

Cl. File
15175-1938-301
Hopi

March 20, 1939.

Mr. Seth Wilson
Supt., Hopi Agency.

Dear Mr. Wilson:

In connection with the proposed construction of certain drift fences in District No. 6, it has been reported to me that the Tribal Council of the Hopis fears that such drift fences might become the boundaries of the Hopi Reservation. Will you please assure the Hopi Tribal Council that no drift or other fences built by the Soil Conservation Service, the Civilian Conservation Corps or any other Governmental agency will have any effect on the determination of the boundary of the Hopi Reservation. It may be necessary and desirable for good range management to build several drift fences, but there is no connection between fences built for better management of the range and the determination of the Hopi boundary. In fact, none of the work projects, undertaken by Governmental agencies in District No. 6, will be allowed to have any effect on the boundary settlement. Will you please bring this letter to the attention of the Hopi Tribal Council?

(emphasis added)

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John Collier
Commissioner

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
FIELD SERVICE

Arlington, California
December 11, 1939

Commissioner of Indian Affairs,
Washington, D. C.

Att: Indian Organization

Sir:

This serves as a special report of my activities during the week of November 26 to December 1. I arrived at Keams Canyon on the Hopi Reservation on November 23rd and left the reservation on the afternoon of December 1, after completing most of the work outlined by Superintendent Seth Wilson.

A number of problems had developed, particularly the question of the Hopi people at First Mesa having a misunderstanding regarding sections of the tribal constitution. At First Mesa, the question of procedure in choosing annually, representatives to the Hopi Council was disturbing this group of three consolidated villages.

The controlling persons of most of the Hopi villages (9) is made up of chiefs, who are at the head of a particular ceremonial group. The head or chief is referred to as the Kikmongwi, and he has all the authority in his village which continues under the traditional Hopi organization, and which is recognized by the Hopi Constitution. First Mesa is allowed four (4) representatives to the Tribal Council out of a possible seventeen (17) councilmen forming the reservation or Hopi Council, and these representatives must be certified by the Kikmongwi before they can be recognized by the Council. So some concern was expressed by this year's councilmen as it appeared that Tunewa, the recognized Kikmongwi of First Mesa, and his advisers, Kutka, Maho and Duke Pahuma, were not making any effort to get together and choose the representatives to the Council for the coming year, 1940.

Section 4, Article IV, of the Hopi Constitution provides that, "Each village shall decide for itself how it shall choose its representatives..." From this it was pointed out to the Kikmongwi, his advisers and others, that there were two ways in which representatives might be chosen -- either the Kikmongwi and his advisers might choose them or the people might choose the representatives as provided by Article III, sections 3 and 4. This misunderstanding of choosing representatives as well as other rather petty misunderstandings, had led to a split in the four leaders of First Mesa -- Tunewa and Duke on one side, and Kutka and Maho on the other. This "split" was especially brought out in a meeting with the four leaders and several other members at a meeting in Superintendent Wilson's residence on the evening of November 27, when Ton Pavatea and George Coochise (1939 council representatives) attempted to get the leaders to agree as to what should be done regarding the selection of the new representatives for 1940. There was no apparent adjustment made at this meeting, but I am sure some good was accom-

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plished. Mr. Wilson explained to them that we were only trying to work with the headmen and Hopi people as provided by their constitution and that their wishes were going to be considered in all cases when it involved their welfare. Tunewa told Mr. Wilson that he was the first superintendent to come to him for advice and try to find out his wishes in helping the Hopi people.

Another meeting was held with the Headmen and people of First Mesa at the Polacca Day school on the evening of November 28, but the only satisfaction arrived at was that the Headmen stated they would be willing to choose the representatives at a meeting on the following day, rather than choose them that night as was planned. At this evening meeting, Superintendent Wilson emphasized the importance of the Hopis continuing the tribal council, and that the right to choose the representatives rested entirely with the individual villages as outlined in their constitution, and that we could do nothing to make them decide the manner in which this was to be done -- it rested with the headmen in this case. The Kikmongwi, Tunewa, mentioned that this was a great responsibility being placed upon him to choose the representatives. Mr. Wilson told him that he was not trying to place upon him any heavy burden, but that he, Tunewa, was being honored and recognized as the leader of his people on First Mesa, and that he, Wilson, was complying with the tribal constitution approved by the Secretary of the Interior, which was the law.

I learned that Bryon Adams, native missionary and First Mesa councilman, had been exerting a certain amount of influence on Tunewa for the past several months, and most of these I talked with laid the present trouble at First Mesa to Adam's activities. Adams was especially attentive to the old Chief at this meeting of the 28th. During the evening's discussions, Adams' brother, Boā, spoke up and said, "leave the old man alone." It is my opinion the old Chief was quite confused by Adams' influence and was unable to decide in his own mind what he should do next for fear he might be criticized or become involved in a quarrel. According to the Hopi way of life, the Kikmongwin must be protected from any unpleasant contacts or becoming involved in any strife.

Superintendent Wilson was unable to meet with Tunewa, his advisers and others on the following day (29th), because of a scheduled meeting with Mr. Radsford of the Department of Agriculture, who was on the reservation to gather data relative to the disputed Hopi reservation boundary and land-use area, so I met with them at Mr. Wilson's request. At this afternoon meeting, considerable discussion again took place, and when it appeared that things were not going to become any better or any action taken in choosing the representatives, I suggested that the four Headmen (Tunewa, Kutka, Maho and Duke) meet with me alone and try to select the representatives. They agreed to this plan and two or three close relatives present were asked to sit in on the closed meeting with us. During this meeting, Tunewa asked me why I could not choose the representatives. I told him that I could not choose them; neither could Mr. Wilson or the Commissioner, because the authority and honor rested with him or with the members of the tribe he might designate to choose them. This was according to their constitution which we must respect, I explained. After some further discussion they decided to act, when I suggested that each of the four headmen select one representative and in this way it would not be placing any undue

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responsibility or burden on any one of them. Each chose one and then the other three confirmed the choice. After the representatives were chosen, they were summoned to appear before an opening meeting and I was asked to announce those selected to represent First Mesa on the tribal council. Two of the representatives accepted the honor; the two others stated they would have to consult their uncles before accepting. This they promised to do before December 1, so that in case they could not serve, others might be chosen by the Headmen. The fact that two of the men chosen for councilmen would have to seek advice and permission so to speak from their uncles, shows again how strong the Hopi clings to his religious or ceremonial ties. The two in question did not appear before the Tribal Council on December 1, at Toreva, to be certified along with the two others who had accepted, and, as a result of this only eight (8) representatives from the nine (9) villages were certified and this was not a sufficient number to constitute a quorum, therefore no business was transacted on that day. Several of the villages who did not send representatives, in most cases, were holding initiation or other ceremonies, so it was hard to contact the headmen or get them to select their representatives, but I am sure the required number, nine (9) for a quorum or more, will have been selected by the next meeting — special or regular.

The Hopi Tribal organization is a much more complicated affair than most of our organized tribes in the southwest, so the administrator in most cases is required to work slowly, patiently and with caution in order to obtain the best results with these good people, and the Office will have to be patient toward the superintendent in the field in working out this new program, as he must also adhere closely to the constitution of the tribe. I do feel that the Hopi people will make progress with their organization once they become better acquainted with their constitution and by-laws and understand its meaning. Members expressed to me that they know and realize this new program under the IRA is for their very best interests and they are keenly interested in the whole program. They have the utmost confidence in their new superintendent, Seth Wilson, and speak of the results he has attained for them during the year and half that he has been among them. A few individuals like Adams, who I mentioned on page two, often cause temporary dissatisfaction or misunderstanding among their people for various reasons, but I question whether he will be able to do very much towards causing any grave concern in breaking down the organization program among the Hopis, however, he will have to be reckoned with from time to time.

While on the reservation I assisted the Tribal Chairman in completing his annual report of activities, which was read before the Council on December 1st. I also discussed the manner of preparing and keeping a treasurer's record and report with the Tribal Treasurer.

I met with the village council at New Oraibi (Kykotsmovi) on the afternoon of November 30th. This village is not under the traditional Hopi organization and the people are interested in adopting a village constitution. The present officers for 1940, with my assistance prepared in rough draft a proposed village constitution which will be studied by the people during the next month or more, before an attempt is made to adopt it in accordance with Section 4, Article III, of the Hopi constitution.

I expect to return to this jurisdiction in January or February and

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assist further with this work or any other problems Superintendent
Wilson may wish my services in.

Respectfully yours,

K. A. Marmon,
Organization Field Agent

EXHIBIT 22d



AMERICAN ASSOCIATION ON INDIAN AFFAIRS • INC
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7, March, 1940

Hon. John Collier
Commissioner of Indian Affairs
Washington, D. C.

Dear Mr. Collier:

Mr. Wilson tells me that some doubt has come up about the meaning of certain parts of the Hopi Constitution, and has asked me to write you what it was the Indians had in mind when those parts were written.

To begin with, there is a general consideration to be kept in mind. I understand that some officials in the Indian Office have objected to forming coöperatives and other such groups limited to single villages. They have said that these should be tribal. But they do not realize that the Hopi Constitution is not just a constitution, a set of rules of self-government, for a single tribe, but like the United States Constitution, it is also the articles of confederation of a number of self-governing villages. The Hopi way is to deal with local problems by villages. The Constitution merely adds to this a way for dealing with larger problems by the whole tribe. This consideration must be remembered in studying any part of the Constitution.

There is a question about the use of the name Tewa in the Preamble and in Article III, Section 1. When the First Mesa Committee was working on the Constitution they all, Tewas and Hopis, said they wanted to be a single village. A Tewa of Arizona is a Hopi. We talked it all over very carefully with the various chiefs and leaders, including Sateli, the Tewa chief. It was agreed that there should be only one village, and I was told that the Walpi kikmongwi would be the kikmongwi meant by the Constitution in the different places where it speaks of him. But we wanted to preserve the Tewa name, and to record the fact that they were uniting with the others in this way, so for that reason we mentioned it in those two places.

I have been asked about the meaning of "leader" in Article II, Section 3, and about what the kikmongwi is expected to do. The meaning of the words, "the kikmongwi shall be recognized as its leader", can be understood only if you bear in mind the preceding words, "[the village] shall be considered as being under the traditional Hopi organization". Those words control everything that is said about the kikmongwi in different parts of the Constitution. The word "leader" was chosen because it did not describe a definite office. The place of the kikmongwi, and the work he may do, are clearly marked in the traditional Hopi system, which is

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the one accepted. It was never intended that anything in the Constitution should be used to force a kikmongwi to take up any command or other activity not proper for him.

At First Mesa, when you look for the kikmongwi, you find several men who stand behind each other. You also find a larger group of men, heads of certain established groups, who work with the kikmongwi. The Hopis know very well who is the one who stands in front and speaks, who is the one who stands behind and yet is the first. As long as the traditions are followed, there can never be any confusion there over who is the kikmongwi in the meaning of the Constitution, nor as to what he can do. But if they depart from the traditions, or any government official tries to go against them, confusion will result immediately. I believe that in practice, one man will speak as kikmongwi, but he will be the voice, not of himself alone, but of many leaders who have talked together.

By using the word kikmongwi instead of chief, we brought in the whole tradition, so that there could be no doubt in the mind of any Indian. We were not just thinking of one person; that whole section, read all together, means that the villages keep a whole way of running things, which they have inherited and which they know works.

Article IV, Section 4, provides that the kikmongwi shall certify representatives to the Council. This does not mean that he appoints them, but that when they have been chosen, he is the person who shall send word that these men, and no others, are the ones who speak for his village.

Conflicting claims of land, both for farming and for grazing, are made by many of the villages. The question has been asked: Who should settle these claims? The answer is clearly given in Article IV, Section 1, Subheading h, giving the Tribal Council power to act as a court to hear and settle claims and disputes between villages in the manner provided in Article VIII. Article VIII provides the manner of so acting, and also provides for an appeal, so that all villages are amply protected from injustice.

This question was discussed with me many times, especially at Kyakotsnovi and Shungopavi. These two villages are in dispute over grazing land. Each wanted its claim settled in the Constitution, which was not proper. Each then wanted some outside official to settle the matter. But in a federation of this kind, if such basic, internal matters cannot be taken care of by the federation itself, then the federation is worthless. If the Hopis are to continue to stand up in this changing world, they must learn to take responsibilities which will cause them to be criticised by some people. It has been the practice of the Hopis to call upon white men to decide disputes, and then to blame them for whatever they decided. It is time they took up this burden for themselves, just as other people do.

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Several questions have come up about Article VII, dealing with the land. These have a connection with this matter of land disputes. The Council is to supervise use of range land, in connection with U. S. Government agencies. This again shows that the Council must not try to dodge problems coming out of the land. All of this Article on the Land is subject to Section 6 of the Act of June 18, 1934, as is required by law. That, of course, covers the legal authority of the Secretary of the Interior to establish rules for land-use and conservation.

The land under this section is divided into two classes: farming land which properly belongs, by tradition and accepted, existing practice, to villages and clans, and range land beyond, use-title to which is essentially tribal. With the help of the surveys of the Soil Conservation Service, it should be possible for the Tribal Council to determine clearly just what lands belong to each village for farming purposes. The Hopis, particularly those at Kyakotsmovi and Moenkopi, wanted to be sure that existing, lawful assignments -- use-ownerships -- should not be upset by the Constitution, so the first section of Article VII was carefully worded to protect them. It is not, of course, intended to freeze into lawfulness the claim of anyone who is using land to which he has no right.

This leaves the wide stretches of land beyond the village holdings. As we know, many Hopis have established farms on that land, where planting is possible. The wording of Section 1 protects these people. But at the same time, all that land is under the Council's supervision, and in cooperation with the S.C.S. and Indian Service, and subject to the Secretary's authority which cannot be set aside by us; it is up to the Council to decide how the use of that land for grazing, and the future taking up of farms, shall be divided.

This makes a long letter. I have put in a good deal of detail, because I have found that it is hard to make people who do not know the Hopi way, understand their way of doing and their way of thinking. The Hopi way has been carefully protected in the Constitution. It is completely different from ours. But it is just as good -- a fact which is proven by the ability of villages and individuals to adjust themselves successfully to dealings with our world, and to modern inventions, without giving up their old way, or turning their backs upon their kikmongwi. At the same time, the white man has brought new problems -- cattle is one of these -- and new ways have to be set up, and taken over by the Hopis, for dealing with these.

Yours sincerely


Oliver La Foy

cc/ Mr. Wilson

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B.I.A., Cl. File
56826-39-318
Hopi

Feb 12 1941

MEMORANDUM for the
Commissioner of Indian Affairs.

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

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

1. Contrary to the prohibitions against the creation of Indian reservations without statutory authority, contained in the acts of May 25, 1918 (40 Stat. 570, 25 U.S.C.A. sec. 211), and March 3, 1927 (44 Stat. 1347, 25 U.S.C.A. sec. 398d);
2. In violation of the rights of the Hopi Indians within the 1882 reservation; and
3. Not in conformity with the provisions of the Hopi constitution approved December 19, 1936.

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

1. Prohibitions of the 1918 and 1927 acts

The act of 1918 provides:

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

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

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

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

An "Indian reservation," as recognized in the 1927 act, itself, may be defined as an area set apart by the government for the use and occupation of Indians. United States v. McGowan, 302 U.S. 535. The right of use and occupancy is the Indian title to land which the creation of an Indian reservation establishes or recognizes, unless, as in rare instances, a different title is specified. This is true whether the reservation is created by treaty, statute, or Executive order. Johnson v. McIntosh, 8 Wheat, 543; Mitchell v. United States, 9 Pat. 711, 745; United States v. Cook, 19 Wall. 591; Leavenworth etc. R.R. Co. v. United States, 92 U.S. 733, 742; Seneca Nation v. Christy, 162 U.S. 283, 288-9; Beecher v. Wetherby, 95 U.S. 517, 525; Minnesota v. Hitchcock, 185 U.S. 373, 388 et seq.; Lone Wolf v. Hitchcock, 187 U.S. 553; Jones v. Meehan, 175 U.S. 1; Spalding v. Chandler, 160 U.S. 394; McFadden v. Mountain View Min. & Mill. Co., 97 Fed. 670, 673; Gibson v. Anderson, 131 Fed. 39. In the McFadden case, supra, the court explained that the effect of an Executive order "was the same as would have been a treaty with the Indians for the same purpose, and was to exclude all intrusion on the territory thus reserved by any and every person, other than the Indians for whose benefit the reservation was made, for mining as well as other purposes." Even a setting apart by the Secretary of the Interior of lands for Indian use amounted to the creation of a reservation, as the Secretary was deemed to be acting for the President. United States v. Walker River Irrigation Dist., 104 F. (2d) 334. Since the effect of an order creating a reservation is to give the Indians the use and occupancy of the land, an order giving certain Indians the use and occupancy of a designated area of land is, in effect, the creation of a reservation. This conclusion is true a fortiori where the effect is to give a tribe of Indians an exclusive right of use and occupancy in an area which was part of a larger area in which they had the right of use and occupancy in common with other Indians settled thereon.

The 1927 act was passed in order to make certain that the rights of use and occupancy within the reservations created by the executive branch of the Government were the same as those recognized in the case of treaty or statutory reservations, and particularly the right to receive the proceeds

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from minerals within the reservation. The intent of the act was to confirm the opinion of the Attorney General in 1924 that the Indians of Executive order reservations had the same property rights as the Indians of other reservations (34 Op. Attv. Gen. 181). That opinion of the Attorney General left open the question whether the President might abolish part of a reservation created by him. It is clear that section 4 of the act, above quoted, was intended to settle this question by providing that the President could not alter the boundaries of reservations already created. It has been suggested that section 4 was intended to relate simply to additions to Indian reservations. No such intent appears in the legislative history of the act, and if such were the intent, the section would have been largely unnecessary in view of the act then in existence prohibiting the withdrawal of public lands as an Indian reservation except by act of Congress (act of June 30, 1919, 41 Stat. 34). However, resort need not be had to the legislative history of section 4 of the 1927 act, since there is no ambiguity in the prohibition upon any type of change of the boundaries of an Indian reservation.

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

These statutory prohibitions were apparently recognized by the Department in the period from 1930 to 1934 when an attempt was made to obtain passage of the Navajo boundary bill with a provision included to authorize the Secretary of the Interior to define a boundary between the Navajo and Hopi Indians. This attempt was abandoned and the bill was finally passed containing a provision that nothing in the act would affect the status of the 1882 reservation. (Act of June 14, 1934, 48 Stat. 960.) The files of the Department show that this result occurred because of the protests coming from both the Navajo and Hopi Indians. (Indian Office files No. 308.2 Pts. 1 and 2, 8970, 1930.)

2. Rights of the Hopi Indians in the 1882 reservation

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

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ation is to other Indians or to non-Indians. The privilege placed in the Secretary of the Interior at the time of the creation of the 1882 reservation to settle other Indians within the reserve permitted him to allow non-Hopis within the reservation. The privilege does not extend to the exclusion from the reservation of the Hopis themselves.

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

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

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

3. Hopi constitution

At least three provisions of the Hopi constitution bar action by the Department to limit the use and occupancy of the Hopi Indians to the proposed Hopi Unit without the assent of the Hopis. Article I, defining the jurisdiction of the Hopi Tribe, provides that the authority of the tribe shall cover the Hopi villages "and such land as shall be determined by the

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Hopi Tribal Council in agreement with the United States Government and the Navajo Tribe." This provision was intended to provide, and clearly does provide, for the defining of a boundary to the land of the Hopis by agreement of all parties concerned. Article VI, section 1(c) embodies the provision in section 16 of the Indian Reorganization Act that organized tribes may prevent the disposition of their property without their consent. Article VII places in the Hopi Tribal Council supervision of farming and grazing upon the lands beyond the traditional clan and village holdings.

Available Legal Procedure

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

I understand that the problem is economic and psychological. The increasing infiltration of the Navajo Indians farming and grazing livestock within the 1882 reservation threatens to choke the Hopi economy, particularly as the Hopis are turning more to the grazing of livestock and the range land is deteriorating. Neither tribe is willing to agree to a reservation boundary. The Hopis believe that such an agreement would embarrass their traditional claims to large areas of land. The Navajos wish the privilege of utilizing the entire 1882 reservation as far as possible. The core of the matter is land use for farming and grazing. I believe it possible to take effective action to control farming and grazing without defining a separate Hopi reservation.

Proposal for grazing segregation

The Secretary of the Interior has the undoubted authority to regulate the use of range land to protect the land from waste and to prevent unfair and unreasonable monopolization by individuals. This authority was established in the Navajo grazing cases (United States v. Eaga, D.C. Arizona, unreported, D.J. File No. 90-2-8-24-3). In so far as the 1882 reservation is concerned, the power is also based upon statutory expression in section 6 of the Indian Reorganization Act. The present Navajo and Hopi grazing regulations (25 CFR Pt. 72) regulate the number of units which each family may place upon the range in the light of the carrying capacity of the range. To administer these regulations the Secretary of the Interior has established grazing districts based upon the social and economic requirements of the Indians, one of which, No. 6, is designated as the Hopi Reservation for the purposes of grazing administration. 25 CFR sec. 72.13(g). Within this Hopi grazing reservation the regulations are to be executed in so far as they are compatible with the provisions of the Hopi constitution and in cooperation with the Hopi Tribal Council (secs. 72.4, 72.6 and 72.9).

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

The Hopi constitution recognized the regulatory power of the Secretary over the range land provided in section 6 of the Indian Reorganization Act. However, since the suggested regulation would not only regulate the use of the range but would exclude Hopis from the use, for grazing purposes, of the land outside the Hopi Unit, the regulations must have the assent of the tribe. The distinction between the regulation of a property right and the denial of the exercise of a property right as a basis of the affirmance or disaffirmance of the power of the Secretary is apparent in the two cases of United States v. Bega, supra, and Mason v. Sams, 5 F. (2d) 255 (D.C.W.D. Wash., 1925). In the latter case the regulations of the Secretary which denied fishing privileges to tribal members without the consent of the tribe were held invalid.

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

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

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

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

If the rights of the Hopis are thus recognized, I see no objection

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to the Navajo superintendent issuing grazing permits to Navajos within the remainder of the 1882 reservation under the authority of the Secretary to settle non-Hopis within the reserve.

Farming Segregation

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

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

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

Nathan R. Margold
Solicitor.

Attachment.

Note: Underscoring by counsel

EXHIBIT 24g

Hopi Agency Files
Keams Canyon, Arizona

Mr. E. R. Fryer,
Supt., Navajo Agency

Sept. 4, 1941

My dear Mr. Fryer:

Reference is made to recent correspondence regarding proposed modification of the boundary of Land Management District No. 6 (Hopi), and to the proposed changes in the boundaries of a number of other districts as recommended in your letter of July 19.

In regard to the proposed modification in the boundary of District No. 6, your attention is invited to Article X of the Constitution of the Hopi Tribe which reads as follows:

"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."

Your attention is also invited to Subsection (g), 25 CFR, 72.13 of the Grazing Regulations of the Navajo and Hopi Reservation which reads as follows:

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

Since it is prohibited by law to establish Indian reservations without specific authorization from Congress, and in view of the fact that the Solicitor has held that this law applies to the proposed establishment of the boundary of the Hopi Reservation as provided for in the above quotation from the tribal constitution and the grazing regulations, the proposed adjustment in the boundary cannot, therefore, be considered as a permanent adjustment of the reservation boundary but must be considered merely as a change in the land management district. In view of the foregoing, and since the constitution of the Hopi Tribe provides that the Hopi Tribal Council shall negotiate with the United States Government and the Navajo Tribe for the establishment of the boundaries of the reservation, it appears that the proposed changes in the boundaries of District No. 6 should be submitted to the Tribal Council for consideration and approval by an appropriate resolution. * * * * (emphasis added)

Sincerely yours,

William Zimmerman, Jr.
Assistant Commissioner

BAR:kh
8-30-41
cc: Zeh, Regional Forester
Hopi Agency.

Forestry Chrono.

EXHIBIT 24h

Classified File
62000-35-301,
Part 5, Navajo

Oct. 27, 1941

Mr. Seth Wilson,
Supt., Hopi Agency,

Dear Mr. Wilson:

Reference is made to the letter of September 23, signed by you, the Chairman, Vice Chairman, and Secretary of the Hopi Tribal Council in reply to our letter of September 4 regarding proposed changes in Land Management District No. 6 (Hopi).

The ten questions asked in your letter are answered in the order enumerated:

1. Is the authority to establish new reservations or modify the Executive Order Reservation of 1882 "for Hopi and other Indians" vested only in Congress?

By Executive Order dated December 16, 1882, approximately 2,500,000 acres of land were 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." By the Act of May 25, 1918 (40 Stat. 570), Congress provided that no Indian reservation shall be created nor shall any addition be made to one heretofore created, within the limits of the States of New Mexico and Arizona except by Act of Congress. Also, the Act of March 3, 1927 (44 Stat. 1347), prohibits any change in the boundaries of the reservation except by Act of Congress. Under date of February 12, 1941, the Solicitor of the Department of the Interior held that the prohibition of the 1918 and 1927 Acts is applicable to the Hopi Reservation.

2. Does the Secretary of the Interior recognize as legal residents of the Executive Order Reservation approximately 4,000 Navajos and 3,000 Hopis?

In effect the Solicitor, in the opinion referred to in the answer to question No. 1, held that where a statute or Executive order created a reservation for a designated tribe or tribes, such tribes have the usual Indian title of use and occupancy even though the Secretary is privileged to settle further Indians upon the land and that such tribes have been considered as having the usual tribal property rights. In connection with the view expressed in this opinion I quote therefrom the following:

EXHIBIT 25a

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

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

3. Does the Navajo Tribe as mentioned in Article I of the Hopi Constitution and By-laws refer to the Navajo residents of the Executive order reservation or the entire Navajo tribe?

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 referred to the "Navajo Tribe" means the general Navajo tribal organization.

4. Does the authority of the Hopi Tribe in Article I give the Council the right to negotiate for a permanent reservation or only the right to negotiate for use rights in the Executive Order Reservation?

The Hopi Tribal Council has the right to negotiate for a permanent reservation, but such boundaries as may be determined upon through such negotiations would not become final unless approved by Congress.

5. Is the Executive Order of 1882 the only legal recognition of rights to land of the Hopi Tribe?

It appears that the Executive Order of 1882 and the approved Constitution are the only positive acts taken by the Government in recognition of the rights of the Hopi Indians. *See Act of 22 July 1958*

6. 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?

The Grazing Regulations for the Navajo and Hopi Reservation (25 C.F.R. 72.5) provide that "The Commissioner of Indian Affairs shall establish land management districts within the Navajo and Hopi Reservation, based

EXHIBIT 25b

upon the social and economic requirements of the Indians and the necessity of rehabilitating the grazing lands." Section 72.13(g), Title 25, C.F.R., provides "For the purpose of the regulations in this part, District 6, as now established by the Navajo Service, shall constitute the Hopi Reservation until such time as the boundaries thereof are definitely determined in accordance with Article I of the Constitution and By-laws of the Hopi Tribe." In view of this declaration any changes now proposed in the boundary of the district should meet with the approval of the Hopi Tribal Council.

7. If the Hopi Tribal Council approves the changes in the District Boundary, would that mean that Article I of the Constitution has been complied with?

Since the proposed change in the boundary of District 6 has no bearing on the establishment of the reservation boundary, the answer to this question is in the negative.

8. What farming rights do the Hopis have in the Executive Order Reservation of 1882? What grazing rights?

This question is closely related to question and answer No. 2. Farming and grazing rights of both the Hopi Indians and the Navajo residents must be recognized and not discriminated against.

9. Would approval of these proposed changes by the Superintendent bind the Hopi Tribe and nullify rights under Article I of the Hopi Constitution and By-laws?

Approval of the proposed changes in the boundary of District 6 would not nullify or affect the rights of the Hopi Indians under Article I of their Constitution. As stated in our letter of September 4, "Since it is prohibited by law to establish Indian reservations without specific authorization from Congress, and in view of the fact that the Solicitor has held that this law applies to the proposed establishment of the boundary of the Hopi Reservation as provided for in the above quotation from the tribal Constitution and the grazing regulations, the proposed adjustment in the boundary cannot, therefore, be considered as a permanent adjustment of the reservation boundary but must be considered merely as a change in the land management district."

10. How can the Hopi Tribal Council go about complying with Article I of the Hopi Constitution and By-laws?

If the Hopi Indians are desirous of establishing for their exclusive use an area out of the Executive Order Reservation of 1882, the first step to take would be negotiations between the two Councils. You, as Superintendent, with the cooperation of the Superintendent of the Navajo Agency, should take steps to bring the two Councils together and should make avail-

able the data, etc., necessary to the negotiations, with a view to entering into a formal agreement as to the location of the boundary of the proposed reservation. Upon completion of the negotiations and execution of formal agreement the matter should then be referred to the Office for initiation of the necessary legislation.

In closing we wish to reiterate that approval by the Hopi Council of the proposed changes in District 6 will in no way affect the rights of the Hopi Indians under Article I of their Constitution. It should also be borne in mind that the proposed changes in the boundary add 29,575 acres which has a carrying capacity of 1,655 sheep units yearlong. If, however, there is still any apprehension on the part of the Hopi Council regarding a possible loss of rights safeguarded by Article I of the Hopi Constitution, a formal resolution of acceptance is not necessary. If such is the only reason for not desiring to sanction the change in the proposed boundary of District 6, the Council could adopt a resolution providing in effect that it will interpose no objection to the change with a specific provision in the resolution that such action in no way affects the rights of the Hopi Indians under Article I of their Constitution.

John Collier
Commissioner.

Approved: JAN. 8, 1942

Oscar L. Chapman
Assistant Secretary.

RAR:kh
10-15, 21, 23-41

cc: Navajo Agency,
Zeh, Regional Forester.
and
Tribal Chairman Sam Shing, Hopi Agency.
Forestry Chrono.

(emphasis added)

EXHIBIT 25d

RESOLUTION OF THE HOPI TRIBAL COUNCIL

Resolution No. 12

A resolution pertaining to the legal and just rights of the Hopi Tribe of Arizona, in the Executive Order Reservation of 1882.

Be it resolved by the Hopi Tribal Council of the Hopi Tribe in special meeting assembled on March 26, 1942; that,

Whereas, the Constitution and By-laws of the Hopi Tribe adopted on October 24, 1936, and approved by the Secretary of the Interior on December 19, 1936, gives the Hopi Tribal Council the responsibility of speaking for the Hopi Tribe; and

Whereas, it is not the purpose of the Hopi Tribe through the Tribal Council to enter into controversy with the Navajo Tribe, the Indian Office, or Department of the Interior, however, it is felt that the Hopis have shown great patience in not rebelling against the unjust conditions which have existed since 1936; and

Whereas, we look to the Indian Office and the Department of the Interior for just and sympathetic recognition of our just rights to the use and occupancy of our original Executive Order Reservations; and

Whereas, we have been denied these rights because of District Six having been set up as a temporary reservation for the Hopi by the Navajo Service without our formal consent, which has also distressed us because of these intolerable existing conditions; and

Whereas, the Hopi Tribal Council wrote the Commissioner of Indian Affairs on October 5, 1937, protesting against District Six with no record of acknowledgment of this protest ever having been received by the Hopi Tribal Council; and

Whereas, the Grazing Regulations for the Navajo and Hopi Reservations provides that the Commissioner of Indian Affairs shall establish land management districts within the Navajo and Hopi Reservations based upon the social and economic requirements of the Indians; and

Whereas, land management districts have not been set up within the Hopi Reservations; and

Whereas, District Six as set up by the Navajo Service denies the Hopis their legal rights to use and occupancy of their land and resources in their Executive Order Reservation of 1882 without their voluntary action; and

EXHIBIT 25e

Whereas, the Acts of May 25, 1918, and March 5, 1927, prohibits any change in the boundary of a reservation within the limits of the States of Arizona and New Mexico except by Act of Congress, so District Six as set up by the Navajo Service as a temporary reservation for the Hopis we consider illegal; and

Whereas, the Bachford recommendations for changes in the District Six boundary are not acceptable to the Hopi Tribe or the Hopi Tribal Council; and

Whereas, a number of Hopi stockmen have made applications to the Navajo Service for grazing permits in conformity with present unsatisfactory regulations and run stock within the Executive Order Reservation outside of District Six; and

Whereas, it is believed it may be years, if not impossible to agree on a reservation with the Navajo Tribal Council;

Now, therefore be it resolved, that;

1. The Navajo Service be restrained from trespass action against these Hopis claiming grazing rights until such time as a land management district acceptable to the Hopis is established and the applications of all Hopis have been acted upon.
2. The Commissioner of Indian Affairs have a member or members of the Phoenix District Office on Grazing and Resources establish a land management district within the Hopi Reservation based upon the needs of the Hopi Indians and acceptable to them.
3. The District to be for the exclusive use of the Hopis with the exception of those Navajos acceptable to the Hopi Tribe.
4. The Hopi Tribe be allowed a revolving rehabilitation fund to compensate for the losses incurred because of the denial of their legal rights by the establishment of District Six.
5. Navajos economically distributed to be compensated by the Government.

The foregoing resolution was on March 28, 1942, duly adopted by a vote of 7 for and 0 against, by the Hopi Tribal Council, pursuant to authority vested in it by Section 1 (a) and (c) Article VI, of the Constitution of the Tribe. This resolution is being submitted to the Secretary of the Interior through the Commissioner of Indian Affairs for his review and recommendations.

Chairman, Hopi Tribal Council

Sam King

Secretary, Hopi Tribal Council

EXHIBIT 25f