schools. Fifty of the six hundred Navajo children on the reservation were being given schooling, all of them off of the reservation. The Hopi boarding school at Keams Canyon had been discontinued, as unsafe, several years previously.

Plf. 260
Plf. 256

On October 15, 1921, General Hugh L. Scott, a member of the Board of Indian Commissioners, reported that the Navajos were then encroaching upon the Hopis as they were when he was in the area in 1911. "The Hopi looks in vain," he wrote, "to the Department for protection for although aware of this condition for many years the Government has continued to neglect its duty in providing a remedy."

Plf. 260
Def. 292

General Scott later called upon the then Indian Commissioner, Charles H. Burke, to discuss the matter. As a result, Burke, on November 28, 1921, directed Inspector L. A. Dorrington to visit the reservation and make a thorough investigation, followed by a report and recommendations. Dorrington's report was not to be forthcoming until January 7, 1925.

Def. 297
Def. 294

In his annual report for 1922, Hopi Superintendent Daniel suggested that a rectangular area within the reservation, comprised of twelve hundred square miles as compared to the six hundred square miles the Hopis were then occupying, be set aside for the exclusive use of the Hopis. Under this plan the remaining 2,663 square miles, as the Superintendent computed it, would be set aside and designated as Navajo territory.

Def. Prop. F.F. p. 34
Plf. 265

In the summer of 1924, the boarding school at Keams Canyon was reconstructed as a school for Navajo children. The Hopis immediately protested use of these facilities located on the 1882 reservation for Navajo purposes. On July 16, 1924, the then Hopi Superintendent, Edgar K. Miller, transmitted this protest to the Commissioner. In doing so, Miller indicated that antagonism still existed between the two tribes on the reservation and added: ". . . there must be something done that will set these tribes right as to the policy of the office in the matter."

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Upon receipt of the Hopi protest, the Commissioner requested the Inspection Division to advise him whether the Navajos were on the reservation by authority in any form of the Secretary or whether they had just located thereon and acquired their "rights" by sufferance. The Inspection Division, in turn, asked the Land Division to look into the matter "thoroughly" and submit a memorandum. Plf. 266

In the Land Division's answering memorandum, written on July 26, 1924, it was stated by Mr. Marschalk, Chief of that division: "It does not appear that the Navajoes have at any time been especially authorized by this Department to occupy and use any part of the Moqui Reservation, but they have simply been allowed to remain by sufferance, although as before stated, the order of 1882 would seem to include them, or at least those who were there at that time." Plf. 267

Thus, after correctly quoting the 1882 order in this memorandum, the Land Division reached the conclusion that the order was intended to confer immediate rights on Navajos occupying the reservation at that time.

Under date of September 29, 1924, Commissioner Charles H. Burke wrote to the Hopi leaders in answer to their protest against establishing a Navajo boarding school within the reservation, at Keams Canyon. The Commissioner first stated that the records of his office show that "from the earliest times there have been both Hopi and Navajo Indians in the territory known as the Hopi reservation." Then, after correctly quoting the pertinent part of the executive order of 1882, the Commissioner wrote: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there." Def. 290

Burke also stated, in his letter of September 29, 1924, that Hopi children were being adequately educated in five day schools on the reservation, and at non-reservation schools. He further stated that because Navajo parents "move about so much," day schools were not practicable for their children and that was why a boarding school was being established for them at Keams Canyon.

On January 7, 1925, A. L. Dorrington, who signed "Formerly Inspector," made the report which had been requested of him Def. 292 Plf. 260

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in November, 1921. At the outset he repeated the old story: ". . . the Navajo Indians do not recognize any boundaries and have persistently and continuously for fifty years or more crowded the Hopi Indians back and back, until they are now confined to comparatively small area immediately adjoining their mesas. . ."

Def. 292

Dorrington thought the Hopis might be somewhat to blame for their plight because they had not asserted their rights through diligent effort to use the land. While Navajo encroachments on the range had continued, Dorrington found that relations between members of the two tribes were otherwise friendly, with considerable visiting of Navajos in Hopi homes, and Navajo attendance at Hopi dances. Dorrington found that the Hopis continued to claim the whole 1882 reservation.

Def. 293

It was Dorrington's recommendation that a rectangular area within the reservation comprising twelve hundred square miles be set aside exclusively for the Hopis. The remaining 2,663 square miles of the reservation to be designated for the exclusive use and benefit of the Navajo Indians "rightfully belonging to the Moqui reservation." This was, as Dorrington pointed out, the same suggestion Hopi Superintendent Daniel had made in 1922.

Def. 293-294

Def. 294

Dorrington thought that the twelve hundred square miles should be set aside for the Hopis with the understanding that within a reasonable, specified, time they would, except for the aged, abandon their mesa villages and establish permanent homes in the valleys. Dorrington believed that in order to effectuate this plan it would be necessary to assist them with home building and new school arrangements.

He also stated that in order to insure unmolested Hopi occupancy of the restricted area which he proposed, "necessary action should be taken as will cause all Navajo Indians now encroaching upon the Hopis to return to the respective localities from which they drifted, viz: Moqui, Navajo and Western Navajo reservations and Public Domain." The twelve-hundred-square-mile area which Dorrington recommended would be entirely in the central part of the southern half of the 1882 reservation.

Def. 295

The Assistant Commissioner requested Hopi Superintendent Miller, who had been at the reservation about sixteen months, to submit his recommendations concerning the Dorrington report. These were forthcoming on February 27, 1925. In his opinion, Dorrington's report presented only the Hopi's side of the con-

Def. 296
Def. 299

Def. 297

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troversy and his proposed solution would cause more trouble and friction than had ever before been evident.

Miller proposed that the matter be carefully investigated by "outside" officials before any action was taken, and that the Navajo's "side" be as completely and thoroughly considered as the Hopi's side. Miller reported that during the last twenty years Navajos had been giving way to the Hopis on the reservation and that the Hopis had prospered and spread out during that period.

It was his opinion that establishment of lines suggested by Dorrington would mean confiscation of property "for a number of prominent Navajos who have been within the confines of the reservation as long as any Hopi." Miller minimized the amount of trouble then being experienced saying that a number of Hopis now live among Navajos "in peace and prosperity."

The Superintendent derided the notion that the Hopis would leave their mesa villages, except by force. He also thought any attempt to divide the reservation would be impracticable because it would necessarily dispossess many Hopi and Navajo homes. Miller was later to change his mind as to this.

The reference in Miller's report, to joint use of sheep dipping vats on the reservation indicates one more respect in which the Government was now assisting Navajos as well as Hopis, within the 1882 area. Def. 298

Miller's critical comments concerning the Daniel-Dorrington proposal apparently brought that suggested solution to a standstill. Nearly a year later, on February 3, 1926, Supt. Miller requested the Commissioner to send a party out to locate and definitely mark the boundary lines of the 1882 reservation. This request was rejected by Assistant Commissioner Merritt. Plf. 283 Plf. 284

On March 31, 1926, Senator Ralph H. Cameron wrote to the Commissioner stating that four Hopi chiefs had waited upon him in Arizona the previous summer. They had requested that either the President or Congress act to make the 1882 reservation "an entire Hopi reserve," and requiring Navajos residing therein to move "to their own reservation." Senator Cameron requested the Commissioner to write to him concerning the matter. Def. 302

Commissioner Burke replied on April 13, 1926. Incorrectly quoting the executive order he stated that the reservation had been set apart for the use and occupancy of the Hopis "and such

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other Indians as the Secretary of the Interior may designate." Burke continued: "There were undoubtedly some Navajo Indians living on this land before the reservation was set apart; others have gone there since and settled. Their rights must be carefully considered." Burke expressed the further view that while there were some difficulties between members of the tribes, "none of the trouble seems to be serious, and it is believed that any attempt to remove the Navajos would cause more trouble and friction than is the case at present."

Def. 303

By the Act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398d, changes in the boundaries of reservations created by executive order for the use and occupation of Indians were prohibited, except by Act of Congress.

Plf. Prop. F.F. p. 59

8.

From the Act of March 3, 1927, to the Second Hagerman Report, January 1, 1932

On November 19, 1927, two and a half years after he had reported that any division of the 1882 reservation would be impracticable, Supt. Miller changed his mind. In a letter of that date, addressed to the Commissioner, Miller stated that "the time is opportune to make some preparation for segregating the Navajos and Hopis." He stated that four years' study had convinced him that "the thing will have to be done."

Def. 304

The principal motivation for this change of position appears to have been the fact that the Hopis were "branching out," thus increasing friction between the two Indian peoples. Commissioner Burke replied on December 10, 1927, calling attention to the fact that Miller's new recommendation was contrary to that which Miller had made on February 27, 1925. Miller was called upon to submit a more detailed report.

Def. 305

Miller made this report on January 16, 1928. Miller erroneously denied that he had changed his views but then went on to explain the change of circumstances which now led him to recommend a division of the reservation. Among these, he said, was the fact that the Hopis had "spread out" since early 1925, causing increased friction with the Navajos.

Def. 306

Another new development, according to Miller, was the "strong and growing disposition among Navajos off this reservation to leave other parts of the country to take up residence on the

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reservation. . ." A third new factor was the increasing boldness of the Hopis in asserting their claim to the entire 1882 reservation. A fourth new circumstance was the Hopi displeasure at the opening of a Navajo boarding school at Keams Canyon. Def. 307

Miller mentioned, as a fifth new development, "the granting of part of the Hopi reservation to Western Navajo for administrative purposes." Miller also frankly stated that the Hopis thought he favored the Navajos "because I am trying to encourage the progress of *both* tribes." Here was another indication of a new official disposition to treat both tribes as having "equal rights."

Miller expressed the view that the best way to accomplish a segregation might possibly be by east-and-west lines through the reserve, giving the Hopis the middle section and the Navajos the north and south sections. Def. 308

He thought an exclusive Hopi agency should then be established for the middle section, with the northern section coming under the Western Navajo Agency and the southern section under the Leupp Navajo Agency.

Miller stated that he had tried to keep the agency at Keams Canyon "neutral and administer the affairs of both tribes in an impartial manner," but "unfortunately" his predecessors had regarded the Navajos as aggressors and had favored the Hopis. It was thus Miller's view that the agency at Keams Canyon had been given the duty of looking after Navajos within the reservation.

On April 13, 1928, Assistant Commissioner Merritt requested Chester E. Faris, District Superintendent at the Southern Pueblo Agency, Albuquerque, New Mexico, to make a careful investigation and a detailed report concerning the proposal for a division of the 1882 reservation. Faris submitted this report on May 12, 1928. He recommended against any division of the reservation as likely to aggravate rather than ameliorate conditions. Def. 309 Def. 321 Def. 310 Def. 310 Def. 318, 319

It was Faris' view that such a division would in any event be impracticable unless a stock-proof fence was built, or close-line riding at "prohibitive" cost was carried on. Faris favored Miller's current efforts to settle small groups of Hopis or Navajos on the so-called "neutral" zone of 150,000 acres of grazing lands, adjacent to suitable water supplies. This effort should be sup- Def. 318 Def. 319

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plemented, Faris urged, by range improvement, water development, reduction and elimination of unprofitable stock, and home building.

Def. 320, 321

The Washington office took nearly two years to decide what to do with Faris' 1928 report. Before making that decision, Commissioner Charles J. Rhoads and Assistant Commissioner J. Henry Scattergood visited the area. On March 14 and April 16, 1930, Commissioner Rhoads wrote concerning the matter to Faris, and to H. J. Hagerman, who occupied the position of Special Commissioner to Negotiate with Indians on the Status of Navajo Indian Reservation Land Acquisitions and Extensions.

Def. Ex. 439, p. 126

Plf. 302-303

Def. Ex. 439 title page, p. 121

He requested them, in cooperation with the superintendents of the Hopi-Leupp-Western Navajo Reservations, to make a study of the Hopi-Navajo controversy and to recommend what action should be taken in settlement of that controversy. The Commissioner also authorized A. G. Hutton, Agricultural Extension Agent, to make an independent investigation and report to Hagerman.

Def. 325

As a part of the investigation, Hagerman and Field Representative H. H. Fiske were authorized to call a conference of Hopis and Navajos. In an apparent further effort to mobilize all possible sources of information on the subject the Commissioner, on May 12, 1930, sent a telegram to Fiske, asking him also to report on the Hopi-Navajo controversy.

Plf. 294

On June 12, 1930, A. G. Hutton submitted to Hagerman and the Commissioner, the report which had been requested of him. He stated that there were then about 2,600 Hopis and 3,550 Navajos within the 1882 reservation. Hutton reported that the areas used by the two tribes were heavily overgrazed but that there was very little Navajo encroachment upon the Hopis. Quite to the contrary, Hutton wrote, the Hopis were moving into areas which the Navajos had occupied for several years.

Def. 324, 325

Def. 327, 330

Hutton recommended against a division of the reservation and also thought that the construction of drift fences was not the correct solution. He believed that it might help in silencing Hopi claims to the whole reservation if the name of the reservation were changed. Hutton also favored a program to improve the livestock being grazed on the reservation.

Def. 329

Def. 330

In Supt. Miller's annual report of June 30, 1930, he stated that he was still for segregation and believed "the time has

Def. 323

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arrived for serious consideration of the matter and final action. . ." He also wrote that the Hopis were getting "so unfair and troublesome and so antagonistic to our agency regulations" that they would have to be ruled by a firmer hand in a territory all their own, if possible.

About the same time that this report was submitted, Miller wrote to the Commissioner transmitting a petition signed by a number of Hopis, together with a sketch showing land claimed by them. These lands included not only the 1882 reservation but practically the entire Navajo Reservation and considerable of the public domain. Def. 332

This was the first of many instances to follow in which, during conferences, and in communications concerning this controversy, some of the Hopis claimed lands greatly in excess of the 1882 reservation area. These exaggerated claims are explained, as Dr. Harold S. Colton later told a Senate subcommittee, by a desire on the part of so-called "orthodox" Hopis to own or control the holy places and shrines where groups of Hopis had worshipped for centuries past. Plf. 299

These shrines are found from Navajo Mountain to the Little Colorado, and from the San Francisco Mountains to the Luckachukas. The Hopi village of Hotevilla, basing its position upon an ancient stone record in the possession of the village chief, apparently claimed the North American continent, from ocean to ocean. Def. 639 Def. 648

While these claims to an extended area were based on Hopi tradition, the fact that claims based on ancient rites were made was by no means unique with the Hopis. It was common for Indian tribes to claim, on such grounds, an area of land much larger than their reservations. As a matter of fact the boundary claimed by the Navajos at that time extended to the city of Albuquerque, New Mexico and included the Jicarilla Apache Reservation. Def. 579

Replying on July 17, 1930, to Miller's letter transmitting the Hopi petition, Commissioner Rhoads stated that their claims to lands "outside the boundaries of their present reservation" could not be favorably considered. After correctly quoting the 1882 executive order, the Commissioner further stated: ". . . it has always been considered that the Navajos have the right to use part of the reservation." Def. 332

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The report which had been requested of Fiske on May 12, 1930, was submitted on July 25 of that year. He reported that a census just completed showed 2,472 Hopis and 3,319 Navajos on the 1882 reservation. The efforts of the Government over a long period of time to induce the Hopis to move down from the mesa villages was resulting in some gradual but increasing success, he stated. But it also had made the Hopis, instead of the Navajos, the aggressors.

Def. 334

Def. 334-336

Fiske told of five specific instances in which Hopis had taken over, or had attempted to take over, localities which had been occupied by Navajos for years. The practice of Navajos as well as Hopis in using sheep dipping vats maintained by the Government, first mentioned by Miller in 1925, was also referred to by Fiske.

Def. 336

"Eighty years of temporizing," Fiske wrote, "have merely held the issue in abeyance." He did not believe it could be solved by assimilation, and that the only practical solution was to divide the reservation. Pointing to the uniqueness of the problem, Fiske stated that "there is no other instance within the United States where two tribes have been assigned with equal rights to a given territory."

Def. 333
Def. 339
Def. 333
Def. 338

While Fiske did not regard the Navajos as interlopers, he did not believe they had gained any "rights" by reason of the fact that they were residing on the reservation in 1882. Fiske wrote: "There is nothing in the wording of the Executive Order to indicate that time of residence had anything to do with the question; but that the Secretary of the Interior might introduce such Indians, of tribes other than the Hopis, as he might see fit to do from time to time."

Fiske thought that Miller's recommendations concerning the acreage to be awarded to the Hopis and Navajos, respectively, were about right. It was his view, however, that Miller's proposed boundaries would dispossess more Indians than necessary, particularly Navajos. He therefore submitted his own suggestion as to where the boundaries should be placed.

Def. 337

Def. 339

Plf. 297, 298
Def. 360
Def. Ex. 439 p. 126 et seq.
Def. Ex. 439 p. 127, 131

On November 6, 1930, at Flagstaff, Arizona, Hagerman and Faris held the authorized conference of Hopis and Navajos. Four Indian reservation superintendents were present to assist them and eleven Navajos and thirteen Hopis were in attendance. This

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was the first time that representatives of the two tribes had been called together to discuss the Hopi-Navajo controversy.

In opening the conference, Hagerman stated that there were then about 2,848 Hopis, of whom 2,472 lived within the 1882 reservation, and 376 lived at Moencopi, several miles west of the reservation. There were then about 43,000 Navajos, Hagerman said, of whom 3,319 lived on the 1882 reservation.

Def. Ex. 439 p. 127, 128

The Hopi delegates first stated that they were without authority to discuss the question of dividing the reservation. Later two of the Hopi delegates, Tom Pavatea and Kotku expressed the tentative view that it might be best not to attempt a division of the area. Kotku also expressed the view that the 1882 reservation should be extended, although recognizing that it was not entirely a Hopi reservation. One Navajo delegate, Billy Pete, favored a division of the reservation in accordance with Fiske's proposed boundaries.

Def. Ex. 439 p. 134

On November 20, 1930, Hagerman and Faris submitted the report which had been requested of them in March and April of that year. They told of the Hopi-Navajo conference, stating that it was there made clear that a Hopi tribal agreement or consent to any specific area or areas which may be set aside for their exclusive use "will be quite out of the question."

Def. Ex. 439 p. 121 et seq.

Def. Ex. 439 p. 121

Hagerman and Faris expressed the view that unless some definite solution was determined upon by the Government, and then adopted and enforced, "the situation would constantly grow worse. . . ." One view they had attempted to explain at the conference, Hagerman and Faris stated, was that the Indians "can not to any great extent base their present respective territorial claims on much except present conditions."

Def. Ex. 439 p. 122

The two officials agreed with the views expressed by Fiske, Miller and Hutton in their independent reports made earlier that year that most of the current "trespassing" was by the Hopis rather than the Navajos. Recommending that a segregation be effectuated, these two officials described specific boundaries of the part which, in their view, should be set aside for the Hopis.

Def. Ex. 439 p. 122, 123

Two segregated Hopi tracts were described in the Hagerman-Faris report of November 20, 1930. One of these, containing about 438,000 acres, was located in the south central part of the

Def. Ex. 439 p. 122, 123
Map following p. 126

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Def. Ex. 439 p. 123

reservation. The other, containing about 23,000 acres, embraced the Hopi colony at Moencopi which was outside of the reservation.

In the opinion of Hagerman, the proposed 438,000-acre tract in the 1882 reservation would include "practically all, if not more than all, the land which has been within the memory of living man used by the Hopi Indians for grazing purposes in this vicinity." Hagerman and Faris stated that if the matter of segregation were accepted in principle, more accurate investigations of surveys in the field would be necessary before the boundary lines of the segregated area could be finally fixed.

Def. Ex. 439 p. 48

A letter dated February 7, 1931, written to Hagerman by Commissioner Rhoads, and countersigned by Ray Lyman Wilbur, Secretary of the Interior, indicates their agreement with the proposal to segregate the two tribes and with the boundaries recommended by Hagerman.

Def. Ex. 439 p. 48

In this letter it is stated that for years it had been the hope of the Department that the Hopi and Navajo Indians would become so friendly and cooperative as to enable them to live in the same country without any jurisdictional or other differences. However, "real amalgamation" had proved virtually impossible, Rhoads wrote, and it therefore appeared that separate districts should be designated for the use of each group "if at all practical."

Def. Ex. 439 p. 48
Def. Ex. 439 p. 48

In his letter of February 7, 1931, Commissioner Rhoads stated that funds were not immediately available to fence the proposed exclusive Hopi area. However, he directed Hagerman, assisted by others, to proceed to more definitely investigate the proposed lines.

Def. 361
Def. 362
Def. 362, 363
Plf. 302

In May, 1931, a subcommittee of the Senate Committee on Indian Affairs, held a hearing at Keams Canyon in connection with the subcommittee's general survey of Indian conditions throughout the United States. Hopi Superintendent Miller told the committee that the reservation should be divided between the Hopis and Navajos. The Navajo tribal delegates stated that they favored a division of the reservation, while the Hopi tribal delegates insisted that the 1882 reservation should be for the exclusive use of the Hopis and that all Navajos be moved out.

Plf. 302
Def. 364, 365

Otto Lomavitu, one of the Hopi delegates at this hearing, did, however, advance an alternative proposal. It was that the Com-

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missioner appoint a committee of three or four disinterested men to make a thorough survey of the reservation as to its Indian and livestock population, and its grazing, agricultural, water and other resources.

Lomavitu said this would be done "with the view of making this Hopi Reservation an exclusive Hopi Reservation." He also stated, however, that on the basis of the committee's findings the Commissioner could "make out a suggested boundary for the Hopi reservation."

This suggestion would be submitted to the two tribes for acceptance or rejection. If rejected by either side the matter would be submitted to Congress. In a letter dated December 30, 1931, addressed to Senator Lynn J. Frazier, Assistant Commissioner J. Henry Scattergood indicated that Lomavitu's proposal, summarized above, was being given consideration by the Office of Indian Affairs. Plf. 302-303

On January 1, 1932, H. J. Hagerman submitted to Commissioner Rhoads a comprehensive report concerning his activities as Special Commissioner to Negotiate with Indians on the Status of Navajo Indian Reservation Land Acquisitions and Extensions. He recommended specific outside boundaries for the Navajo Indian Reservation which would comprise 16,541,955 acres. Def. Ex. 439

The reservation so described would include the 3,414,528 acres contained in the original 1868 Treaty, 10,234,997 acres described in ten executive orders and amendments thereof, 179,110 acres described in three Acts of Congress, and 2,713,320 acres consisting of eight tracts then in the public domain. In addition, Hagerman recommended acquisition, by purchase, for the use of the Navajos, of three tracts, comprising 322,560 acres, located outside of the proposed Navajo reservation as defined in the report. This report was published as Senate Document No. 64, 72nd Congress, 1st Sess. Def. Ex. 439

Among the tracts which would be thus included, was the December 16, 1882 Executive Order area, which Hagerman listed as containing 2,499,558 acres. Explaining the inclusion of this area within the proposed over-all Navajo reservation, Hagerman stated that the Hopis "range out for some distance" from the mesa villages, "but occupy only a small portion of the whole so-called Hopi Reservation." He stated that "the whole area is considered and treated as a part of the Navajo Reservation." Def. Ex. 439 p. 4 Def. Ex. 439 p. 12

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Hagerman expressed the view that it would be necessary "to segregate certain reasonable areas for the exclusive use of the Hopis," this to be accomplished or confirmed by Congressional enactment. These views coincided with those which he had expressed in his November 30, 1930 report which had been approved by the Secretary and Commissioner.

Def. Ex. 439 p. 47, 48, 49

In fulfillment of the instructions he had received from the Commissioner, after submitting the earlier report, Hagerman specifically described the area which he believed should be set aside for the Hopis, "embracing approximately 500,000 acres." The boundaries thus proposed accorded exactly with those suggested in 1930, no change being deemed desirable. In Hagerman's view these lines "are fair and just to both the Hopis and Navajos."

Def. Ex. 439 p. 49

9.

From the Second Hagerman Report to the Adoption of the Hopi Constitution in 1936

Plf. 307

On April 25, 1932, Hagerman wrote to the Commissioner stating that a final satisfactory adjustment would be promoted if it were understood that the various Hopi shrines could be identified, surveyed, and set apart for the exclusive use of the Hopis. Answering this letter, Commissioner Rhoads expressed general agreement with the suggestion and stated that this could be done under the general supervisory authority vested in the Secretary without the necessity of legislation.

Plf. 307, 308

Plf. 299

Rhoads requested Hagerman to confer with Dr. Harold S. Colton concerning the location of these shrines. The Commissioner asked to be informed whether such shrines were exclusively Hopi and raised the question whether the Hopis would be reluctant to designate the location of these shrines.

Plf. 308

Under date of June 10, 1932, Dr. Colton wrote to Supt. Miller, giving general information as to the whereabouts of four "Kachina" and six "Eagle" shrines. Dr. Colton explained that the Kachina shrines were the same for all the mesas, but the Eagle shrines belonged to the clans of the different pueblos. The Eagle shrines are associated with the cliffs on which eagles build their nests where, for hundreds of years, the Hopis had gone to procure ceremonial eagle feathers. Colton suggested that if Eagle shrines were set apart for Hopis, this should include rights to the eagle nests on the cliffs.

Plf. 311, 312

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In the meantime, on February 8, 1932, the Department of the Interior submitted to Congress, for consideration, a proposed bill defining the exterior boundaries of the Navajo Indian Reservation. The area so described included the 1882 reservation, but there was added a proviso to the effect that so much of the area included within the over-all boundaries as fell within a tract then particularly described ". . . be, and the same is hereby set aside as the Hopi Indian Reservation and should be held for the exclusive use and occupancy of the Hopi Tribe." The area so set aside would be the same as that which Hagerman had recommended for the Hopis in his 1932 report.

Def. Ex. 439 p. 57

Def. Ex. 439 p. 61

Def. Ex. 439 p. 57

The proposed bill defining exterior boundaries of the Navajo Indian Reservation was apparently thereafter changed to eliminate the second proviso to section 1, in which lands therein, set apart for the exclusive use of the Hopis, were specifically described. Instead, the proviso was changed to read, ". . . the Secretary of the Interior is hereby authorized to determine and set apart from time to time for the exclusive use and benefit of the Hopi Indians, such areas within the Navajo boundary line above defined, as may in his judgment be needed for the use of said Indians."

Def. 386

Plf. 314

A conference of sixty-eight Hopis, meeting at Oraibi on August 6, 1932, did not find this acceptable and sent a written request to Commissioner Rhoads that he come to the Hopi country to discuss the matter. Commissioner Rhoads replied that it was not practicable for him to travel to the Hopi country at that time.

Def. 386

The Commissioner indicated that, if the proposed bill was enacted, the Secretary, after consultation with the Hopis, would then set aside an area for the exclusive use of the Hopis. He asked them to consider, as a suitable area to be set aside for this purpose, the lands within the boundaries which had been originally defined in the second proviso of section 1 of the proposed bill. This was put forward as a tentative suggestion only and the Hopis were invited to submit their views in writing.

Def. 387

Def. 387, 388

On September 5, 1932, Otto Lomavitu, President of the Hopi Council of Oraibi, responded to the suggestion that the Hopis express their views in writing concerning the way the Hopi-Navajo problem would be handled in the new form of the proposed bill. He stated that the proposal would be studied but he also inquired, ". . . in whom is the title to this reservation vested. . . ," Hopis or Navajos?

Def. 390

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Commissioner Rhoads on September 24, 1932, replied that the language of the 1882 executive order reading "and such other Indians as the Secretary of the Interior may see fit to settle thereon," was used:

Def. 392

> ". . . to take care of a large number of Navajo Indians who were then living within the Executive Order area, as reports on which the Executive Order withdrawal was based indicate that the purpose of the withdrawal was for the joint benefit of the Hopi and Navajo Indians living within the area."

In this letter Otto Lomavitu was also told of new revisions of the proposed bill which were being considered. In November, 1932 five meetings at various Hopi villages were thereafter held to discuss the matter. The Hopis in the three villages on the First Mesa (Walpi, Tewa and Sichumovi) were for allowing the land and agency situation to remain as it then existed.

Plf. 324

Plf. 325

Plf. 324

Those in the Hopi villages on the Second Mesa (Mishongnovi, Shipalovi and Chimopovi), and on the Third Mesa (Oraibi, Hotevilla and Bacabi), except the "conservative" group at Oraibi, were for a distinct Hopi reservation of much greater extent than proposed, and a separate Hopi agency. Two agency officials who reported on these meetings expressed the view that the demands of the Second and Third Mesa Hopis might be substantially reduced after further consideration.

Def. 394, 407

Before the latest version of the proposed bill to define the exterior boundaries of the Navajo Indian Reservation was introduced, and on December 7, 1932, a hearing concerning the problem was held before the Senate Committee on Indian Affairs. Some Hopis who favored a greatly enlarged Hopi area which would include about all of the Navajo reservation were present and presented their views.

Def. 400

Senator Hayden stated, as he had done on other occasions, that the 1882 reservation "was reserved for the benefit of both the Hopis and Navajos." Senator Hayden advocated the setting aside of a definite area for the exclusive use of the Hopis, if that could be done by a satisfactory adjustment between the tribes. If not, Senator Hayden suggested the establishment of separate grazing areas.

Def. 397

Def. 400

Def. 409

In a memorandum, dated December 20, 1932, and addressed to the Secretary of the Interior, Commissioner Rhoads stated that

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when the Executive Order of December 16, 1882 was issued, there were, in addition to the Hopis, "a considerable number of the Navajo Indians . . . living within the area withdrawn." "Hence," Rhoads stated, "the language used in the Executive Order was designated to take care of the rights of both groups of Indians in their joint use and occupancy of the lands." Rhoads further advised the Secretary that the 1882 reservation "is considered to be withdrawn for the joint use of both groups of Indians and not for the exclusive use of the Hopi or Navajos . . ."

By the end of 1932, the Indian Office, apparently bowing to Hopi opposition, agreed that the bill extending the exterior boundaries of the Navajo Reservation should contain a proviso that the legislation would not affect the existing status of the 1882 reservation. The new draft of the bill, thereafter prepared, eliminated all reference to a separate area for the Hopis and contained the new proviso referred to above. On January 31, 1933, the Hopis were advised of this change. Plf. 330 Plf. 331

On February 13, 1933, Otto Lomavitu wrote to Supt. Miller, asking two questions concerning the meaning of the December 16, 1882 Executive Order. Miller referred the matter to Commissioner Rhoads who replied on March 11, 1933. Rhoads stated that the new proviso added to the proposed bill saving the "existing status of the Moqui (Hopi) Indian Reservation," fully protected the rights of the Hopi Indians to the executive order area "and also those Navajo Indians who are already living therein." Def. 411 Def. 415

Concerning any royalty income which might later result from the development of natural resources on the reservation, Rhoads stated that "it would appear that such of the Navajos as are permanently residing on the reservation would probably be entitled to share with the Hopis in any income from future mineral production."

The proposed bill defining the exterior boundaries of the Navajo Indian Reservation, and containing the new proviso saving the status of the December 16, 1882 reservation, was introduced in the Senate on February 28, 1933, as S. 5696, 72nd Congress, 2nd Session. The bill made no progress in the 72nd Congress. On June 6, 1933, it was re-introduced as S. 1876, 73rd Congress, 1st Session, but again made no progress. Plf. 334 Plf. 338

A similar bill, with the same proviso, was introduced on January 23, 1934, as S. 2499, 73rd Congress, 2nd Session. The same Plf. 340

Plf. 311 form of bill was introduced in the House of Representatives on April 3, 1934, as H.R. 8927, 73rd Congress, 2nd Session.

Def. 418 While the 73rd Congress bills were pending, further studies were being carried on in the field concerning the exact description of boundaries of an exclusive Hopi area within the 1882 reservation. A report thereon, made by Joseph E. Howell, Jr., Range Examiner, was submitted on April 16, 1934, to Commissioner John Collier, who had replaced Commissioner C. J. Rhoads the previous year. He proposed extension of the Hopi area which would add 59,225 additional acres, bringing total Hopi acreage in the proposed segregated area to 528,407. This would still not include all Hopi fields, Howell stated.

Plf. 211
Def. 421
Def. 419

Plf. 312
Def. 423 On May 5, 1934, Harold L. Ickes, then Secretary of the Interior, wrote letters to the respective chairmen of the Senate and House Committees on Indian Affairs, recommending favorable consideration of S. 2499 and H.R. 8927. In each letter he stated:

> "It is of importance to observe that section 1. . . contains a provision safeguarding the rights of the Hopi Indians to their lands, which are centrally located within the present Navajo Reservation."

Def. 424
Plf. 343

Plf. 342, 344
Def. 423
Def. 427, 430
Plf. 349 The Senate and House bills were favorably reported by the respective committees, with amendments which, however, left undisturbed the proviso saving the 1882 reservation area from the effect of the bill. The bill was enacted in that form, being approved on June 14, 1934, as Chap. 521, 48 Stat. 960-62.

Thus, while the exterior boundaries of the over-all Navajo Indian Reservation, as newly defined, included the area described in the Executive Order of December 16, 1882, the Congress saved the status of that area by incorporating this clause in section 1 of the Act:

> "1. Nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882."

Def. 431 Four days later, on June 18, 1934, Congress enacted, as Chapter 576, 48 Stat. 984, the Indian Reorganization Act. Under section 6 of this Act, the Secretary of the Interior was directed to make rules and regulations for the operation and management of Indian forestry units, to restrict the number of livestock grazed on Indian

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range units, and to promulgate such other rules and regulations as might be necessary to protect the range from deterioration, prevent soil erosion, assure full utilization of the range, and like purposes.

Under section 16 of this Act, any Indian tribe or tribes, residing on the same reservation were given the right to organize for their common welfare, and to adopt an appropriate constitution and by-laws to become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case might be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he might prescribe.

It was provided in section 18 of this Act that the Act shall not apply to any reservation wherein a majority of the adult Indians voting at a special election duly called by the Secretary of the Interior, shall vote against its application.

Except for the reconstruction of the Keams Canyon facilities as a boarding school for Navajos, and the early Navajo boarding school at Blue Canyon, the first school for Navajos was built on the 1882 reservation at Pinyon in 1935. The Navajo school at Blue Canyon had been moved to Tuba City outside the reservation in about 1910 or 1920. R. 1137 Def. Ex. 594 p. 1

Some time during the first half of 1935, it was determined to consolidate in one general Navajo agency, the northern, eastern, southern and western jurisdictions of the Navajo reservation, and to also include therein the supervision of the Navajos on the 1882 reservation, and the Hopi jurisdiction. The then Acting Superintendent of the Hopi agency, A. G. Hutton, was advised by the Commissioner on July 6, 1935, however, that he would continue to be in charge of the Hopi jurisdiction "for the present." But Hutton was further advised that it was necessary that "all projects and programs of the Hopi jurisdiction be cleared through the General Superintendent of the Navajo area." Def. 432 Plf. 443 Def. 432

On November 6, 1935, the Commissioner, with the approval of the Secretary of the Interior, issued: "Regulations Affecting the Carrying Capacity and Management of the Navajo Range." By their terms these new regulations were expressly limited to the "Navajo Reservation," which, under the Navajo Reservation Act of June 14, 1934, expressly excluded the 1882 reservation. Def. 436-437

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Def. 436 These 1935 regulations provided a method of establishing land management districts with the assistance of the Navajo Tribal Council; fixing the maximum carrying capacity for livestock of each such district; conferring with the Navajo tribe or any suitable subdivision thereof, with the object of delegating responsibilities to the tribe or subdivision; establishing, with the advice and consent of the Navajo Tribal Council, methods of range management; and taking such other action as might be deemed necessary to bring about livestock reduction or to establish a land management plan "in order to protect the interests of the Navajo people."

It does not appear that similar regulations, or any regulations covering the same subject matter were promulgated at this time with regard to the 1882 reservation.

Plf. 347 Some time during the first part of 1936, boundaries for the land management districts, as contemplated by section 6 of the Indian Reorganization Act, were defined. They are referred to in a letter to Commissioner John Collier from Navajo General Superintendent E. R. Fryer, dated May 15, 1936. It is therein pointed out that several of the land management districts, as laid out, "cut through the Navajo and into the Hopi country . . ."

Plf. 347 In this letter Fryer stated that Hopi Superintendent Hutton was in agreement with him that "the entire Hopi and Navajo Reservations" should be considered "as one super land management district." Fryer accordingly requested authority for a consolidation of "Hopi and Navajo E C W personnel and funds," and for the placing of all personnel "on the Hopi" who were working on land with land management problems directly into the Navajo land management division. Fryer renewed this recommendation in a letter to the Commissioner dated May 22, 1936. These recommendations came to fruition in 1937, as will later be indicated.

Def. 445 One of the land management districts defined early in 1936 was No. 6, which was intended to include all lands used by the Hopis. The defined boundaries for district 6 were apparently about the same as those which had previously been recommended by Hagerman in 1932 and had been proposed for inclusion in the first draft of the Navajo Indian Reservation Act, as a proviso thereto. The boundaries of district 6 were so described in order to simplify the land use administration of that particular area where Hopis were concentrated, and not with the intention of creating a restricted Hopi reservation.

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At this time the Hopi Indians had no tradition of tribal organization. The tribe was composed of a number of self-governing villages which had not joined in common action for more than two hundred years. In recent years, however, a need had developed for a representative tribal body to handle matters outside the scope and competence of the traditional village authorities. Def. 447

The chiefs and leaders of the villages therefore decided to effectuate such an organization, utilizing the procedures provided by the Indian Reorganization Act of June 18, 1934, which was later amended by the Act of June 15, 1935, 49 Stat. 378.

On the day that the latter Act became law, the Hopi Indians of the 1882 reservation accepted the Indian Reorganization Act for application to the 1882 reservation by a vote of 519 to 299, the total votes cast being 818. Def. 446 Def. 449

The Hopi village chiefs and leaders, and a constitutional committee selected by the Hopis, assisted by a Field Representative from the Office of Indian Affairs, thereafter worked three months preparing a constitution and by-laws. Because the exact rights of the Hopis and Navajos upon the 1882 reservation were then undefined, the section in the proposed constitution on jurisdiction limits tribal authority to the Hopi villages and makes provision for negotiation by the tribal council with the proper officials for definition of the reservation. Def. 447

Writing to the Secretary of the Interior on September 16, 1936, Commissioner Collier stated that: "Authority to carry on such negotiation is one of the main motives of tribal organization." This jurisdictional provision, contained in Article I of the Hopi Constitution, reads as follows: Def. 446, 447

> "Article I—Jurisdiction. The authority of the Tribe under this Constitution shall cover the Hopi villages and such land as shall be determined by the Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe, and such lands as may be added thereto in future. The Hopi Tribal Council is hereby authorized to negotiate with the proper officials to reach such agreement, and to accept it by a majority vote." Plf. Ex. 214, p. 1

Several other provisions of the Hopi Constitution have special importance with regard to the Hopi-Navajo controversy. Article VI, section 1(c) embodies the provisions of section 16 of the Def. 853 Plf. Ex. 214

Indian Reorganization Act that organized tribes may prevent the disposition of their property without their consent. Article VII places in the Hopi Tribal Council supervision of farming and grazing upon the lands beyond the traditional clan and village holdings.

Def. 449 The proposed constitution and by-laws were submitted to the voters of the Hopi Tribe on October 24, 1936 for their ratification or rejection. The vote was 651 to 104 in favor of ratification. Plf. Ex. 214 pp. 9, 10 The Secretary of the Interior approved these instruments on December 19, 1936, and they became effective on that date.

10.

From the Adoption of the Hopi Constitution to the Appointment of the Rachford Commission, in November, 1939

Def. 466 As a result of suggestions made in late 1936 and early 1937, by E. R. Fryer, Superintendent of the Navajo Agency, Allan G. Def. 467 Harper was designated by Commissioner Collier to develop a plan of administrative interrelationships between the Hopi and Navajo administrative jurisdictions. On February 17, 1937, Harper submitted such a plan, to which was attached, in addition to Def. 475 his own signature, those of E. R. Fryer, Superintendent Navajo Service, A. G. Hutton, Superintendent Hopi Reservation, and William G. McGinnies, Director, Land Management Service, Navajo Service.

In a preliminary recital contained in the memorandum outlining this plan it was stated that the "theoretical" Hopi Reservation is "much larger than is needed by the Hopis, or, in fact, occupied by them." It was further stated that a large population of Navajos resided and ranged its livestock "within the so-called Hopi Reservation, and has done so for decades."

Def. 477 The plan outlined in this memorandum, which was approved Def. 470, 471 by the Commissioner on March 16, 1937, was intended to rest upon certain general principles, among which were the following: (1) All administrative matters which exclusively concerned either the Hopi or Navajo Indians as separate tribes were to be completely within the jurisdiction of their respective superintendents; (2) all administrative matters which affected the Hopi and Navajo Indians jointly were to be under the jurisdiction of the Hopi Superintendent as to district No. 6, and under the jurisdiction of the Navajo Superintendent as to other land manage-

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ment districts; (3) all activities conducted in both jurisdictions which were related to construction and engineering projects and land planning were to be unified and directed by the Land Planning Division of the Navajo Service; (4) all activities in district No. 6 concerned with land use administration were to be administered by the Hopi Superintendent.

Among other things it was proposed in this memorandum that the Navajo reservation and the 1882 reservation be administered, insofar as land use was concerned, as one homogenous unit, divided into land management districts. In laying out individual land management districts within the combined reservations, six (Nos. 1, 2, 3, 4, 5 and 7) were so located that they extended partly within and partly without the 1882 reservation. As before noted, one additional district (No. 6) was entirely within the 1882 reservation and embraced the Hopi villages and adjacent lands.

Def. 470

Def. 444

Plf. Ex. 291

In connection with the proposed division of administrative functions within the 1882 reservation between Hopis and Navajos, the memorandum carries this statement:

> ". . . This arrangement will be tentative until the definite boundary of the Hopi-Navajo reservation shall have been determined. This arrangement is established as a matter of administrative expediency and convenience and shall not be construed in any way as fixing an official boundary between the two tribes, or as prejudging in any way the boundary which is ultimately established."

Def. 470

About the same time that Fryer suggested that a plan of administrative interrelationships be developed, he also proposed that the Hopi boundary matter be reopened. The Commissioner requested Fryer to recommend someone to handle this assignment. On March 22, 1937, Fryer replied, stating that the administrative relationships problem had been worked out so satisfactorily that it now seemed unwise to reopen the boundary matter at that time. Fryer wrote:

Def. 465

Def. 478

> ". . . If we preserve the grazing rights of the Hopis within District 6, and recognize the complete administrative control of the Hopi Superintendent over this particular area, then there will, in a short time, come a recognition from both the Navajo and Hopi Indians that District 6 is reserved specifically for Hopi use. After this has become fixed in the minds

of both tribes then the determination of a definite boundary will be much simpler than if we were to tackle it now."

Comprehensive grazing regulations for the Navajo and Hopi reservations were approved June 2, 1937, effective as of July 1, 1937. It was recited in the preamble to the regulations that this was being done pursuant to the authority conferred by several cited Acts of Congress, the general grazing regulations of 1935,

> ". . . and that of the Grazing Committee of the Navajo Tribal Council acting in accordance with a resolution of the Navajo Tribal Council dated November 24, 1935. . ."

It was not recited in the memorandum that the Hopi Tribal Council had acted in the matter. However, the regulations provided that,

Def. 480

> ". . . only such part of these regulations shall be enforced on the Hopi Reservation as are not in conflict with provisions of the constitution, by-laws and charter of the Hopi Tribe heretofore or hereafter ratified or any tribal action authorized thereunder: . . ."

Under these regulations the Commissioner of Indian Affairs was given the duty of establishing land management districts based upon the social and economic requirements of the Indians and the necessity of rehabilitating the grazing lands. The Commissioner was required to promulgate for each district the carrying capacity for livestock, stated in terms of sheep units yearlong, in the ratio of, mules and horses one to five, cattle one to four, and goats one to one.

Def. 481

The superintendents were required to keep accurate records of ownership of all livestock and issue permits for such stock and the issue of such animals; reduce the livestock in each district to the carrying capacity of the range; require the dipping of livestock, and restrict the movement or prevent the introduction of livestock where necessary; regulate the fencing of range and agricultural land; and regulate the construction of dwellings, corrals and other structures within one quarter mile of Government-developed springs or wells.

Def. 482

Def. 483, 484

In these regulations the term "Hopi Reservation," was defined as follows:

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"For the purpose of these regulations District 6, as now established by the Navajo Service, shall constitute the Hopi Reservation until such time as the boundaries are definitely determined in accordance with Article I of the Constitution and By-laws of the Hopi Tribe."

On June 28, 1937, Hopi Superintendent Hutton, writing to Navajo General Superintendent Fryer, called attention to several instances in which Navajo Service personnel had sanctioned Navajo encroachments on long-held Hopi grazing and agricultural lands outside district 6. Fryer replied that district 6 should not be recognized by anyone in the Navajo Service as being a reservation since it was merely an area which defined land use as between Navajos and Hopis. Def. 487 Def. 490

At Fryer's suggestion a conference was held on August 12, 1937, at which the exact meaning of the boundaries of district 6 was discussed. This resulted in a memorandum, dated August 25, 1937, prepared by Fryer, in which he stated that district 6 was not a reservation for the Hopi Indians, and Hopis living outside that district were not required to move within the lines of that district. Fryer stated that while it was attempted to include all Hopi range use with district 6, this was impossible in several instances and that there were still Hopis living, grazing and farming outside that district. Def. 493

According to Fryer, Hopis living in districts 3, 4, 5 and 7 had range rights equal to the Navajos in those districts, and that Navajos living in district 6 had the same rights and privileges as the Hopis. On January 27, 1938, however, Fryer wrote Hutton that ". . . we do not believe that Navajos in district 6 should feel that they have rights in that district equal to the Hopis." Def. 529

On October 5, 1937, the Hopi Tribal Council held a special meeting to discuss the operation of the land management districts. In a letter of that date, addressed to the Commissioner, the dissatisfaction of the Hopis with this operation was explained. Pointing out that these districts were created without the approval of the Hopi Tribal Council, the Hopi Council expressed the view that the plan gives control of the greater part of the 1882 reservation to the Navajos. Def. 500

This Navajo control, it was contended, resulted in more Navajos settling on the 1882 reservation, "which will make a satis-

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factory settlement of the land question more difficult than ever." The Hopi Council also asserted that district 6, as set up, "does not include nearly all of the area that has been occupied by the Hopi Indians for a good many years."

The Hopi Council stated in this letter:

> ". . . definite boundary lines be set up, giving the Hopi sufficient area on which they can carry on livestock and farming operations so that all the people may be able to make a living, and until such time it is requested that your Office leave the entire Hopi Reservation under the supervision of our Hopi Superintendent."

The Commissioner sent a copy of this letter to Navajo Superintendent Fryer, soliciting his comments. The latter objected to the Hopi Council's suggestion stating that it would "break up the entire land-management scheme."

Def. 555

On December 28, 1937, the Commissioner signed and promulgated a map defining land-management districts established within the Navajo and Hopi reservations, and setting down the carrying capacity for livestock in each of the districts. In advising Superintendent Fryer of this action, the Commissioner stated:

Pif. 372

> "It is understood, also, and it should be clearly explained to the Navajo and the Hopi counsels [sic], that the delineation of District 6 is not a delineation of a boundary for the Hopi Tribe, but is exclusively a delineation of a land-management unit."

Def. 530, 531

On January 28, 1938, Fryer wrote to Hutton suggesting that he ask the Hopi Tribal Council to send a petition to the Commissioner requesting the appointment of a commission "to establish a reservation for the Hopis." Referring to the conference which had been held in August, 1937, Fryer stated that it was there "understood" that no Hopis would move out of district 6 who had not previously lived outside, and that no new Navajo families would move into district 6.

Pif. 377

On March 1, 1938, the Hopi Tribal Council adopted a resolution requesting that, beginning July 1, 1938, all funds appropriated "for the Hopi Tribe and Reservation" be allocated to the Hopi Superintendent for expenditure for the benefit of Hopis, as it was before the Navajo Service Agreement of March 5, 1937.

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The resolution lists several reasons why, in practice, the agreement of March 5, 1937, was unsatisfactory to the Hopis.

Upon the request of the Hopi Tribal Council, Commissioner Collier and six of his staff officials met with the Hopis at Oraibi, Arizona on July 14, 1938. Fifteen Hopi Tribal Council members and four chiefs attended this meeting. The Commissioner talked at length, expressing the view that Seth Wilson, who had been appointed Hopi Superintendent in place of Hutton, would assist the Hopis towards accomplishing what the Hopis wanted.

Def. 566
Def. 571
Plf. 379
Def. 572, 575

The Commissioner announced a new administrative policy under which the Hopi Superintendent would be in immediate administrative charge in district 6. all projects of land development, water development and other projects within that district would be presented to the Hopi Tribal Council for final approval. The only contact with the Navajo Service would be in making use of its technical and supervisory personnel and machinery.

Def. 576
Def. 577, 578

Collier also announced that the Keams Canyon School and plant which was located in district 6, would be returned to the jurisdiction of the Hopi Superintendent. He did not indicate whether that school would then become a Hopi school, but it later developed that the school was available to both Navajos and Hopis.

Def. 576
Plf. Ex. 291
Def. 687, 688

According to the Commissioner, nothing with regard to the administration of district 6 or the other land management districts "pre-determines or settles anything with regard to the ultimate Hopi Tribal boundary."

A Hopi delegate questioned why it was necessary for a Hopi to obtain a permit in order to establish a home outside district 6. Commissioner Collier replied that the requirement for permits was a part of the grazing regulations and "has nothing to do with the reservation boundary." The Commissioner stated that if a Hopi was already established outside of district 6,

Def. 596

> ". . . he stays there and it will be the duty of the Hopi Council and the Superintendent to look after him. Where disagreement arises between him and a Navajo the matter will be referred to the Hopi Superintendent."

Def. 597

Navajos already established inside of district 6 would also have a right to stay there, Collier asserted. The Commissioner suggested that the Hopis and Navajo Tribal Councils select committees to negotiate with each other upon the boundary matter.

Def. 578, 593, 595

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Def. 599, 602
Def. 590
Def. 599

None of the Hopi delegates agreed. Some reasserted the ancient Hopi claims to an extended area and one suggestd that the boundaries of district 6 be made to conform to the boundaries of the 1882 reservation. One Hopi delegate stated in effect that there was nothing to negotiate with the Navajos, and no Hopi negotiating committee would be appointed.

Def. 603, 578

Noting this failure to accept the suggestion that the boundary matter be negotiated, the Commissioner stated that an agency official would be sent out to get the views of the Hopi chiefs, intimating that the Secretary of the Interior would have to make the final decision. Commissioner Collier suggested Dr. Gordon Macgregor as the official to undertake the initial assignment.

Def. 571, 605, 609

Def. 613

On August 1, 1938, the Superintendent of the Hopi Agency and the Superintendent of the Navajo Service entered into a memorandum of understanding, giving effect to the new administrative arrangement which the Commissioner had announced at the Oraibi meeting. In September of that year, Navajo General Superintendent Fryer requested authority to make minor boundary changes in the land management districts to adjust for instances where the present boundaries arbitrarily divided the customary range of an individual or small group. This request was denied, the Superintendent being requested to submit recommended boundary changes to the Washington office for consideration.

Def. 625
Def. 336

Def. 626, 632-633, 644
Def. 644
R. 354, 644, 632

In the meantime studies were in progress concerning the number of Navajos residing within district 6 as it then existed, and the number living within a proposed extension of that district. The study which was made by Gordon Page and Conrad Quoshena of the Department's Soil Conservation Service, also dealt with the number and location of Hopis residing outside that district. A meeting of field officials, including Superintendents Fryer and Wilson, was then held at the Navajo Service office at Window Rock, Arizona, on October 31, 1938, to have a preliminary discussion of the Navajo-Hopi boundary problem.

Def. 644

No completely satisfactory basis on which recommendations could be made for a definite boundary line were arrived at in the discussion. It was agreed, however, that an intensive survey should be made of the area then occupied by Navajos and Hopis and that every effort be made to delineate the actual individual use of the respective claimants.

Def. 695

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Page and Quoshena were designated to make this survey with the assistance of range riders. The purpose of the survey was to provide for the consideration of the Commissioner and the Secretary of the Interior as great a fund of factual information as possible concerning the use and need in the area.

While Hopi residences, farms and grazing areas had always been located, for the most part, in the south central portion of the 1882 reservation, this was not true of Hopi wood-cutting activities. They were required to travel to parts of the 1882 reservation a considerable distance from their villages in order to obtain the wood which they needed. On December 16, 1922, the Hopi and Navajo agencies entered into a cooperative agreement governing the cutting and gathering of dead firewood, as well as the cutting of live timber anywhere in the 1882 reservation. Def. Prop. F.F. 295-296

On December 20, 1932, when Commissioner Rhoads had recommended that a "proportionate" area within the 1882 reservation be designated for the exclusive use of the Hopis, he also suggested that "a fire wood reserve . . . be set aside for the Hopis." Def. 409

In August, 1933, Commissioner Collier had rejected a request that the Hopis be permitted to cut timber for small building operations within the San Francisco Mountain area, stating that yellow pine as well as pinon and juniper was available in the Black Mesa country "which is much more accessible and will meet their needs. . . ." In Howell's report of April 16, 1934, proposing some extension of the Hopi's area of occupancy, he had pointed out that even the suggested extension of the area of woodland was insufficient and had been badly depleted. Plf. 339

He had also stated that "Some provision must be made for fuel wood, house timbers, and other miscellaneous wood products." In Navajo Superintendent Fryer's memorandum of August 25, 1937, he had stated that, Def. 420

> "Hopi Indians can go outside District 6 for wood. We shall, however, attempt to set aside an area somewhere adjoining District 6 for the exclusive use of the Hopi Indians."

At the Oraibi meeting held on July 14, 1938, Commissioner Collier had suggested that his proposed boundary negotiating committees Def. 579

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> ". . . prepare the description of . . . any timber and wood privileges that are needed by the Hopis, with a view of negotiating for any needed protection or privilege. . ."

No exclusive wood-cutting area for the use of the Hopis was set aside, and since no "negotiating" committees of the kind suggested by Commissioner Collier were ever appointed, there were no negotiations concerning Hopi wood-cutting privileges outside district 6. Instead, they were placed under the same permit system as the Navajos, when it was necessary for them to seek wood in district 4 to the north.

Def. 655

This led to misunderstandings and dissatisfaction on the part of both Hopis and Navajos, as indicated by official correspondence had in January, 1939. Despite this permit system, agency officials continued to assure the Hopis that they had timber "rights" in the 1882 reservation extending beyond district 6.

Def. 657

The branch of forestry of the Bureau of Indian Affairs later became responsible for timber management and for the issuance of timber-cutting permits outside of land management district 6. It operated under the direct supervision and control of the agency forester for the Navajo agency. In performing this function the forestry service has never made any distinction between the Navajo reservation and the 1882 reservation outside of land management district 6. Stumpage rate collections, less ten per cent deducted for an administrative fee payable to the Bureau of Indian Affairs, was uniformly paid to the Navajo tribe.

Def. Prop. F.F. 295

Def. Prop. F.F. 299

In a conference held in Washington, D.C., on April 24, 1939, Commissioner Collier, obviously referring to the entire 1882 reservation, told a committee of Hopi leaders that the Office of Indian Affairs would "protect your timber right . . . to give access to the forests. . ." The need of woodland resources in addition to those available on the 49,100 woodland acres available in district 6 was also indicated by the Gordon B. Page report of December, 1939.

Def. 675

Def. 753

Def. 671, 685

Def. 671

On April 24 and 25, 1939, four Hopi leaders met in Washington with the Commissioner and other agency officials, at which time the Hopis presented a map showing the "sacred area" that the Hopi people desired. The map showed an area much larger than the 1882 reservation, being bounded by Rainbow Bridge and

the Colorado River on the south and east, below Winslow, and almost to Gallup on the west and north.

The Commissioner made it clear that broad claims of this kind could never be recognized. Discussing the question of the division of the reservation into "use" areas, the Commissioner stated that: "Any agreement which is made of use-rights will not be a giving up of this claim." Def. 682

Adverting to the 1882 executive order, Commissioner Collier stated that the land was set aside for the Hopis "and other Indians resident there. . ." He then continued: Def. 683

> "The creation of district 6 was not a finding as to what area the Hopis should occupy. The Hopis were not consulted. The making of the true finding is in the future."

The Hopis were also told that neither the Indian Reorganization Act of June 14, 1934, nor the adoption of the Hopi constitution and by-laws, had any effect on the legal status of the 1882 executive order. Def. 685

In the summer of 1939, intensive efforts were undertaken to assemble information needed in establishing a final division of land use between the two tribes, and in defining a Hopi reservation of exclusive occupancy. A good deal of the field work was performed by the Soil Conservation Service, much of it in the form of a human dependency survey. Such matters as range use and the dependency on this resource, agricultural land potential and developed, sacred areas, population pressures and woodland requirements were investigated. Much of the basic information had, in fact, been collected over a period of the three or four previous years, but was now brought together by Gordon B. Page who had participated in the basic field studies. Def. 696 Def. 702

In November, 1939, C. E. Rachford, Associate Forester, U. S. Forest Service of the Department of the Interior, was designated to head a commission to conduct a further field investigation, study all available information, and make recommendations concerning the boundaries of district 6, and the boundaries of an exclusive Hopi reservation. Rachford's field studies actually got under way on December 4, 1939. Def. Prop. F.F. 92 Def. 708 Def. 702, 708, 710, 714, 715, 716, 717

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11.

From the Appointment of the Rachford Commission to the Centerwall Report of July 29, 1942

Def. 825, 720

On December 14, 1939, a conference was held at Winslow, Arizona, at which time Rachford, Fryer and Wilson agreed upon four points with regard to the re-examination of the boundaries. These were: (1) the "spiritual" claims of the Hopis would in a measure be satisfied by the compilation of their sacred areas and shrines with an agreement between the two tribes assuring the unmolested use of these areas; (2) the boundary line to be established would be a fixed one, to be fenced wherever topographic conditions made this necessary; (3) peripheral groups should return to their own territory within one year, but isolated Hopis and Navajos long resident in the "territory" of the other tribe should, with the consent of the affected tribe, remain where they were; and (4) in the zones of dispute the boundary line would be established on the basis of continued use to be considered as establishing the users' "title."

It was further agreed that, on the basis of these points, Rachford would recommend the boundary line. The conference then actually proceeded to apply the points agreed upon to the various areas on the periphery still in dispute, leaving it to Rachford to make final recommendations.

Def. 722-810

Def. 727

Gordon B. Page submitted his report covering district 6 in December, 1939. He reported that 2,619 Hopis and 160 Navajos were living within the boundaries of district 6 as it then existed. The Hopis lived, for the most part, in eleven villages.

There were four villages on the First Mesa: Polacca, Walpi, Tewa (or Hano), and Skitchumovi, with minor concentrations at Five Houses and Bluebird Canyon. There were three Second Mesa villages: Sipaulovi, Mishongnovi, and Chimopovi, with some people living at the foot of the mesa at Torevu. Four villages were located on the Third Mesa: Oraibi, Old Oraibi, Hotevilla, and Bocabi. The Navajo population within district 6 was located mostly at Keams Canyon, but a few lived along the southern and western boundaries of the unit.

Def. 728

Def. 727, 728

According to Page, almost all Hopi range use outside the then existing boundaries of district 6 was by cattle men, although there was some sheep grazing outside the district. One reason Hopi cattle ranged so far was that they ranged without super-

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vision and, to avoid damaging unfenced agricultural land, they were normally kept ten miles or more from the villages.

Page found that bands of Hopi sheep, or cattle and sheep, were crossing over the southwest, south and southeast lines of district 6 and into districts 5 and 7. Other Hopis permitted cattle to range west and northwest of district 6 into district 3, and beyond the 1882 boundary line on to the Moencopi plateau. A few Hopi bands were also found crossing the northern boundary of district 6 into district 4. Plf. Ex. 291

Page reported that agriculture exceeded all other sources of commercial and non-commercial income in district 6 and furnished forty-four per cent of the total. The percental amounts contributed by livestock, weaving, and the sale of miscellaneous items were small, amounting to twelve, one and three per cent respectively. There were 5,916 acres in cultivation in district 6, about three-fourths of which was planted to corn. Most of the remainder was in orchard (eight hundred acres), beans (530 acres), melons and squash (160 acres), and vegetables (eleven acres). Def. 729 Def. 732 Def. 733

In Page's opinion, slightly more than one thousand acres of additional farm land would be needed to produce those products which were then imported by the Hopis, but irrigation would be needed for some of these additional products. There were 168 acres of agricultural lands within district 6 which were then lying idle, and approximately 950 acres of potential agricultural land. Def. 736 Def. 737

Page found that district 6 had a "carrying capacity" of 17,631 sheep units on the 44,657 forage acres available, but that approximately 31,395 sheep units were being grazed. This indicated the necessity of a 13,764 reduction to reach carrying capacity. Def. 737, 751

Rachford made his boundary report on March 1, 1940. Stating that over four thousand Navajos and nearly three thousand Hopis then lived in the 1882 reservation, Rachford expressed the opinion that "one Indian has the same legal right as another to the land resources on which he is dependent." Def. 817

The Hopis, Rachford stated, had the "moral" right, as the first settlers, to areas then used by Navajos. In his view, however, Def. 818

> ". . . the area involved, its condition, its congested population, and the absence of surplus natural resources simply

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> preclude the possibility of total exclusion of the Navajos from the large area demanded by the Hopis."

Rachford found much evidence to indicate that, due to the hostility and aggressiveness of the Navajos, the Hopis had been restricted to an area entirely too small for a reasonable expansion needed to meet the ever-increasing population. He therefore recommended that the Hopis continue the use of such agricultural areas then occupied by the Hopis outside of district 6, stating that "even this is inadequate." "A solution of the problem must lie," Rachford asserted, "in colonization of the surplus Hopi population on other areas, such as the Colorado River Project at Parker."

Def. 817, 819

Def. 820

Def. 820

Rachford also expressed the view that the Navajo "situation" seemed equally precarious to that of the Hopi. "Here are two tribes," Rachford observed,

> ". . . contending for the same area of land which, if it were possible to do so, would no more than meet the legitimate needs of either tribe."

Under these circumstances, he thought, an equitable adjustment between the two tribes seemed about all that could be done.

Rachford then made seven recommendations, which may be summarized as follows: (1) the Hopis should be assured of the right of ingress and egress to and use of specific areas within the Navajo territory for ceremonial purposes; (2) the boundary line of district 6, extended to include agricultural land outside of the district, then used by the Hopis, should be marked and fenced; (3) a shift of population required by these adjustments should be made at the earliest possible date, isolated groups accepted by the other tribe being allowed to continue occupancy and use as at present; (4) each superintendent should remove within one year the Indians under his jurisdiction from the areas from which they are excluded; (5) the proposed boundary line may be slightly modified by the two superintendents; (6) the established use of coal, wood and farming fields should be continued; and (7) the Navajo contention that Keams Canyon facilities be made a Navajo agency is unsound.

Def. 821

Def. 821

The land management district boundary changes recommended by Rachford in this report would result in the taking away of 13,512 acres from the then district 6 acreage, 8,568 going to

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district 4, 2,988 to district 5, and 1,956 to district 7; and the adding of 34,999 new acres to district 6, all coming from district 7. Thus district 6 would have a net gain of 21,479 acres, bringing total acreage for that district from 499,248 to 520,727. The livestock carrying capacity of district 6, expressed in sheep-units-year-long, would be thereby increased from 17,863 to 18,785. The boundary line as so outlined by Rachford was essentially the same as delimited at the Winslow conference on December 14, 1939. Def. 825

Navajo Superintendent Fryer and Hopi Superintendent Wilson asked for clarification of some of the recommendations made in the Rachford report, and agreed on certain modifications in the revised boundary lines of district 6 which he proposed. In the main, however, the Rachford recommendations and proposed boundaries, based on the points agreed upon at the December 14, 1939 conference, were acceptable to all administrative field officials. During the spring and summer consideration was given to the form of the order which would effectuate these changes, and the procedure to be followed insofar as Hopi and Navajo tribal action might be required. Def. 825, 827, 828 Def. 832 Plf. 392 Plf. 394 Def. 833

On October 9, 1940, the Commissioner submitted a draft of such an order to the Secretary of the Interior for approval. In this draft it was recited that, subject to stated exceptions, the Hopi Indians "shall have the right of exclusive use and occupancy" of that part of the 1882 reservation therein described in metes and bounds. This description conformed to the Rachford boundary proposal as modified by agreement between the Hopi and Navajo superintendents.

This draft of order further provided that the part of the 1882 reservation situated outside of the above-described boundary "shall be for the exclusive use and occupancy of the Navajo Indians," subject to the following provisions. The first of these was to the effect that Navajos who established farming or grazing "rights" within the Hopi part prior to January 1, 1926, "shall have the right to remain occupants of the land they now use. . ." Def. 848 The second proviso was to the effect that Hopis who established farming or grazing "rights" outside of, but adjacent to, the Hopi part prior to January 1, 1926,

> ". . . shall have the right to continue occupancy and use of said lands, such rights to be determined by the Commissioner of Indian Affairs."

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In a letter to the Secretary which accompanied this draft, the Commissioner described the order as one to govern "the use rights of the Hopis and the Navajos within this area." The Commissioner stated that Indians forced to move by reason of this order would be compensated for unremovable improvements through the granting of rehabilitation work or other means at the disposal of the superintendent.

Def. 846

It was explained that the exercise of coal, wood and timber rights under rules and regulations of the conservation unit serving the two jurisdictions would be continued. The Commissioner assured the Secretary that the Hopis were not to be disturbed in their use of certain areas within the Navajo jurisdiction for ceremonial purposes. In order to safeguard travel by Hopis to these sacred areas, permits signed by the Navajo Superintendent were to be obtained. The Commissioner stated that it was planned to fence and mark the boundary on the ground as promptly as this could be done.

Def. 859, 861

The draft of this order was submitted to the Department's Solicitor, Nathan R. Margold, who returned it to the Commissioner, disapproved, on February 12, 1941. Noting that the order would exclude the Hopis from the major part of the 1882 reservation without expression of assent on the part of the Indians and without statutory authorization, the Solicitor found the proposed order invalid in three respects.

These were: (1) it was contrary to the prohibitions against the creation of Indian reservations without statutory authority, contained in the Acts of May 25, 1918 (40 Stat. 570, 25 U.S.C., § 211), and March 3, 1927 (44 Stat. 1347, 25 U.S.C., § 398d); (2) it was in violation of the rights of the Hopi Indians within the 1882 reservation; and (3) it was not in conformity with the provisions of the Hopi constitution approved December 19, 1936.

Def. 857

In this opinion the Solicitor stated that the 1882 reservation was not created for the exclusive use of the Hopis, since the Secretary was empowered to settle other Indians therein. The Solicitor called attention to previous memoranda in which the Solicitor had held that, where the order contains such a reservation of authority, but over a long period of time there has been no action by the Secretary to introduce other Indians into the reservation, the rights of the named tribe have been deemed exclusive. But the Solicitor added:

Def. 858

"I do not maintain that in this case the rights of the Hopis have become exclusive rights since there were Navajos upon the reservation at the time the 1882 order was promulgated, and Navajos have continued within the reservation in increasing numbers." Def. 858

The Solicitor suggested, as an available alternative, an amendment to the grazing regulations providing that no Navajos shall be issued permits within the Hopi grazing district and no Hopis shall be issued permits within the remainder of the 1882 reservation. A further amendment might be included, the Solicitor stated, to enlarge district 6 to give effect to the proposed revised boundaries. Def. 860

Amendments of this kind would be permissible, the Solicitor ruled, if the Department found that, for the proper protection of the range from destruction and for the effective enforcement of the regulations, it was necessary to separate Hopi and Navajo grazing. Suggesting that there was a factual basis for such a finding, the Solicitor stated:

"It is apparent that the Hopi Tribal Council can control its own members better than it can the intruding Navajos who are ancient enemies. The presence of the Navajos within the Hopi grazing districts is a deterrent to constructive action by the Hopis to protect the range. The friction between the two Tribes makes the enforcement of the regulations difficult."

The Solicitor expressed the view, however, that since the suggested amendments to the grazing regulations would operate to exclude Hopis from the use, for grazing purposes, of the land outside the Hopi unit, ". . . the regulations must have the assent of the tribe." In his opinion, however, a formal agreement or the signing of a document by the Hopi Tribal Council would not be necessary if they were reluctant to take such a position. If the Tribal Council would assist in the execution of the regulations through the issuance of permits within the Hopi unit "and in such other ways as may be appropriate," this would sufficiently demonstrate their acquiescence to meet legal requirements, Margold ruled. Def. 860

In this opinion of the Solicitor two additional important rulings were announced: (1) it would be possible for the Secretary

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Def. 861 to use his authority over the settlement of non-Hopis within the reserve to remove Navajo farmers from the Hopi unit; and (2) the Secretary does not have the power to remove the Hopi farmers who may be located outside the Hopi unit but within the 1882 reservation "in view of the use and occupancy rights of the Hopis in that area."

Plf. 409 The Office of Indian Affairs thereafter redrafted the proposed order dealing with use and occupancy of the 1882 reservation, in an attempt to meet the objections of the Solicitor. The revised draft, however, was also disapproved by the office of the Solicitor. In a letter dated April 5, 1941, Assistant Solicitor Charlotte T. Lloyd explained that the revised draft contained no provision for the consent of the Hopis to their exclusion from areas out-
Plf. 410 side district 6, and there was no provision for compensation for the disruption of the farming activity of the Navajos and Hopis who would be uprooted.

Def. 875 876, 877, 878, 880 Further efforts were then made to draft an order pertaining to district 6 which would meet the Solicitor's objections. At the same time the proposed revision of boundary lines was further reviewed. This led to the preparation of a revised description
Def. 880 which would result in a district 6 acreage of 528,823, as compared to the then existing acreage of 499,248, and Rachford's proposal of 520,727.

Under this latest revision of boundaries the carrying capacity of district 6 would become 19,518 sheep units as compared to the then existing capacity of 17,863, and a capacity of 18,785 as proposed by Rachford. On September 4, 1941, the Office of Indian Affairs ruled that in view of the Solicitor's opinion and the provisions of Article I of the Hopi constitution, the proposed
Def. 883, 884 changes in the boundaries of district 6, as revised, should be submitted to the Hopi Tribal Council for consideration and approval.

Def. 890 The proposed changes in the boundaries of district 6 were apparently then submitted to the Hopi Tribal Council. Before acting in the matter, the Council wrote to the Washington office,
Def. 893 through the Hopi Superintendent, propounding ten questions of fact and law. Commissioner Collier replied thereto on October 27, 1941, his letter being approved on January 8, 1942, by Assistant Secretary of the Interior, Oscar L. Chapman.

In answering most of these questions the Commissioner referred to and applied the rulings contained in the Solicitor's

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opinion of February 12, 1941. In one question the Council inquired whether the Secretary recognized as "legal residents of the Executive Order approximately 4,000 Navajos and 3,000 Hopis." In his reply the Commissioner stated, in effect, that the Hopis residing on the reservation had the right to the non-exclusive use and occupancy of the entire reservation except to the extent that they might voluntarily relinquish such right. As for Navajo rights, the Commissioner wrote: Def. 891

> "It is our opinion that only the individual Navajos residing on the 1882 Reservation on October 24, 1936, the date of the ratification of the Constitution of the Hopi Tribe by the Hopi Indians, and the descendants of such Navajos, have rights on the Reservation. Since, however, such Navajo Indians do not have a separate organization but are governed by the general Navajo tribal organization, Article I of the Hopi Constitution referring to the 'Navajo Tribe' means the general Navajo tribal organization."

Thereafter the practice continued, as before, of denying grazing permits to district 6 Hopis for use of lands outside of district 6, except where they were able to show that they had historically and continuously grazed their sheep at least a portion of the year outside that district. Def. 894, 895

Early in 1942 the Hopis seemingly attempted to make a test case of this practice, submitting 105 applications by Hopi stockmen for grazing permits on range lands outside of district 6. Def. 895 None of these applications had been approved or signed by any representative of the Hopi Agency. Navajo Superintendent Fryer returned all of these applications "without action" on February 27, 1942, complaining bitterly to the Hopi Superintendent that this effort "has taken all the dignity out of our joint attempt to settle or alleviate the problem." On March 28, 1942, the Hopi Tribal Council unanimously passed a resolution disapproving the Rachford recommendations, as modified, for changes in the district 6 boundaries. Def. 911

In 1942 some of the "Old Oraibi" Hopis who had moved to Moencopi, west of the 1882 reservation, in a 1906 "revolt," desired to move back to Oraibi with their livestock. The Solicitor's office ruled, however, that they had abandoned their use and occupancy rights in the reservation. It was therefore held that the Moencopi Hopis should not be permitted to return unless the Hopi Tribal Council gave formal consent. Def. 897 Def. 416

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Pif. 418 On April 18, 1942, Commissioner Collier instructed Willard R. Centerwall, Associate Regional Forester at Phoenix, Arizona, to conduct a new study of the Hopi-Navajo boundary problem. Centerwall was told that in interpreting the needs of the Hopis he was to 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." Collier told Centerwall that it was the desire of the Washington office "that every attempt be made to arrive at an equitable solution of this problem."

Def. 930, 900 Centerwall submitted his report to the Commissioner on July 29, 1942. It carried the approval of Burton A. Ladd, then Superintendent of the Hopi Reservation, and Byron P. Adams, Chairman of the Hopi Tribal Council. J. M. Stewart, then the Navajo Superintendent was not available in the field at that time, but a copy of the report was sent to Washington for Stewart's consideration and approval.

Def. 930, 937, 900

Def. 913, 914 Centerwall stated in this report that the Hopis and Navajos had agreed that all prior grazing use rights should be established as of 1936, when district 6 was established. He also stated that it must be clearly understood that the setting aside of a land management unit for the Hopi Indians,

> ". . . does not create a reservation boundary, since the Hopis would remain entitled to all beneficial use, including the right to any proceeds within the remainder of the 1882 Executive Order Reservation."

Def. 915 It was Centerwall's view, expressed in this report, that full recognition should be given to Navajo Indians who had established "use rights" anywhere within district 6. Another premise of his boundary proposal was that

> ". . . in accordance with Forestry regulations, the right to secure fuel wood anywhere on the 1882 Reservation is reserved by the Hopis."

Postulating his boundary recommendations on these and other conditions, Centerwall recommended, by a metes and bounds description, revised boundaries for district 6. Establishment of

Def. 916 these boundaries would accomplish a substantial enlargement of district 6 acreage and livestock carrying capacity as compared

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to the original district 6, and as compared to the boundaries recommended by Rachford as revised:

	Original District 6 Boundaries	Revised Rachford Boundaries	Increase in Rachford over Original
Acres	499,248	528,823	29,575
Sheep Units	17,863	19,518	1,655

	Centerwall Boundaries	Increase in Centerwall over Original	Increase in Centerwall over Rachford
Acres	641,797	142,549	112,974
Sheep Units	24,640	6,777	5,122

The Centerwall report contains a detailed "justification" for the boundary revisions recommended by him. In the four Navajo land management districts (3, 4, 7 and 5) which would lose land to district 6 under this revision, a total of fifty-one Navajo families would be adversely affected. Centerwall stated that this figure probably includes some families that are not entitled to consideration and omits some that are deserving. Def. 928

Grazing lands having a maximum carrying capacity of 3,552 sheep units would be lost to the Navajos under the Centerwall proposal. He stated, however, that most Navajo sheep are only on the ranges in question during a portion of the year and that the actual loss in year-long sheep units would be closer to two thousand. The most important considerations which seem to have governed Centerwall in making these revisions were the recognition of exclusive or predominant prior use and the full utilization of lightly loaded or idle grazing lands. Def. 917, 926, 918, 919, 922, 926

Among other considerations which guided Centerwall were the following: (1) simplifying fencing by getting away from sharp breaks and escarpments; (2) establishing boundaries which are easy to follow and observe; (3) making room for overlapping in grazing use; (4) avoiding the necessity of "splitting" waters; (5) definitely setting out work areas for each Service; (6) simplifying livestock management and movement; (7) eliminating friction between Hopi and Navajo livestock operators; and (8) eliminating "split" administration. Def. 928

In his report Centerwall pointed out that the carrying capacity of district 6 in 1936 was 17,863 sheep units, whereas the Hopis Def. 912

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actually maintained livestock requiring a carrying capacity of 31,323 sheep units. Reasoning that compliance with sound range management practices thus required 13,460 sheep units to be grazed outside of district 6, Centerwall,

> ". . . assumed that the Hopi Indians were using grazing lands on the Executive Order Reservation outside the boundaries of Unit 6 at the time Unit 6 was created."

"Such being the case," Centerwall concluded,

> "the Hopis have undoubtedly established prior use rights on lands that are now being used by the Navajos. In like manner, Navajo Indians have established use rights on grazing areas within the Executive Order Reservation boundary and must be given credit for the same."

12.

From the Centerwall Report to the Solicitor's Opinion of June 11, 1946

Def. 932 Walter V. Woehlke, Assistant to the Commissioner, construed this part of the Centerwall report as indicating that Centerwall thought the object of his investigation was to enlarge district 6 so as to provide additional grazing for the thirteen thousand excess sheep units. In a memorandum to the Commissioner, dated August 28, 1942, Woehlke disagreed with Centerwall's theory, as he construed it. "The object of his labors," Woehlke wrote,

> ". . . was to settle the boundary dispute on an equitable basis, not to find range for the excess Hopi livestock. It should be remembered that while the Navajos reduced drastically, the Hopis did not."

Plf. 407 Woehlke, who had bitterly assailed the Solicitor's opinion of
Def. 932 February 12, 1941, also complained of Centerwall's reliance thereon, saying that Centerwall quoted from that opinion "with a noisy licking of the chops. . ." Referring to the Solicitor's opinion in his memorandum commenting upon the Centerwall
Def. 932 report, Woehlke said: "That memorandum was a fine example of the workings of the legalistic mind at its worst."

Def. 936, 937 The Navajo Service, headed by General Superintendent J. M. Stewart, also strongly objected to some of the adjustments proposed by Centerwall. On September 23, 1942, the Hopi and Navajo superintendents sent a joint letter to the Commissioner

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indicating that the principal differences arising out of the encroachments of Navajo families on land traditionally and continuously used by the Hopis were about to be removed.

The two superintendents expressed the view that they could make the necessary administrative adjustments in the boundary of district 6 by mutual agreement between the two agencies. In making these adjustments, it was indicated, the superintendents were agreed that: (1) "on-and-off" use (partial use by each tribe) is not desirable; (2) the principal purpose of the establishment of the adjusted district 6 line is the erection of a barrier which would prevent the crowding in of new families of Navajos onto territory used by the Hopis; and (3) it is not the intention of bringing about the removal of permanently settled Navajo families from district 6.

On October 7, 1942, the Commissioner's office authorized them to proceed with that effort on the basis of the Rachford and Centerwall recommendations, modifications agreed upon between them to be submitted to the Commissioner for approval.

Upon receipt of these instructions, the Hopi and Navajo superintendents called a conference of field officials of the two agency offices, which conference was held at Winslow, Arizona, on October 22, 1942. They unanimously agreed to recommend that the boundary line of district 6 be approved as recommended by Centerwall, with three modifications. Def. 938

One of these modifications was to shift back to district 4, an area consisting of five square miles which Centerwall had proposed be taken from district 4 and added to district 6. The conference agreed that this area had historically been used almost exclusively by a particular group of Navajo Indians, and that the new line, consisting of the Oraibi Wash would make an excellent natural boundary.

The other two modifications would result in giving Navajo permittees in district 3 exclusive use of a fifteen-square-mile area, which Centerwall had shifted to district 6, and in giving Hopi permittees in district 6 exclusive use of an area consisting of 5.8 square miles which Centerwall had left with district 3. Both of these modifications were justified by the conference on the ground of equitable distribution of grazing and water rights. Def. 939

The district 6 boundaries thus recommended would add 131,946 acres to the original district 6, as compared to the

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142,549 acres which would have been added under Centerwall's recommendations. The superintendents' recommendations would add a carrying capacity of 5,764 sheep units to district 6, as compared to the 6,777 units which would have been added by Centerwall.

Def. 946

Def. 938
Def. 940, 941

In submitting these boundary recommendations to the Commissioner on November 20, 1942, the Hopi and Navajo superintendents also suggested certain administrative policies to be followed. Navajo and Hopi Indians who had established residence on either side of a district boundary would be permitted to continue living there. In such cases, and insofar as practicable, livestock grazing permits would be limited to one district. Grazing "rights" would be established on the basis of past use. Rights to wood and timber on the whole reservation would be equal.

Def. 942

After a reasonable time in which to make adjustments, Navajo stockmen in districts 3 and 4, to the west and north, would be given no range rights inside district 6. Navajo range rights along the east and south boundaries adjacent to districts 5 and 7 would be given further consideration. The district 6 boundary would represent a division of the reservation based on range use. Hopis would be assured the right to ingress or egress to areas "within the Navajo jurisdiction" for ceremonial purposes with protection to the extent that police power will permit.

Def. 943

This latter suggestion concerning access to Hopi shrines was consistent with similar recommendations which had been made over a long period of time. It appears to have been advanced first in December, 1931, when Assistant Commissioner J. Henry Scattergood wrote to Senator Lynn J. Frazier, reporting a suggestion which had come to his attention from the field. As he stated it,

Plf. 302-303

> ". . . the shrines sacred to Hopis that are located in what is at present Navajo reservation land might be fenced and set apart with the understanding by both tribes that the Hopis could always have uninterrupted access to them. Such an arrangement, if consummated, would make it unnecessary to include within the Hopi boundary the intervening land as suggested by the extremists."

Plf. 307
Def. 409
Def. 448
Def. 579
Def. 681

Similar suggestions were made by Commissioner Rhoads in May, 1932, and December, 1932; Navajo Superintendent Fryer, in December, 1936; Commissioner Collier, in July, 1938, April,

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1939, and October 9, 1940; Walter V. Woehlke, Assistant to the Commissioner, in December, 1939; and C. E. Rachford, in his report of March 1, 1940. Def. 823 Def. 819-820

A specific provision to this effect was incorporated in a proposed secretarial order prepared in 1937, but never signed. Article IV of the Hopi By-laws, adopted together with the Hopi Constitution in 1936, and still in effect, provides: Plf. 374

> "The Tribal Council shall negotiate with the United States Government agencies concerned, and with other tribes and other persons concerned, in order to secure protection of the right of the Hopi Tribe to hunt for eagles in its traditional territories and to secure adequate protection for its outlying established shrines." Plf. Ex. 214, p. 9

On April 24, 1943, the Office of Indian Affairs approved the boundaries, carrying capacity and statement of administrative policy, as recommended by the two superintendents on November 20, 1942. While the Hopi Tribal Council had approved the Centerwall recommendations it was apparently not asked to act on the modifications proposed by the two superintendents on November 20, 1942, and approved by the Commissioner. In any event, the recommendations were apparently put into effect. Def. 945, 949 Def. 955

A considerable adjustment in place of residence and range use was thereafter made, by both Hopis and Navajos, in order to respect the new district 6 boundary lines and minimize trespass. Many Navajo families, probably more than one hundred, then living within the extended part of district 6, were required to move outside the new boundaries and severe hardships were undoubtedly experienced by some. In April, 1944, the two superintendents met with leaders of the two tribes in an effort to further clarify the adjustment policy.

Commissioner Collier met with Hopi leaders at Oraibi, Arizona, on September 12, 1944, at which time the Hopi claims to the 1882 reservation were once more aired. Stating that the Navajos could not be forced off of the 1882 reservation, the Commissioner made this statement concerning the basis of the Navajo claim to part of the reservation: Def. 957a

> ". . . Now, we don't need to debate as to the number of Navajos there were there or not, they came. The Secretary made a report every year how many there were, and he let them come in each year. In addition he went to Congress

and asked for money for the schools for both the Navajos and the Hopis on the Executive Order, and they gave it to him. . . ."

In a letter to Dr. Arthur E. Morgan, Community Services, Inc., written on December 16, 1944, Commissioner Collier made the following statements concerning the purpose intended to be served by the order of December 16, 1882, the status of Navajo Indians in that reservation, and the pattern of use rights. He said:

Plf. 424, 425

". . . Actually the Navajo Reservation was established by treaty in 1868 prior to the Executive order which established the Hopi Reservation. The raiding of Hopi lands is a matter of history, but as a matter of fact it started before 1882, and the action of the President in creating the Hopi Reservation at that time was at least in part an attempt to protect Hopis in an area of their own. The fact that the Government failed to provide protection other than drawing an imaginary line between the Hopi and Navajo must be acknowledged, but at least it was the intention of the Government to assist the Hopis.

". . . There never was any formal opening of the Hopi Reservation to Navajo settlement. The Navajo Indians simply filtered across the Hopi boundary and were never challenged by the Government.

"It is true, as suggested here, that the Executive order did not create an exclusive reservation for the Hopi Indians. The language provided that the land should be 'set apart for the use and occupancy of the Moqui (Hopi) and such other Indians as the Secretary of the Interior may see fit to settle thereon.' The Secretary never officially settled any other Indians on the area but in the absence of any action to eject the Navajo Indians who had filtered into the area it was in time assumed that these Navajo were there with the consent of the Secretary."

Def. 958

On February 14, 1945, Assistant Commissioner Woehlke advised Hopi Superintendent Ladd that construction of fences along the revised district 6 line was designed to protect the interests of Hopi stockmen and to prevent additional encroachments of Navajo livestock on Hopi ranges. "In our judgment,"

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Woehlke wrote, "the proposed fences will have no effect on Hopi land claims, but will prove to be a great practical value to the Hopi stockmen."

William A. Brophy, who succeeded Collier as Commissioner of Indian Affairs, gave Hopi leaders the same assurance on April 26, 1945. He stated: Plf. 428

> "I want to assure that any fences built will in no wise be construed as establishing district 6 as the Hopi Reservation, or jeopardize any claims which you may have to other lands. The purpose of the fence is not to mark off the boundaries of the reservation, but merely to prevent cattle and horses from straying; to assist the stockmen in improving the quality of their herds, and in controlling the breeding program by preventing inferior sires from mixing with the herds."

Again, on May 3, 1945, the Commissioner gave the same assurance to Senator Burton K. Wheeler. Stating that district 6 was established in order to protect Hopis against additional encroachments by Navajo stockmen, the Commissioner stated:

> "This was in no sense an establishment of boundary lines of the Hopi Reservation. Those boundary lines still are the lines of the Executive Order reservation."

Despite these assurances that the district 6 lines, and fences erected along them, were not intended to mark a Hopi boundary, it continued to be true, as it had been ever since district 6 was established in 1936, that Hopi stockmen were excluded from moving beyond district 6 into other parts of the 1882 reservation, except upon a showing of pre-existing use.

This disparity between assurances and practice did not go unnoticed. Calling attention to the fact that in the Solicitor's opinion of February 12, 1941, it was ruled that proposed changes in district 6 boundaries could not be made without the approval of the Hopi Tribal Council, that Council asked the Commissioner, on September 23, 1941: Plf. 412, 413

> "If the proposed changes in the present District require the approval of the Hopi Tribal Council, why didn't the original District require the approval of the Council?"

No direct answer was made to that question.

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At a meeting held on November 6-7, 1945, attended by several agency officials, a young Hopi leader, Karl Johnson, inquired:

Def. 959, 962

> "Now, then, if this District 6 is not to be construed as the Hopi Reservation, and if that land beyond District 6 is still the property of the Hopis, then why can't the Hopis go outside of District 6?"

No answer was made.

Def. 966, 970

On June 11, 1946, Felix S. Cohen, then Acting Solicitor of the Department of the Interior, rendered an opinion with regard to the ownership of the mineral estate in the 1882 reservation. Referring to various department records all of which, and more, have been referred to above, the Acting Solicitor expressed the opinion that it was the intention, in creating the 1882 reservation, to set aside the lands for the use and occupancy of the Hopi Indians

Def. 969

> ". . . and for the use and occupancy of the Navajos then living thereon, and to permit the continued settlement of Navajos within the area in the discretion of the Secretary."

The Solicitor continued:

> ". . . Had there been any intention of disturbing the Navajos then occupying the area, it would have been a comparatively simple thing to draft the Executive order so as to create a reservation exclusively for the Hopis. But that was not done. The prime need at the time was to provide Indian reservation status for lands long occupied by Hopis and Navajos alike, and to retain administrative authority over the further settlement of Navajos within the area. This was precisely what the Executive order of 1882 accomplished."

The Solicitor noted in his opinion that, with minor exceptions, no action was taken to prevent settlement of Navajos within the reservation until the Department, on January 8, 1942, took the position that the Navajos would not be allowed to settle on the reservation after October 24, 1936, when the Hopi constitution was ratified. Holding that Navajos who had moved into the reservation area before October 25, 1936, were to be deemed settled therein pursuant to the December 16, 1882 order, the Solicitor stated:

Def. 969

> ". . . I do not mean to imply that the Navajos could acquire rights in the reservation through the Secretary's inaction or

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through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Sectary 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."

Concerning the comparative rights of the Hopis and Navajos in the 1882 reservation, the Solicitor ruled in this opinion that it

". . . would be a violation of the clear language of the Executive order to distinguish between the quality of estate acquired by the two groups. . ."

Continuing, the Solicitor stated:

". . . I therefore hold that the rights of the Navajos within the area who settled in good faith prior to October 24, 1936, are coextensive with those of the Hopis with respect to the natural resources of the reservation. It is settled by now, of course, that the mineral estate is in the Indians. See the act of March 3, 1927 (44 Stat. 1347; 25 U.S.C. sec. 398a), and *cf. United States v. Shoshone Tribe of Indians,* 304 U.S. 111 (1938)."

The Solicitor pointed out that the Act of May 11, 1938, 52 Stat. 347 (25 U.S.C. § 396a-f), provides that the unallotted lands of an Indian reservation may be leased for mining purposes, with the approval of the Secretary, "by authority of the tribal council or other authorized spokesmen for such Indians." Holding that the term "such Indians" refers to the Indian owners of the reservation, the Solicitor declined to state whether the authority for such leasing, insofar as the settled Navajos were concerned, should come from the Navajo Tribal Council, or whether a special council should be called to designate representatives of the Navajos of the 1882 reservation. Def. 966, 970

The Solicitor stated that this was an administrative question which should be considered in the first instance by the Indian Service.

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> ". . . No necessity would arise for the preparation of a roll identifying all of the individual Indians entitled to participate in the mineral estate, . . ."

the Solicitor ruled,

> "unless it were intended to individualize and distribute among the Indians the proceeds derived from mineral leasing."

13.

From the Solicitor's 1946 Opinion to the Act of July 22, 1958

Def. 942 Following issuance of the Solicitor's opinion of June 11, 1946, official assurances continued to be given that district 6 was not intended as a Hopi reservation in lieu of their rights in the entire 1882 reservation. Thus, on May 12, 1948, Acting Commissioner William Zimmerman, Jr. wrote to an interested citizen,

> ". . . I wish to assure you that the establishment of District 6 does not modify in any way Hopi rights in the Executive Order Reservation of 1882. . ."

Def. 979 In the late 1940's there was a considerable increase in the amount of joint administrative activity on the 1882 and the Navajo reservations. On May 4, 1948, for example, an agreement of cooperation was drawn up between the Navajo and Hopi agencies for the initiation of soil and water conservation practices. The purpose of the agreement was to effect an organization which would attempt to bring soil erosion under control and assist in rebuilding soil resources. Under this plan the Navajo and 1882 reservations, considered as a unit, were divided into five work areas.

District 6 and several other districts which included 1882
Def. 980 reservation lands, were combined to constitute "work area" No. 4, with headquarters at Keams Canyon. All soil conservation activities were to be under the general supervision of the conservationist in charge, at Window Rock, Arizona. This whole arrangement was considered necessary in order to cover the two reservations on a "watershed basis."

Another example of such intermingling of Navajo and Hopi administrative action is to be found in Secretary of the Interior J. A. Krug's proposal, advanced in his report entitled "The
Def. 977, 607 Navajo" issued in March, 1948, that Navajo and Hopi families

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be resettled on irrigated land of the Colorado River Indian Reservation in western Arizona. By the spring of 1949, this program was under way.

A third example of such joint agency action is evidenced by a letter dated December 15, 1949, sent by Road Engineer H. E. Johnson, employed by the Navajo Service at Window Rock, to Walter O. Olson, Assistant Superintendent of the Hopi Indian Agency. Johnson therein recommended that the Hopi road department use the Navajo road department in an advisory capacity along the pattern of the old regional office. "All construction, maintenance, and engineering should be inspected and approved by this office," Johnson stated. Def. 982

As another indication of this tendency it may be noted that in 1950 some of the duties and responsibilities of the Washington office concerning both reservations were delegated to an Area office established at Window Rock, with Allan G. Harper as Area Director. Plf. 433 Def. 1006, 1007

Under the Act of August 13, 1946 (60 Stat. 1049, 25 U.S.C. 70, Chapter 959, §1) an Indian Claims Commission was established. Hopi leaders and the Hopi Tribal Council apparently gained the impression that this commission might award them land, and they began referring to that agency as the "Lands Claim Commission." In the summer of 1950, this false impression was brought to the attention of James D. Crawford, then Superintendent of the Hopi Agency, with the suggestion that the Hopis be disabused of the idea that they might obtain more land through some proceeding before the Indian Claims Commission. Def. 983, 984

On September 9 and 10, 1950, the Commissioner made a tour of district 6 of the 1882 reservation, inspecting housing, schools, range and industrial activities, and conferring with the Hopi Tribal Council. A memorandum containing pertinent information was prepared in advance, presumably by the Hopi Agency, for the Commissioner's use in connection with this tour. Def. 986

Among the facts stated in this memorandum were the following: At the Keams Canyon boarding school there were then 138 Navajo children and 75 Hopi children; there were five Hopi day schools and a boarding high school within district 6, attended only by Hopis; the 631,194 acres of land then within district 6 fell into the following categories: 208,134 acres of grassland, 5,639 acres of sagebrush, 309,062 acres of browse, 78,411 acres Def. 989 Def. 991

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Def. 1000 of pinon and juniper, 22,818 acres of waste and 7,130 acres of cultivated but unirrigated land; in fiscal 1949, the Hopis owned 2,700 cattle, 1,150 horses, and 9,077 sheep;

Def. 992 ". . . water is a major problem. All of their (Hopis) activities revolve around and are affected by the scarcity and poor availability of water. . ."

Plf. 435, 436 On March 23, 1951, the trespassing of Navajo cattle and bulls in several areas of district 6 was becoming a serious problem, especially because it interfered with the Hopis' controlled breeding program.

Def. 1004 Hopi complaints of a different kind were aired before a House Subcommittee on Indian Affairs, at a hearing held in Phoenix, Arizona on March 27, 1951. The Hopi Tribal Council had been rendered completely useless by the political conflict within the Plf. 440 Hopi villages resulting from the stock reduction plan put into effect in 1943. Hopi representatives at the March, 1951 hearing alleged that certain persons affiliated with the Office of Indian Affairs were endeavoring to prevent formation of a new Council.

Def. 1005 The Hopis also complained that their children were not receiving an adequate education, that the Office of Indian Affairs was partial to the Navajos in the determination of the Navajo-Def. 1006 Hopi rehabilitation program, that the Window Rock Area Office was not interested in them and that the Hopi Agency should be restored and divorced from the Navajos. In a letter dated July 3, Def. 1004, 1007 1951, addressed to the Commissioner, Associate Area Director Walter O. Olson discussed each such complaint, and expressed the view that none of them were meritorious.

Plf. 441 By July, 1951, the total population of the Navajo Indian Tribe was 69,167 (about six thousand within the 1882 reservation), as compared to a Hopi Indian Tribe population residing Def. 1006 within the 1882 reservation, of 3,200. The total acreage of the Navajo Indian Reservation, plus the part of the 1882 reservation lying outside of district 6, was then 15,508,033, as compared to 631,194 acres for the Hopis within district 6. Thus the Hopis had about 4.4% of the total Navajo-Hopi population, and were permitted to occupy about 3.3% of the combined land area available to the two tribes.

Def. 1012 In the summer of 1952 there was more trouble brewing along the boundary of district 6. On June 8 of that year Area Director Harper reported several complaints of Navajo livestock tres-

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passing, and one complaint that Navajo police were invading Hopi country to enforce Navajo claims on the other side of the boundary.

On April 9, 1954, the Commissioner of Indian Affairs reported to Orme Lewis, Assistant Secretary of the Interior, that the present resource base for both the Hopis and Navajos in the 1882 reservation was inadequate, but that relief might be obtainable by economic development or the discovery and development of mineral resources.

The Commissioner also stated that the entire Navajo Indian Reservation surrounding the 1882 reservation is Plf. 441

> ". . . overcrowded and overgrazed, and sufficient range is not available to permit relocation of either Navajos or Hopis to other areas within the Navajo Reservation without causing further overcrowding and disruption."

In the Commissioner's view, the Navajos and Hopis were traditionally antagonistic and "successful administration at this time requires a physical separation and clear definition of the rights of the two tribes."

The Commissioner also stated, in the report to the Assistant Secretary that district 6 does not have an adequate supply of wood for fuel and fence posts. "The establishment of any reservation boundary," he wrote, "should consider the problem of such basic needs as fuel, water, range and farmland." In the Commissioner's view it was desirable to retain subsurface rights in joint ownership until such time as their value and location is determined, as any division thereof prior to development "might later prove unfair." Plf. 442

The Commissioner expressed the opinion that it would be extremely difficult and expensive to determine the Navajos and their descendants who were in residence on the 1882 reservation on October 24, 1936, when the Hopi constitution was ratified. According to the Commissioner, Navajos with rights in the 1882 reservation were also enrolled in the Navajo Indian Tribe, but they should not be allowed to share in the assets of two reservations.

Commencing in 1954, and for each subsequent school year, a careful enumeration was made under the direction of the Commissioner, of all school-age children on the Navajo Indian Reser- Def. Prop. F.F. 148

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vation, and that part of the 1882 reservation outside of land management district 6, as expanded in 1943. The school census data were used by the Bureau of Indian Affairs to project the necessary planning for school facilities, teachers and school personnel for the ensuing years. In making the annual school census, however, there was no effort to segregate Navajos who were living within the 1882 reservation from those who were living outside that reservation. In fact the authorities who took the census were not even aware of the executive order area.

Def. Prop. F.F. 290

Def. Prop. F.F. 293
Plf. Obj. 74-75

According to the comprehensive Navajo school census taken in 1955 under the supervision of the education department of the Bureau of Indian Affairs, there were 2,929 Navajo children then living in the 1882 reservation. They were not listed separately from the children of other areas but census officials were able to determine this information by consulting data contained in the census records.

R. 1087

R. 1148

The method of regulating traders on the 1882 reservation which attained its final form in 1955, had its beginning many years before. Under the Acts of August 15, 1876 (19 Stat. 176, 25 U.S.C., § 261) and March 3, 1901 (31 Stat. 1058, 25 U.S.C., § 262), the Commissioner had sole power and authority to appoint traders to the Indian tribes and to make rules and regulations governing their selection and operations. General regulations governing licensed traders on any Indian reservation were promulgated on June 29, 1927. On June 1, 1937, special regulations covering trade on the Navajo, Zuni and 1882 reservations were promulgated, and were thereafter amended from time to time.

Def. Ex. 576, 579

On March 20, 1948, the Navajo Tribal Council adopted a resolution purporting to regulate traders on the Navajo Indian Reservation. On May 20 of that year, Martin G. White, Solicitor of the Department of the Interior, rendered an opinion in which it was stated that insofar as tribal lands were concerned, the consent of the tribe to the use of land for business purposes must be obtained, as provided for in the regulations. Thus, the Solicitor ruled, the Navajo Tribal Council may act concurrently with the Secretary in the issuance of traders' permits containing appropriate conditions relating, among other things, to the payment of rent.

On January 1, 1955, the Commissioner approved resolutions of the Navajo Tribal Council, adopted in 1954, relating to traders'

Def. Ex. 579

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leases and setting rental rates. Under these procedures the Navajo Tribe granted leases to traders on that part of the 1882 reservation outside of district 6 as well as on the Navajo Indian Reservation, such leases being approved by the Superintendent of the Navajo Agency.

The proceeds received from these leases, nine of which were in existence in 1958, were paid into the Navajo tribal treasury. This was done notwithstanding the direction of the Navajo Area Director, W. Wade Head, on September 17, 1957, addressed to the General Superintendent of the Navajo Agency, that any such rentals should be held in escrow pending final determination of Navajo and Hopi rights in the area outside district 6 and within the 1882 reservation.

Def. Prop. F.F. 300, 301, 302
Def. 1014
Plf. Obj. 77
Plf. Ex. 302
R. 1206

The reference to activity by the Navajo Tribal Council makes it pertinent to note that during all of the time that Navajos resided within the 1882 reservation, they had the same representation in the Navajo Tribal Council as was accorded Navajos residing outside that reservation.

By the summer of 1958, the Hopi population in the 1882 reservation was probably something in excess of 3,200. Most of them resided within district 6, as expanded in 1943. A few had homes, farms or grazing lands in adjoining districts on the 1882 reservation.

Def. 1006
Plf. Prop. F.F. 91

Other Hopi activities then being carried on outside district 6, as expanded, included wood cutting and gathering, the gathering of plants for medicinal, ceremonial, handicraft and other purposes, the visiting of ceremonial and eagle shrines, and a limited amount of hunting.

By the summer of 1958, the Navajo population on the 1882 reservation was about 8,800. This did not include the very few Navajos then living within district 6 as expanded in 1943. The places of residence of the Navajos within the 1882 reservation were scattered quite generally over the entire area outside of district 6. Government schools for Navajo children were then being maintained within the 1882 reservation at Pinyon, Smoke Signal, White Cone, Sand Springs, Dinnebito Dam and Red Lake.

R. 1136

The legislation enabling Hopis and Navajos to seek a court determination of their respective rights in the reservation area was enacted on July 22, 1958, 72 Stat. 402.