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PARTITION OF THE SURFACE RIGHTS OF NAVAJO-HOPI INDIAN LAND

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HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.R. 1193

A BILL TO AUTHORIZE THE PARTITION OF THE SURFACE RIGHTS IN THE JOINT USE AREA OF THE 1882 EXECUTIVE ORDER HOPI RESERVATION AND THE SURFACE AND SUB-SURFACE RIGHTS IN THE 1934 NAVAJO RESERVATION BETWEEN THE HOPI AND NAVAJO TRIBES, TO PROVIDE FOR ALLOTMENTS TO CERTAIN PAIUTE INDIANS, AND FOR OTHER PURPOSES

MARCH 7, 1973
WINSLOW, ARIZ.

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Printed for the use of the
Committee on Interior and Insular Affairs

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U.S. GOVERNMENT PRINTING OFFICE
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PARTITION OF THE SURFACE RIGHTS OF NAVAJO-HOPI INDIAN LAND

WEDNESDAY, MARCH 7, 1973

U.S. SENATE,
SUBCOMMITTE ON INDIAN AFAIRS OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Winslow, Ariz.

The subcommittee met at 9:15 a.m., in the Civic Center, Winslow, Ariz., pursuant to notice, Senator James Abourezk, presiding.

Present: Senator Fannin.

Also present: Jerry T. Verkler, staff director, Gerald Gereau, Fred Craft, William Chandler.

Senator ABOUREZK. The field hearings of the Subcommittee on Indian Affairs of the Senate Interior and Insular Affairs Committee are hereby opened.

I want to announce first that the hearings will run until noon today.

But, however, we have guaranteed both sides in this dispute equal time, so we will go for 2½ hours from the time the witnesses from the Navajo Tribe begin to testify, and if that necessitates running past 12 o'clock, we will do so, and we will provide 2½ hours for the people from the Hopi Tribe to testify this afternoon.

So that each side has equal time.

We hope to break for lunch at about 12 o'clock or soon thereafter as the testimony is finished.

We hope to come back about an hour and a half after that testimony is done to reconvene the afternoon session.

OPENING STATEMENT OF SENATOR JAMES ABOUREZK

Senator ABOUREZK. Let me open my remarks by saying what a great pleasure it is for me to be here in the home State of my good friend and colleague, Senator Paul Fannin.

One of the first things I learned upon coming to the Senate from the House of Representatives this past January was that Paul Fannin is one of the hardest working and most respected members of the U.S. Senate.

I was very glad to be assigned to the Committee on Interior and Insular Affairs because my home State of South Dakota has a large Indian population and much of the State consists of public lands. I was doubly pleased at the opportunity to work with Paul Fannin. It is my opinion that few if any men have a greater knowledge and understanding of the problems confronting our Indian people, and particularly the Arizona Indian citizens, than Paul Fannin.

In his 8 years as a member of the Senate Interior Committee, Senator Fannin has worked hard for Indian rights and Indian self-

determination. He has stated many times that Indians know best what is best for Indians, and that they have proven that they are capable of outstanding leadership. Paul Fannin believes, and I concur, that our Indian citizens have earned the right to determine their own destiny.

You from Arizona know that Senator Fannin's concern for the Indian people predates his service in the U.S. Senate by many years. As a private citizen and businessman, Paul Fannin worked with and for Indians, and he was able to do even more during three terms as one of Arizona's outstanding governors.

Let me state, also, my great appreciation to Mayor Tom Whipple, his city council, and the good citizens of Winslow for the hospitality which has been extended to the committee and its staff and for the use of this fine civic center in which to conduct these hearings.

I want a'so to thank Gov. Jack Williams for courtesies extended, and to express the committee's appreciation for the assistance of Winslow Chief of Police Walter Maule, Navajo County Sheriff Lyle Jenkins, Col. Tom Mildebrandt, and Capt. Wes Mauldin of the Department of Public Safety, and to staff members of the Bureau of Indian Affairs for helping with arrangements for these hearings.

[The prepared statement of Senator Abourezk follows:]

STATEMENT OF HON. JAMES ABOUREZK, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA AND CHAIRMAN, SUBCOMMITTEE ON INDIAN AFFAIRS

Senator ABOUREZK. This is an open, public hearing by the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs to take testimony on a longstanding dispute between the Hopi and Navajo Indian Tribes involving the title and use of approximately 2.5 million acres of land set aside in an 1882 Executive order primarily for the Hopi Tribe. It is the earnest hope of this subcommittee and the full membership of the Senate Interior Committee, that this dispute can be settled fairly and expeditiously so that both the Navajo and Hopi Indian people can turn their energy to more positive pursuits.

A 1962 Arizona district court decision gave the Hopis exclusive interest to approximately 700,000 acres, and set aside the remaining 1.8 million acres for the joint use of the two tribes. Since the 1962 decision the two tribes appear to have arrived at an impasse despite repeated negotiations.

Last year the Senate Interior and Insular Affairs committee held a hearing on H.R. 11128, a House-passed bill to authorize partition of the land in which these tribes have an interest. At this hearing both sides of the controversy made presentations, but because it was so late in the session and because of the many complexities surrounding this dispute, it was decided that it would be unwise for the committee to act at that time without the benefit of a more thorough examination of the facts involved in the controversy.

The committee felt that in fairness to both tribes and to the Senate itself, the committee should not act without sending representatives to the area for a field examination and local hearing to allow those people who could not come to Washington an opportunity to be heard.

I direct the text of H.R. 1193 appear at this point of the record.

[The bill referred to follows:]

93D CONGRESS
1ST SESSION

H. R. 1193

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1973

Mr. STEIGER of Arizona introduced the following bill; which was referred to the Committee on Interior and Insular Affairs

A BILL

To authorize the partition of the surface rights in the joint use area of the 1882 Executive Order Hopi Reservation and the surface and subsurface rights in the 1934 Navajo Reservation between the Hopi and Navajo Tribes, to provide for allotments to certain Paiute Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all of the surface rights in and to that portion of the Hopi Indian Reservation created by the Executive Order of December 16, 1882 in which the United States district court

found the Hopi and Navajo Indian Tribes to have joint, undivided, and equal interests in the case entitled Healing against Jones (210 Fed. Supp. 125 (1962), affirmed 373 U.S. 758) shall be partitioned in kind as provided in this Act.

SEC. 2. Hereafter the United States shall hold in trust exclusively for the Hopi Indian Tribe and as a part of the Hopi Indian Reservation, the surface interests in and to the following described lands:

Commencing at the northeast corner of the Executive Order Reservation of December 16, 1882, 110 degrees 00 minutes west longitude by 36 degrees 30 minutes north latitude;

thence due south, 40.6 miles to mile 209 on the east boundary of the Executive Order Reservation of 1882, as surveyed by United States Bureau of Land Management in 1963 and 1964, to the true point of beginning;

thence due south, 9.9 miles, following the east boundary of the Executive Order Reservation of 1882 to the centerline of State Route 264;

thence southwesterly, 33,900 feet, following the centerline of State Route 264, to the center of its junction with State Route 77;

thence southerly, 7.73 miles, following the centerline of State Route 77;

thence west, 31 degrees 30 minutes south, 29,300 feet, to the southwest corner of section 6, township 25 north, range 21 east;

thence west, 11.5 miles, following the section lines to the northwest quarter corner of section 7, township 25 north, range 19 east;

thence southwesterly 16,500 feet, to the intersection of the section line between sections 14 and 23, township 25 north, range 18 east, and the Old Polocca-Winslow Road;

thence southerly $\frac{1}{4}$ miles, following the centerline of the Old Polacca-Winslow Road, to the south boundary of the Executive Order Reservation of 1882;

thence due west, 26 miles, following the south boundary of the Executive Order Reservation of 1882, to a point due south of Monument Point, also known as Finger Point and Katchina Point;

thence due north, 18,250 feet, to Monument Point;

thence northwesterly, following the rim of Garces Mesa, to the western extremity thereof, located in the southwest quarter of section 1, township 25 north, range 13 east;

thence northwesterly, 2.4 miles, following a fence

line, to the end of the fence line and the southern extremity of Garces Mesa, located in the southeast quarter of section 27, township 26 north, range 13 east;

thence northerly, following the rim of Garces Mesa to a point where said rim intersects the line common to the northeast quarter and the northwest quarter of section 22, township 26 north, range 13 east;

thence north, 1,500 feet, to the north quarter corner of section 22, township 26 north, range 13 east;

thence north northeasterly, 6,000 feet, to the northeast corner of section 15, township 26 north, range 13 east;

thence north, 3,500 feet, along the section line;

thence west 16 degrees 30 minutes north, 4,800 feet, to the end of a fence adjoining Dinnebito Wash;

thence west 16 degrees 30 minutes north, 4,000 feet, following the fence, to the top of a rim;

thence north 53 degrees west, 5,900 feet, following a fence, to the top of Moencopi Plateau;

thence northwesterly, 9,300 feet, following the rim of the plateau to its junction with the west boundary of the Executive Order Reservation of 1882, 4,650 feet south of mile 110;

thence due north, 41 miles to the centerline of United States Route 164;

thence northeasterly, 5 miles, following the center-line of Route 164 to the junction of a road to the east;

thence south 30 degrees east 4½ miles, to the top of the rim;

thence southerly, 1.1 miles, following the rim;

thence east 11 degrees south, 2.6 miles, to a point where the Black Mesa Slurry Pipeline intersects the 36 degree 15 minute parallel;

thence northeasterly, 8.2 miles, following the north boundary of the pipeline right-of-way;

thence north 59 degrees east, 3.2 miles, to the junction of two major drainages from the north;

thence north 44 degrees east, 2.7 miles, to the easterly bend in a pickup road;

thence northeasterly, 3.6 miles, following the said road, to a point where the road bears abruptly to the southeast;

thence northeasterly, 4¼ miles, following the divide;

thence due east, 3 miles, to 110 degrees 30 minutes west longitude;

thence east 27 degrees 30 minutes south, 2.9 miles, to a point where the east boundary of the right-of-way for the proposed State Second Mesa-Kayenta Road crosses the Moencopi Wash;

thence southerly, 20½ miles, following the east

boundary of the proposed road right-of-way to a point south of Big Mountain Dam where a line from Gum Point bearing north 54 degrees 02 minutes west will intersect the east boundary of the right-of-way;

thence south 54 degrees 02 minutes east, 21.8 miles to Gum Point;

thence southeasterly, 8½ miles, following the northern rim of the mesa to mile 209 on the east boundary of the Executive Order Reservation of 1882, to the point of beginning; excepting the Hopi Reservation as established by the decree of the United States District Court on September 28, 1962, in said case of Healing against Jones; containing nine hundred and four thousand two hundred and sixty-five acres, more or less.

SEC. 3. Hereafter, the United States shall hold in trust exclusively for the Navajo Indian Tribe and as a part of the Navajo Indian Reservation the surface interests in and to the following described lands:

All of the lands within the Hopi Executive Order Reservation of December 16, 1882, except the lands described in section 2 of this Act and the exclusive Hopi Reservation as established by the decree of the United States District Court on September 28, 1962, in said case of Healing against Jones; containing nine hundred seventeen thousand eight hundred and fifteen acres, more or less.

SEC. 4. Partition of the surface of the lands described in sections 2 and 3 hereof shall not affect the existing status of the coal, oil, gas and all other minerals within or underlying said lands.

All coal, gas, oil and minerals of every kind, shall be managed jointly by the Hopi and Navajo Tribes, subject to such supervision and approval by the Secretary of the Interior or as otherwise required by law, and the proceeds therefrom shall be divided between the said tribes, share and share alike.

SEC. 5. Hereafter the United States shall hold in trust exclusively for the Hopi Indian Tribe and as a part of the Hopi Indian Reservation all right, title, and interest in and to the following described land which is a portion of the land described in the Act of June 14, 1934 (48 Stat. 960), on which the Hopi Tribe was located on the date of said Act and outside of the Hopi Executive Order Reservation:

Beginning at a point along the rim of Moencopi Plateau where the plateau meets the Navajo purchased land at approximately 5,000 feet elevation, said point being on the north boundary of section 9, township 29 north, range 11 east (projected);

thence northerly and northwesterly along the rim of Moencopi Plateau to a point on the projected section

line between section 11 and section 12, township 31 north, range 10 east;

thence north along said section line to the center of Moencopi Wash;

thence up the center of Moencopi Wash to a point where it meets the west boundary of allotment No. 54;

thence south and east to the southeast corner of allotment 52;

thence north to the southwest corner of allotment numbered 50;

thence east and north around allotment numbered 50 to the northeast corner thereof;

thence west to the centerline of the highway;

thence northerly and easterly along the centerline of the highway to a point on the centerline of section 28, township 32 north, range 11 east;

thence north along the centerline of sections 28, 21, 16, 9 and 4, township 32 north, range 11 east, to the north quarter corner of said section 4;

thence east along the north lines of sections 4, 3, 2 and 1, township 32 north, range 11 east, to the northeast corner of said section 1, said corner being on the range line between ranges 11 and 12 east;

thence south along said range line to the center of Moencopi Wash;

thence up the center of Moencopi Wash to the west boundary of the Hopi Executive Order Reservation of December 16, 1882;

thence south along said west boundary to a point where a northeasterly extension of the Buck Pasture Fence would intersect said boundary;

thence southwesterly to Windmill numbered A-149;

thence westerly along the section line on the south boundary of section 6, township 29 north, range 12 east, and continuing along the section lines on the south boundary of sections 1, 2, 3, and 4, township 29 north, range 11 east, to the point of beginning.

SEC. 6. The Secretary of the Interior, hereinafter called the "Secretary," is hereby authorized to allot in severalty to individual Paiute Indians, not now members of the Navajo Indian Tribe, who are located within the area described in the said Act of June 14, 1934, and who were located within said area or are direct descendants of Paiute Indians who were located within said area on the date of said Act, land in quantities as specified in the Act of February 8, 1887 (24 Stat. 388), as amended, and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 331, 348, and 349 of title 25, United States Code.

SEC. 7. Hereafter the United States shall hold in trust exclusively for the Navajo Indian Tribe and as a part of the Navajo Indian Reservation the lands described in the said Act of June 14, 1934, except the lands described in sections 2 and 5 hereof and the lands in the exclusive Hopi Indian Reservation commonly known as Land Management District 6, and further excepting those lands allotted pursuant to section 6 hereof.

SEC. 8. The Secretary is authorized and directed to remove all Navajo Indians and their personal property, including livestock, from the lands described in sections 2 and 5 of this Act. Such removal shall take place over a period of ten years with approximately 10 per centum of the Navajo occupants to be removed each year. No movement of Navajo Indians onto any of the lands described in sections 2 and 5 of this Act or Land Management District 6 shall be lawful unless advance written approval of the Hopi Tribe is obtained. No Navajo Indian shall hereafter be allowed to increase the number of livestock he grazes on the areas described in sections 2 and 5 of this Act, nor shall he retain any grazing rights subsequent to his removal therefrom.

SEC. 9. The Secretary is authorized and directed to remove all Hopi Indians and their personal property, including livestock, from the lands described in sections 3 and 7 of this Act. Such removal shall take place over a period of

two years with approximately 50 per centum of the Hopi occupants to be removed each year. No movement of Hopi Indians onto any of the lands described in sections 3 and 7 of this Act shall be lawful unless advance written approval of the Navajo Tribe is obtained. No Hopi Indian shall hereafter be allowed to increase the number of livestock he grazes on the areas described in sections 3 and 7 of this Act, nor shall he retain any grazing rights subsequent to his removal therefrom.

SEC. 10. (a) Navajo Indians moved pursuant to section 8 of this Act shall be given priority for assignment of lands included within the Navajo Indian irrigation project. The Secretary in cooperation with the Navajo Tribal Council shall determine the size of parcels within the project to be assigned to such Indians as necessary to provide them with an economic base.

(b) Notwithstanding the provisions of section 3 of the Act of June 13, 1962 (76 Stat. 90), as amended by the Act of September 25, 1970 (80 Stat. 867), the Navajo Tribe shall not be required to pay the United States for any federally owned lands included within the Navajo Indian irrigation project which are assigned to Indians moved pursuant to this Act.

(c) The value of lands acquired by the Navajo Tribe in fee and included in the project as provided in section 3 (b)

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of said 1962 Act which are assigned to Indians moved pursuant to this Act shall be credited against any sums the Navajo Tribe owes or may in the future owe to the United States under section 3 of said 1962 Act.

(d) The Secretary is hereby authorized to declare that any federally owned lands within the areas described in section 3 (a) of said 1962 Act, as amended, not susceptible to irrigation and not needed for project works or canals are held in trust by the United States for the Navajo Tribe.

(e) The Secretary is also authorized to acquire by purchase, exchange, or condemnation, any non-Government lands within said areas which are not susceptible to irrigation and which are not needed for project works or canals. After acquisition, said lands shall be held in trust by the United States for the Navajo Tribe.

(f) The lands transferred to or acquired for the Navajo Tribe pursuant to (d) and (e) shall be available for assignment to Navajo Indians moved pursuant to section 8 of this Act who do not desire to locate on Navajo Indian irrigation project lands or who cannot be accommodated on such lands.

SEC. 11. Hopi Indians moved pursuant to section 9 of this Act shall be given priority to assignments of land within the areas vacated by Navajo Indians. The Secretary in cooperation with the Hopi Tribe Council shall determine the

size of parcels necessary to provide resettled Hopi Indians with an economic base.

SEC. 12. (a) All Hopi and Navajo Indians moved pursuant to the provisions of this Act shall be considered "displaced persons" within the meaning of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (84 Stat. 1894). For the purpose of determining payments due under that Act, such Indians shall be deemed to own the land on which their habitation is located.

(b) The United States shall purchase from each such Indian any habitation and other improvements owned by him on the area from which he is being moved. The purchase price shall be the fair market value of such improvements.

(c) In addition to the above payments, the Secretary shall pay to each Indian family moved pursuant to this Act the sum of $3,000 for indeterminable expenses and personal hardship.

SEC. 13. The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all Navajo Indian use of the lands described in sections 2 and 5 of this Act subsequent to the date of this Act.

SEC. 14. The Hopi Tribe shall pay to the Navajo Tribe the fair rental value as determined by the Secretary for all

Hopi Indian use of the lands described in sections 3 and 7 of this Act subsequent to the date of this Act.

SEC. 15. The Navajo Tribe and the Hopi Tribe may each commence or defend in the United States District Court for the District of Arizona an action or actions against each other for the following purposes:

(a) For an accounting of all sums collected by the Navajo Indian Tribe since September 28, 1962, as trader license fees or commissions, lease rentals or proceeds or other similar charges for the doing of business or the use of lands within the Executive Order Reservation of December 16, 1882. The Hopi Indian Tribe shall be entitled to judgment for one-half of all sums so collected, together with interest at the rate of 6 per centum per annum.

(b) For the determination and recovery of the fair value of the grazing and agricultural use by the Navajo Tribe and its individual members since the 28th day of September 1962, of the undivided one-half interest of the Hopi Tribe in the Executive Order Reservation of December 16, 1882, outside of Land Management District 6, together with interest at the rate of 6 per centum per annum.

(c) For the adjudication of any claims that either the Hopi or Navajo Tribe may have against the other for damages to the lands to which title was quieted by the United States District Court for the District of Arizona in said tribes,

share and share alike, subject to the trust title of the United States, without interest. The claims shall be limited to occurrences since the establishment of grazing districts on said lands in the year 1936, pursuant to section 6 of the Act of June 18, 1934 (48 Stat. 984).

Neither laches nor the statute of limitations shall constitute a defense to any action authorized by this Act for existing claims if commenced within two years from the effective date of this Act.

SEC. 16. The Navajo or the Hopi Tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of said Hopi and Navajo Indians by said tribes and the members thereof, and to fully accomplish all objects and purposes of this Act. Such actions may be commenced in the United States District Court for the District of Arizona by either of said tribes against the other.

SEC. 17. The United States shall not be an indispensable party to any action or actions commenced pursuant to this Act. Any judgment or judgments by the court shall not be regarded as a claim or claims against the United States.

SEC. 18. All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes avail-

able for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this Act.

SEC. 19. The Secretary is hereby authorized and directed to accomplish the following:

(a) Survey and monument the boundaries of the Hopi Reservation as defined in sections 2 and 5 of this Act.

(b) Erect a boundary fence on said boundaries and construct a service road paralleling said fence.

SEC. 20. There is hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

Senator ABOUREZK. I am pleased that my colleague, Senator Paul Fannin, of Arizona, the ranking minority member of the Senate Interior Committee, is also here today to participate in this hearing.

Before turning to the witness list, I will call on Senator Fannin to make any statement that he might care to make.

STATEMENT OF HON. PAUL FANNIN, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator FANNIN. Thank you, Mr. Chairman.

First of all, I want to commend the chairman for arranging these hearings.

We are very fortunate that we have a chairman of the subcommittee that has great expertise in this field. He has had years of experience in his own State of South Dakota by having lived and worked with the Indian people of that State.

He was also a very fine member of the Interior Committee of the House of Representatives, and I know that his services there were very valuable, as they are now in the Senate; I look forward to working with Senator Abourezk and to having the privilege of his advice and counsel.

We are very proud to have you here in Arizona, Senator Abourezk, especially on this occasion.

We are also very pleased to have Congressman Sam Steiger with us today, because he has spent years in working with our Indian people.

He is highly qualified as a member of the Interior and Insular Affairs Committee of the House of Representatives. He is also ranking member of the Subcommittee of Indian Affairs.

So, we are here today working with fine gentlemen, to assist our Indian citizens in achieving their goals and we are going to listen to them, not only today, but throughout the months and years ahead, to assist them in reaching those fine goals that they have placed for themselves.

This field hearing has been called to gather more information concerning the dispute between the Navajo and Hopi Tribes over reservation lands. This and this alone is the purpose of the hearing.

We thank the people of Winslow, and Mayor Tom Whipple for affording us this location for these hearings.

There is no question that the time has come to resolve this decade-old dispute.

We know that the current situation of uncertainty and animosity is detrimental to everyone involved. We know that such conditions have resulted in overuse of the range and an understandable unwillingness for either tribe to make needed investments in improvements to safeguard this land. An equitable settlement of the controversy is needed not only to keep the peace today but to preserve reservation resources for tomorrow.

The tribes we are concerned with here today have long and proud histories stretching back thousands of years. They are great peoples who conquered a frequently harsh environment without the technological equipment available to non-Indian settlers who came only in recent times. Today, the Navajos and Hopis are important and respected elements of Arizona and America. And today they face challenges perhaps even more difficult than those in ancient times. These tribes must determine how they are to deal with the 20th century. Their full energies should be concentrated on self-determination and how they can benefit from today's world without succumbing to it. Thus, it appears to me that this dispute is sapping much of the tribal energy which could be better put to use on other problems.

We have fine neighbors, Chairman Peter MacDonald and his council; the Hopi Tribe Chairman Hamilton and his fine group, and they are all to be commended for the work they are doing for their people.

It might be well to stress that the problem we are examining here is a dispute between two Indian tribes. It does not involve relations between Indians and non-Indians.

My preference would be that the two tribes themselves reach a settlement through negotiation, but unfortunately this has not happened.

This leaves Congress as the only authority which can initiate a resolution to this problem.

Again, I emphasize, I wish this were not so. The judgment in this dispute, whether it comes ultimately from the Congress or the courts, will be deemed by many on each side of the issue to be wrong, regardless of what the final decision may be.

So, it is not a happy burden, but it is the clear responsibility of Congress to act in such controversies.

Tribal spokesmen came to Washington last year to give us their views, and now we have come here so that we could have the partic-

ipation not only of the leaders but of other tribal members. We are here to learn more and to see personally what the problems are. In a very real sense we are acting as the eyes for the Interior Committee and the Senate.

It is my hope that we will gather much useful information—arguments and facts presented forcefully but with the responsible restraint that is essential in domocratic processes.

In short, we are here to see and to listen.

Senator ABOUREZK. Thank you, Senator Fannin.

The first witness will be Congressman Sam Steiger of Arizona.

Congressman Steiger and I served 2 years together in the House. I was on the Interior Committee and on the Interior Affairs Committee with Congressman Steiger and I can say that he has worked hard to bring a solution to this.

I don't know if everybody agrees to this solution. He has tried to face up to it. I appreciate working with Congressman Steiger.

STATEMENT OF HON. SAM STEIGER, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF ARIZONA

Mr. STEIGER. Thank you, Mr. Chairman.

I will be as brief as it is possible for a politician to be with a battery of microphones and cameras.

I will attempt to get to the heart of the matter with a minimum of ritual.

I do not share the extent of you gentlemen's enthusiasm or optimism about the outcome of these hearings. If I did not know you both well, I would be very concerned that this would be just another gesture.

I am hopeful that this will not be just another gesture and not just a forum for excessive statements on the part of the principal parties.

Because, as you both have recognized, your own awareness, this is not a superficial problem. This is a deep problem with very old roots that cannot be disposed of with a superficial solution.

Mr. Chairman, you have already recited a great deal of history of this problem. I will not bore you with that.

I am not here to defend my legislation. I will tell you, as you will recall from 3 or 4 days of hearings that you sat through on the House side, that my legislation has not changed significantly from that which was passed, which passed the House last year.

I will tell you that I am concerned about the thrust of Mr. Chandler's—who is your assistant on the majority side of this committee—I am concerned about the thrust of his expertise and the manner in which he has circulated it, because the one concern I have about this whole thing, is that both sides having set in concrete by the awareness of the Federal Government or a lack of concern of the Federal Government, it seems to me it has got to come to an end.

The rigidity should not be sustained. That is, the rigidity on both sides. We must do that which will break down the rigidity, Mr. Chairman.

One method of breaking down the rigidity in my view is the introduction of a bill such as I have introduced, that will force a mandatory solution.

I will tell you, gentlemen, and I have not discussed this publicly with anybody, but this is an area in which I do have some specific knowledge.

When this bill was first introduced, I was assured by Chairman MacDonald of the Navajo, that he felt that it could be resolved by direct negotiations between the parties, and his belief was sincere.

I do not question that for a moment. He believed that it could be negotiated. That was over a year ago now, and to the best of my knowledge, not only have there been no successful negotiations, but the enmity between the tribes has grown.

You can well attribute that to the presence of the legislation or whatever. But the fact is that without a catalyst such as your committee's interests, such as legislation of some kind, such as final court judgments, all of which now confront this problem, without the presence of these, the situation is not going to be solved.

I would hope that we not lapse into some cosmetic solution, such as the Congress did in 1962, or whenever it was that it organized the Hopi-Navajo Boundary Commission which, to the best of my knowledge has never met.

It is a typical congressional confrontation of a problem—form a committee and hope the problem will go away.

Mr. Chairman, this problem is not going to go away. And whatever this committee achieves in its wisdom, I will tell you that if it is acceptable to all the parties, you will have this Member of Congress who will wholeheartedly support—this is one instance in which I am convinced there is no partisanship involved in this situation—there is no particular parochial interest in this situation, except for the fact that those of us who represent Arizona are obviously more concerned in seeing it solved than somebody who doesn't represent Arizona.

But, outside of that, the desire to solve the problem is genuine.

I hope that we do not—we who are not directly involved as the principals that you will hear today—who are directly involved—I hope that we who are not directly involved will be able to remain objective enough, that we keep the solution as our goal and not the appeasement of one side of this dispute or other.

I would be happy to respond to any questions that the Chairman or Senator Fannin would have.

Senator ABOUREZK. Thank you, Congressman Steiger.

I probably ought to establish what at least I intend to do.

I cannot speak for the other members of the committee because nobody can do that, except themselves.

But, as chairman of the Indian Affairs Committee of the Senate, I want to first clarify that my position is not one that is set and concrete.

As a matter of fact, I have no position as yet.

I can assure you, Congressman Steiger, that this matter will be resolved in a very short time, and very expeditiously and I have already made my wishes known that this not go to another Commission to be studied further, and that it not be bucked off to somebody else, but, that it be resolved by this subcommittee and the full Committee on Interior and Insular Affairs, because I sincerely believe that the dispute, because of the vacillation, the delay over the last several decades, has caused the lines to harden on both sides.

It should not have been the case.

I was interested to know in the report that was submitted to me by the committee staff, that the Bureau of Indian Affairs first decided in 1911 that some partition ought to be made.

In 1931, they made another decision to try to partition the area. Now, in 1973, we are still here trying to resolve the dispute.

Mr. STEIGER. If the chairman will yield.

There is another historical note that I think is worthy of mention.

I believe the date is 1892, but if it is not it is 1894—there is documentation of the first request by the Hopi Nation at that time to circumscribe a line around their reservation so they would be free of any intrusion.

This was a request from the Hopi Tribe through the then Indian agent, through the then Secretary of the Interior, to the President.

At any rate, I gather that was what led to the order of 1892, that resulted in the confusion.

But the point is, Mr. Chairman, as you point out very properly, we are looking at seven decades of vacillation on this, and an ever increasing ratio of vacillation.

We vibrated faster as the problem hardened.

Senator ABOUREZK. I further publicly want to state that I hope that you, Congressman Steiger, if you have any blame you want to lay, lay it on me as chairman of the subcommittee rather than on the staff, because they work under my direction, and if there is any responsibility to be taken, I will be happy to take that.

It is a matter of having the staff prepare certain documents and alternatives according to their own wishes, and they can only do that within the limits of their own human objectivity.

So I will be happy to accept any blame that anybody might want to cast.

But, I can assure everybody here who is concerned with this dispute, that this will be resolved, that I do not suppose that anybody is going to be happy with the resolution of it, 100-percent happy, because in any kind of dispute, if you are going to try to heal the wounds and reconcile the two sides, later on, there has to be some compromise made on the part of both sides.

And, nobody knows yet how that will come about.

I might also ask, with reference to the bill that you offered, and was passed through the House last year, do you have any idea as to the boundary lines that you drew on that bill—how many Navajo people will have to be moved as a result of drawing these boundary lines?

Mr. STEIGER. Somewhere in the neighborhood of 1,200 families, which I suspect would be in the neighborhood of 5,000 and 6,000 people.

That's the figure that the Navajos use, and I have no reason to dispute that figure.

Senator ABOUREZK. Was the cost of relocation, so far as money terms are concerned, computed as a result of that bill?

Mr. STEIGER. Mr. Chairman, the bill came out of the House with $16 million to compensate for the loss of relocation.

I hope that the committee—I am not about to tell you what questions to ask—but I have the very real feeling that many of the Navajo people who are directly involved are not aware of the compensation factor, nor are they aware of the possible legal alternatives under the various court decisions, which could mean an expulsion with no compensation, since the court has no authority to compensate, obviously, as the chairman is aware.

The $16 million is $4 million less than the bill called for initially, but it was what the House and committee as a whole arrived at.

One unique factor in that, Mr. Chairman, I think is worthy of mention, that the bill as passed the House called for a referendum of those Navajos to be moved—a majority of those Navajos voting for the purchase of new lands to be held in trust by the Navajo Nation.

If a majority of those people did opt for the new lands, then under the terms of that particular bill, such amounts under $16 million as were required would be used to purchase the new lands to relocate all of those who are to be moved and who so desire to go to the new lands to be held in trust.

I think that was an honest attempt by the committee, as I think the chairman will recall, since he was a party to some of that.

It was an honest attempt to ease the pain of movement if that was to be the solution.

Senator ABOUREZK. Am I correct in understanding that the court order of 1962—*Healing* v. *Jones*, did that call for removal of people?

Mr. STEIGER. The thrust of *Healing* v. *Jones* was that each tribe was entitled to an undivided half interest in the land.

It did not specify which land. Did not specify whose half was whose.

Simply an undivided half interest.

I am glad you asked the question. Because here again, I have the feeling that the Navajos, at least, were not as informed as they should be by their then leaders, in that they were told they won the *Healing* v. *Jones* case.

I know that from my own discussion with them, that they felt they had won the case, that their counsel then, who is not their counsel now, and their leadership then, who is not their leadership now, informed the people that this was a victory.

I suppose it was, because the Hopi looked upon it as a defeat, since they wanted all of the land. And so the Hopis maintained that *Healing* v. *Jones* was a defeat.

Well, in effect, Mr. Chairman, it was what you have indicated, it was a judicial compromise, if you will. Nobody won or lost a clear out victory or defeat. But again, I think, Mr. Chairman, you will find upon careful probing, that the leadership—possibly on both sides—certainly on the Navajo side—has not been as candid with their people as it is my belief that their responsibilities dictate—the present leadership, and the fact that it has not let the Navajo people know that they are to be compensated if they are to be moved under the terms of the House bill, and past leadership in deceiving the Navajo people by telling them they won a court victory in 1962.

Senator ABOUREZK. I wonder—I am sure there must have been some basis for that $16 or $20 million cost estimate made by the Bureau of Indian Affairs.

Are they the ones who made the estimate?

Are they the ones who made the estimate of the cost of relocation?

Mr. STEIGER. That estimate was as a result of negotiations to which I was a party, the BIA was a party and there were Members of Congress—a Member who represented only Navajos, and so it was felt it was a kind of negotiation situation.

If you are looking for a specific criteria, I will tell you there was minimal specificity and we felt it was an achievable amount, one that the committee would accept and the Congress would accept, and one that would apparently do the job that was needed to be done.

Senator ABOUREZK. Do you know of anybody who has tried to calculate what I would term the social cost of moving?

In other words, I am told that there in these 6,000 families, people who have jobs in that area, other people are reliant upon the particular welfare agencies that are serving some of the most disadvantaged families, that there will be a great deal of social cost and social grievance as a result of any moves of people now living there.

Have you any comment on that particular cost?

Mr. STEIGER. Mr. Chairman, I think there you have hit the nitty-gritty of the whole problem.

I do not think the wildest-eyed Navajo partisan could not agree that they have a legal problem.

The most violent Hopi partisan could not fail to agree that relocating these families is going to present a hardship.

Now, how hard a problem, how tough a problem, I am not competent to say in any kind of actuarial terms, quantitative terms.

Where I too have referred to my age and which I am not about to tell the chairman because I am very sensitive—a man my age has to be sensitive—had I spent my entire life on a given piece of ground, I would feel that it was the end of the world to move from that piece of ground.

So how I as that individual who is dedicated to that piece of ground, and I will tell the chairman that the Navajo I believe has got a greater love for the ground than I as a non-Indian might have.

I do have some empathy. How you compensate for that, I do not know.

Mr. Chairman, I think the committee in its wisdom simply has to recognize that there will indeed be social problems.

There will be social problems if nothing is done, and the violence and bitterness will continue and those create social problems.

If it was not for the problem that the chairman has specified, we could have bitten this bullet a long time ago.

I do not pretend to tell the chairman this is the only solution.

But, I will tell the chairman that if there was a way in which the movement could be avoided, and the $16 million could be saved by the Government, I think the wisdom of Solomon would indeed be challenged.

I do not know of any other way to do it.

So, I will tell the chairman that, yes, there will be significant social costs.

Senator ABOUREZK. By way of comment, Mr. Steiger, the attorney for the Navajo Tribe has computed about a $40 million cost of relocation—just by way of comment—I am not sure what the basis for that is.

I think that ought to go into the record.

I have one further question on this particular aspect.

Do you believe that the Congress has a responsibility to try to calculate what the social cost might be?

Mr. STEIGER. Yes, I think the Congress has a requirement to take into account in any of its actions the result of any of its actions,

and so if you are saying I think we should look at the social costs, I will stipulate that we should.

I will also tell you that if we do it from other than an objective source, you are not going to get good information.

Because the feelings in this matter are so deep and so intense, that I just do not think objectivity from either party is going to be attainable.

Senator ABOUREZK. It should come from an outside source, perhaps, requested by the committee?

Do you agree with that?

Mr. STEIGER. I would agree with the chairman, absolutely.

Senator ABOUREZK. I have been told as well that there are almost no Hopi people living in the disputed territory.

Is my information correct?

Mr. STEIGER. That is correct, Mr. Chairman.

Senator ABOUREZK. And that the problem, if you did relocate Navajo people, the problem would be of moving human beings to replace livestock.

Mr. STEIGER. Mr. Chairman, if I may, we are now getting into what I consider the invective which has been used by those Navajos who are involved in the resistance of the movement.

That is a totally improper equation, Mr. Chairman—the substitution of people for livestock.

That is the kind of emotional demagogic nonsense that has beclouded this whole issue.

I will tell the chairman that the problem is, that the law says that the Hopis are entitled to half of that land, and the facts are they do not have any of it.

Now, the rest of it becomes a subject for, how do we achieve the law with the least harm socially?

I do not think we achieve that by spurious—I am not saying the chairman is using spurious—because I recognize the phrase of substitution of people for livestock or livestock for people—and I suspect that that is not the kind of phrase that simply occurs to one—it is the kind of phrase that is used in a public relations sense.

If somebody could explain—and I suspect much more important—to the Hopi council and the Hopi people—why they are not entitled to use what the court has told them they are entitled to use, I suspect that that would solve the problem if they could convince them.

Otherwise, we are going to have to either move some people or compensate some people.

Senator ABOUREZK. Thank you.

Senator Fannin, do you have any questions?

Senator FANNIN. Yes; thank you, Mr. Chairman.

First of all, Congressman Steiger, we very much appreciate that you are here with us.

You are perhaps the most knowledgeable man in the Congress on the question of the settlement of the Hopi-Navajo land problems.

Certainly, you have spent days and months and years talking to people on the reservation listening to testimony and you are a pragmatic legislator.

I consider you in that category, and you also know that legislation is the art of the impossible.

So, you have got your bill through the House of Representatives and I assume from your feelings now, that a bill will be approved similar to the bill that was approved last year.

We are seeking to settle this matter.

If we are not successful in passing your bill—I know you do not want us to start out on that basis—you do not want us to say, "Look we won't be successful in getting approval of your bill in the Senate, so let's look for something else."

So, I want to premise my statement with that understanding.

You have testified in the Senate and we made progress.

We made progress for getting a settlement, whether the bill was approved or not.

There are other solutions that have to be discussed with you.

Would you consider that sending the issue back to the court with the authority to settle this matter, would be a satisfactory alternative?

Mr. STEIGER. Senator Fannin, if that is what is the only achievable situation, obviously, that is a solution.

I think again we have to recognize that the court is pretty well committed with regard to the direction it would go.

So, then those who would opt for that particular solution, would have to recognize there is at least in any view, since the court would have no authority to compensate that I know of, then we are talking about a legislative—the same results as a legislative solution without the benefit of compensation.

So, I will simply tell you, that if that solves the problem, I am for it.

I just do not know from this vantage point, how that would solve the problem.

Senator FANNIN. Congressman, I asked that question because it has been discussed, as you know.

Mr. STEIGER. Yes; I know.

Senator FANNIN. From the standpoint of timing—I know we are all anxious to get this matter settled—what would be your estimate of timing involved?

Mr. STEIGER. Of course, the courts as you know take even a greater amount of time than the Congress, and that is as much time as the Lord allows, because we do not have any more time in a given lifespan.

So, obviously, the delay would be greater than if the Congress were able to act in some form and solve the problem legislatively.

I would tell the Senator, that a different version of my bill, if you will, would be far more acceptable to the Indian people involved, if only because it would arrive at a solution much faster than any court process, in my opinion.

There is a third possibility, Senator Fannin, which you have raised with me, and perhaps we should discuss that one, too.

Senator FANNIN. I raise this point in my statement as to whether or not that would be another alternative subject to a certain date by which a settlement would be reached.

Mr. STEIGER. I missed that. I would like to comment on that.

Senator FANNIN. Yes.

Mr. STEIGER. I do not want us to be seduced again, as I was seduced.

I will tell the Senator and subcommittee that in my view, the well-meaning pledges of negotiated settlement that were given to me personally in all sincerity were certainly simply not lived up to.

Not because of any ill will on anybody's part, but simply because they were not achievable.

So, I would hope that whatever your committee in its wisdom decides to do, you will take into account the fact that the final dates for negotiating purposes have been set in the past and have not been achieved.

Thank you, Senator.

Senator FANNIN. That is why I asked the question, because we have you here and can benefit from your testimony.

We appreciate your suggestions, and I am wondering, with the vast array of information that we have in the Congress at times we do have questions regarding the authenticity or the validity of that information.

Do you know of any particular matters that we should consider and clarify while we are here?

Mr. STEIGER. Well, I like the thrust of the question, and I want to tell both members of the subcommittee—if they would look with a jaundiced eye on all the factual information, and with the admonition that it be accepted and gratefully so, with the understanding that it is going to be looked into and going to be verified.

I know that Senator Fannin understands, and I suspect Chairman Abourezk does, but it is very difficult for anybody who has not been involved with this problem for a long time, to understand the depth and intensity of the feeling on both sides of this question.

That kind of intense feeling, as I know both of you gentlemen know from your own political careers, that kind of intense and sincere deep feeling leads to a lack of objectivity, which leads to a lack of analysis of the factual situations.

I can let two people on different sides of a problem see the same factual situation and come away with a totally different view.

So, what you are going to hear now, are people who have an axe to grind, and rightfully so, and they should be heard.

All I ask is that you examine that which is presented as fact and have the staff verify that which is presented as fact.

Senator FANNIN. Congressman, I am glad to have that answer from you. We are trying to determine the facts from the many statements which have been made over the period of the hearings, from the work that has been done by you and others.

I commend you for your work, your dedication to this problem. I certainly hope you do have a feeling to bring it to a settlement.

I think we all should have that in mind as we go forward with these hearings.

Mr. STEIGER. I thank you, Senator Fannin.

Mr. Chairman, I can only tell you once again, you have demonstrated your excellent judgment in choosing to be in the Fair City of Winslow rather than the rather chilly city of Wounded Knee, and we welcome you here with open arms.

Senator ABOUREZK. I have found I have to divide my time between both cities.

Mr. STEIGER. Having visited both, and the fact that you stayed here shows real judgment.

Thank you, Mr. Chairman.

Senator ABOUREZK. Thank you, Congressman Steiger.

I would like to ask at this time, that Congressman Steiger join us here at the committee.

The first witness of the Navajo is the chairman, Peter MacDonald.

I wonder if he would come forward at this time and any of his staff members that he would like to have accompany him.

I wonder if you would introduce the gentlemen you have.

Mr. MacDonald. Mr. Chairman, I would like to introduce our general counsel, George P. Vlassis from the firm of Brown, Vlassis and Bain of Phoenix.

I would also like to say that we have a list of witnesses that we have submitted.

Because of the rain and snow on the reservation, the order in which they appear may differ as they arrive.

Senator Abourezk. That is fine.

I might ask you, Mr. MacDonald, I know you would like to have your counsel with you to help you answer questions when it comes to anything within his knowledge.

The committee would prefer that legal counsel not actually testify today on either side, for the reason that we want mostly the local people here of both tribes to give their testimony, while we are in the field.

Of course, if we do have further hearings we will want them, the legal counsel to do that in Washington.

We would appreciate it if counsel would abide by that rule today.

Mr. MacDonald. Fine, we understand that.

We just have him just to make him feel that he earns his money.

Senator Abourezk. Thank you.

Go ahead Mr. MacDonald.

STATEMENT OF PETER MacDONALD, CHAIRMAN, NAVAJO TRIBAL COUNCIL

Mr. MacDonald. First of all, let me extend my sincere thanks to the Senate Interior and Insular Affairs Committee for its decision to make a thorough investigation of the so-called Navajo-Hopi dispute. In particular, we are grateful to you, Senator Abourezk and Senator Fannin, for having come to Winslow today to get the views of those people who would be most directly affected by any decision which you make.

What we ask of you today is that you do indeed probe the facts that are relevant to this controversy and that you render your decision only after the facts have been established.

To anyone, Mr. Chairman, who comes to this area without any preconceived notions, the defensive position in which my fellow tribesmen find themselves today would be simply unbelievable. Here, Mr. Chairman, are thousands and thousands of Navajo men, women, and children, living on land on which they and their ancestors have lived for generations and now, after more than a century, they have to defend their right to be on the land.

When our ancestors first arrived in the area, which is now the disputed area, it was vacant, unused land, When Navajo people arrived on this land, they did not drive anyone out. Yet, here we are today, after our people have lived on the land for all this time, with some people telling us now; "Get out! Half of this land now belongs to the Hopis and you must make room for them."

If anyone were to ask how many Hopis are expected to move onto the land from which the Navajos will be driven out, the answer is "none". The Navajo people are to be driven out just to make room for Hopi livestock, irrespective of what Mr. Steiger said here earlier.

If anyone were to ask further whether the Hopis have enough excess livestock to use all this additional range land, the answer would be "no" again. Many years will pass before the Hopis will have enough economic resources to make use of all the land which is now to be taken from the Navajos and given to them.

If you then ask why Navajos are to be driven from land which Hopi-owned livestock might use 10 or 15 or 20 years from now, the answer is that the Hopis have a vested property interest in that land and that that property interest must be respected.

You then ask when that property interest was acquired by the Hopis and you discover that according to the court decision in *Healing* v. *Jones*, the "vested poperty right" of the Hopis was acquired in 1958 through an act of Congress.

Thus, because Congress in 1958 gave the Hopis a vested property right in land on which Navajos have lived for generations, Navajos are now to be driven off that land.

Did Congress really intend that result when it passed the act of July 22, 1958? At that time Hopis and Navajos used and occupied shares of the reservation which on a per capita basis did not differ substantially from each other.

Did Congress really, in 1958, intend to change the allocation so drastically as to give each Hopi an acreage of land more than four times as large as the acreage allocated to each Navajo?

I really don't believe that this is what the Congress intended in 1958, but that is what the court in *Healing* v. *Jones* said the Congress did in 1958, and *Healing* v. *Jones* is now the law.

How, an outsider will ask, did all of this come about?

How was it possible that after thousands of Navajos had lived on land for generations, the Congress of the United States suddenly gave an interest in the land to another tribe?

A simple answer, Mr. Chairman, is that the Navajo Tribe has, ever since 1882, been the victim of a tragedy of errors.

Your investigation of the history of the Executive order reservation will demonstrate that time and again the Navajo Tribe was short-changed in Washington as a result of sheer ignorance of the facts and just plain blunders.

Fortunately, whenever another error was committed in Washington, Government officials in the field were realistic enough to develop workable and realistic answers right on the spot.

But now, it seems, the accumulated blunders of a number of generations have caught up with all of us and the danger is great that the most colossal blunder of all will be committed, namely the expulsion of thousands of Navajos from their homeland, if the present makeup of the so-called Steiger bill is to have consideration as it is written now.

Why is it we are treated this way when we know on the other hand lands were taken from the Indians by white people, and when we pursued through the Indian Land Claims Act to reclaim these lands

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which were taken from us, we were told that we cannot remove the cities or move the people, but we can only get compensation for what we lost.

Yet, in the case of the Navajos and Hopis, the Navajos were in those areas long before these acts were enacted, or laws were made, yet we are told that because of 1958 and 1962 decisions, that we must leave the lands on which we have lived for generations.

Senator ABOUREZK. Mr. Chairman, I wonder if I might interrupt you at this point.

Is my understanding correct that at the time of the 1882 Executive order, there were about 300 Navajos living on the disputed land at that time?

Mr. MACDONALD. That is what we hear in testimony.

But, according to the Navajo people themselves, we estimate that there were more than that many in that area.

Senator ABOUREZK. What is your estimate of how many lived there at the time of the Executive order in 1882?

Mr. MACDONALD. We believe at the time of the 1882, there were at least 6,000 people in that area.

Senator ABOUREZK. Where does that estimate come from?

Mr. MACDONALD. That came from—just the testimony gathered by the Navajos during the time of the land claims case.

Senator ABOUREZK. In 1962?

Mr. MACDONALD. Right, 1958 and 1962.

Senator ABOUREZK. You are talking about *Healing* v. *Jones* case?

Mr. MACDONALD. Yes, during that time there was testimony made by Navajos as to who—what families lived in those areas, and what estimated number of families that had lived in the area.

But, the actual Government documents that were made, I imagine, based on what this 300 family figure came out is something that we do not have, but as I have said before, often times, the Government figures are much, much less than the figures that are actually in existence.

For instance, in this revenue sharing, we are told that there are only 80,000, and we are getting our revenue sharing checks on the basis of that population.

But, we have an official count by BIA and the Navajo Tribe, we have over 130,000 Navajos now.

So, there is a drastic difference between the Government figures which they consider to be official, and the official figures that we have for ourselves.

Senator ABOUREZK. Thank you.

Please continue.

Mr. MACDONALD. I would say as much as I would prefer—as much as the Navajo Tribe would like to prefer—that this matter be resolved between the two tribes on a mutually negotiated basis, it seems that because of the events that have taken place over the past few years, that the Hopi Tribe wants to have this dispute resolved through acts of Congress, by supporting bills introduced in the Halls of Congress.

We would like to have it resolved by the two tribes, if possible.

Fortunately for all of us, there is still time to take another look.

Senator ABOUREZK. You say you would rather have it resolved between the two tribes.

Are you willing to appoint a negotiating committee with authority to negotiate a settlement, but only to return with the final settlement for approval by the tribe?

Mr. MACDONALD. Yes, in fact, we have established a commission to work with the Hopi Tribe, but I think the Hopi Tribe themselves would rather see this go through Congress.

It takes two to negotiate. If one side does not want to negotiate, we are frustrated on our side by trying to work out some kind of solution, and yet, every suggestion that we make, we have come to some kind of agreement every time we do.

It goes back to the Hopi council and it is rejected.

For instance, we had an agreement made between the Hopi chairman, his vice chairman, his general counsel, myself and my vice chairman, and my general counsel, and the Bureau of Indian Affairs in Albuquerque, as to how we would proceed in improving the relationship and gradually leading into negotiated settlement of the disputed area.

Senator ABOUREZK. Mr. Chairman, the past efforts at negotiations between the two sides I am told, has broken down because each negotiating team said, "You cannot make any decisions right now until we go back to the tribe."

It is broken down just because of, I suppose you would call it the bureaucratic red tape in that kind of thing.

What I am asking, I guess, and I want to make it more clear than I made it in my first question, is, are you willing to appoint a small team of negotiators so it does not become unwieldy, who can negotiate to a final decision and then go back to the tribe for final approval, instead of going back on each point as it is made?

Mr. MACDONALD. Definitely.

Senator ABOUREZK. All right. We will ask the Hopi people that same question and find out if they also are willing.

Senator FANNIN. Mr. Chairman.

Senator ABOUREZK. Senator Fannin.

Senator FANNIN. Chairman MacDonald, are you saying that you would be willing for the Congress to pass legislation that would provide that if you do not arrive at a decision amongst yourselves by a certain date, that you would approve that legislation?

Mr. MACDONALD. Yes.

In fact—with the understanding that if negotiated settlement cannot be made, then if the only choice we have is to have an imposed decision by the Government, then I have a draft bill which I would like to present to the members of the Congress which I will later also want to present to the Navajo Tribe Council for its consideration.

Senator FANNIN. Thank you.

I would be very interested in that bill.

Senator ABOUREZK. Mr. Chairman, one other question before you get back to your statement.

How much time do you think this negotiating process ought to be allowed before the Congress makes a final decision on how this thing ought to be resolved?

Would you say 6 months, 3 months, or would you give us an estimate?

Mr. MacDonald. Earlier in my testimony before the House Committee of Interior and Insular Affairs, I have suggested that kind of approach.

I believe at that time, I stated that it will take at least 6 months to come to the first meaningful point so far as negotiations are concerned, because up to that 6 months, it will probably take about 90 days to gather some facts around which negotiation can really be taken, and up to 6 months, it would then become some visible evidence as to areas of where points can be negotiated and areas where we still have difficulties.

Senator Abourezk. Would a year, in your opinion—would a year be too long to allow this negotiating process to take place before Congress itself took action?

Mr. MacDonald. I would say if we are going to resolve this as quickly as possible, I think a year—I won't go more than a year.

Senator Abourezk. You would say a year would be the maximum time that you will agree to?

Mr. MacDonald. Right.

Senator Abourezk. Would you also agree to a third party being involved in the negotiations, some totally objective neutral interested party that would be invited as a sort of mediator?

Mr. MacDonald. Yes.

In fact, I suggested in my earlier testimony, let the two tribes work at it first with some kind of guideline and supervision, and then if the two parties just cannot make a go of it, then the third party enter into it along the way and sort of move into a binding arbitration.

Senator Abourezk. You would agree to binding arbitration?

Mr. MacDonald. I would even agree to it—I did the first time.

Senator Abourezk. I am talking about mediators to start with.

Mr. MacDonald. That would be the last resort—the last resort would be binding arbitration.

Before that, the two tribes ought to go at it first on their own, and then the second phase might be to have a third party to go along to try to guide the negotiations through.

But, as I said, the final result, if it cannot be worked out, would be either binding arbitration, which in turn, would become legislation of some sort.

Senator Fannin. Mr. Chairman.

Senator Abourezk. Senator Fannin.

Senator Fannin. Chairman MacDonald, are the Navajos now willing to abide by the court order that is now in effect? Are you implementing that order?

Mr. MacDonald. You mean to move the livestock?

Are you talking about the Tucson or *Healing* v. *Jones*?

Senator Fannin. The Tucson order.

Mr. MacDonald. I thought the Tucson situation is that there is no court order yet.

The Government is submitting plans and we are still going to submit additional plans, and the judge has yet to make his decision as to what would be the solution to the question on joint use area.

Senator Fannin. My understanding is, Chairman MacDonald, that they have made a decision that the Navajos should remove the cattle. The issue has been decided.

Mr. MacDonald. My information—I get this from my general counsel who was just down there last Saturday—is that there has not been any order as to what really is to be done regarding livestock in the area.

Senator Fannin. Well, you are talking about methods. I am talking about abiding by the decision of the court.

Senator Abourezk. I think there has been an order, Senator Fannin.

There has been an order, but the final details of how it should be accomplished is still pending.

Senator Fannin. The final order has been made.

Senator Abourezk. Those are all the questions I have on that particular thing.

Would you please return to your statement?

Mr. MacDonald. The fact is that in spite of all the past blunders, the Government can still solve our problem out here fairly and justly. You, the Members of the Congress, can pass a law which resolves all difficulties fairly and justly, with respect for the human as well as the property rights of Navajos and Hopis alike.

We ask you, Members of the Congress, to investigate the facts. If we can demonstrate to you that the area which Congressman Steiger wants to see partitioned is an area in which my people lived for generations and from which they did not expel anyone, we ask you, we plead with you, to leave them there, to leave my people there.

The Court in *Healing* v. *Jones* has said that you, the Congress, gave the Hopis a vested property right in that land back in 1958. We ask that you use the authority that you have, to pay the Hopis in cash or in substitute land the value of this vested property right, which you gave them less than 15 years ago, not that you ask the Navajo people to pay in suffering for it now and for generations to come.

As you study this problem, you will find that a great many myths and rumors have sprung up. We ask you not to accept any of these stories without having investigated them. Here are some examples:

You will be told that most of the Navajos now living in the disputed area have moved there during the last 10 years or so.

That simply isn't so. They have, as I have said, lived there for many generations. The population increase is mostly due to the fact that Navajo families have lots of children.

You will be told that there is a danger of a range war out here. That, too, isn't so. Our people now live in peace with the Hopis. The range war consists of one man hired to create such feeling and appearance. He is referred to by the Navajos as the range rider. This man's principal preoccupation and vocation is to harass the herdsmen, intimidate those living along the border of the Hopi land and people.

As we all know, in the absence of a livestock fence, Navajo livestock does stray on to district No. 6, but the Hopi solution is merely an aggravation, because we have temporarily fenced district No. 6 to avoid the trespassing which has been considered or described as a range war between the Navajo and Hopis.

But those suggestions have been refused and rejected by both the Hopis and the Bureau of Indian Affairs.

You will be told that the bullying Navajos are pushing the peaceful Hopis around. That too, isn't so. We are not pushing the Hopis

around and, I believe, that most Hopis don't want to push us around either. There is just a small group of Hopi leaders who want to build a Hopi empire at the expense of thousands of Navajos who earn a meager living off the land which they consider their own.

You will be told that the Hopis have not used the area now occupied by the Navajos because the Navajos have intimidated them. We do admit that in days long gone by Navajos may have conducted raids into the Hopi area, as they did to us.

But that, as I say, was long ago. The areas which the Hopis have used and occupied for residences, for farming, and for grazing are all well within the area that was known as land management district No. 6 and which is now the Hopi Reservation.

Not only are all the lands which the Hopis used and occupied for residential and agricultural purposes within district No. 6, but district No. 6 is, in fact, larger than the traditional Hopi use area.

Thirty years ago, in 1943, when the Government made what many people thought was the last adjustment between the Hopi and the Navajo area of occupancy, the Hopis got quite a bit of additional land from which the Navajo people were moved away. So the real fact is that the Hopis have gotten more land and now have more land than they ever used before for residential and agricultural purposes.

I am using the words "residential and agricultural" advisedly. It is true that the Hopis also use the area of Navajo occupancy, but only for religious purposes and for gathering wool and coal. Our position is that we would be glad to have these ancient uses clearly identified and to guarantee the Hopis perpetual easements to continue to make these uses of the land on which Navajo people continue to live.

You will also be told that the Navajos are overgrazing the land. We do admit that the amount of livestock in the area is greater than good conservation practice would demand. But believe me, when I say that the livestock is not there to enhance the prestige of the owners, but simply because it is needed to support the population.

An important reason why the range has deteriorated during recent years is that the Government of the United States stopped, in 1964, to expend any funds on conservation efforts within the disputed area. A major effort at range improvement is undoubtedly needed.

The problem of inadequacy of resources does not only apply to the Navajos living in the disputed area. It applies to the entire reservation. But what I can tell you, and I am sure you will agree, is that the problem of overgrazing, of inadequate resources, is certainly not going to be solved or alleviated by taking more land and more resources away from the Navajo people.

Another misstatement is that the Navajos in the disputed area are not really dependent on the land because they are on welfare. I have never quite understood how all these people supposedly dependent on welfare could be responsible for so much overgrazing. It would seem to me that either they are making a great deal of use of the land or they are not. It can't be both.

The fact is that the Navajo people are eking out a meager living off the land. It is a meager living, as I have said, but they have the satisfaction of feeling and knowing that they are on their own land and are making an effort to support themselves.

They are raising their children to be self-reliant and I am sure that most of them will ultimately be able to improve their own economic conditions over those of their parents.

To the older generation, welfare assistance is an income supplement. If their land, their herds, and their work were taken away from them and they were completely dependent on handouts, they would be destroyed as a people, such as happened to the Kabintos, even though there were just five or six people that were moved out, we had a tremendous hardship.

One man died of a heartbreak and other families are just in a transient state right now.

Even though we had to deal with those, we know that these kinds of consequences are evident, if the proposal to evict Navajos, if that is to be implemented.

What I have so far addressed myself to is the so-called 1882 Executive order, the area which has been the subject of blunders for over 90 years, blunders which I hope you will bring to an end.

Now let me turn to the Moenkopi area, that is that piece of land standing west of the Executive order area that you see on the map—where the Steiger proposal would start us out on a brandnew blunder.

Moenkopi is a village lying to the west of the 1882 Executive order reservation, settled by the Hopis in relatively recent times.

Under an act which became law on June 14, 1934, the area in which Moenkopi lies was made a part of the Navajo Indian Reservation, with a proviso that the land was set aside "for the benefit of the Navajo and such other Indians as may already be located thereon."

In recent years it has been suggested that the formulation of the 1934 law, which incorporated lands into the Navajo Reservation but provided that the lands should be held for the Navajos and other Indians located there, should be changed to define clearly what area these other Indians, the Hopis, had owned or occupied, and that that area should be taken out of the Navajo Reservation and added to the Hopi Reservation. We have no objection in principle to such a rearrangement.

What we do object to, and object to most strenuously, is the effort to turn the settlement of the Moenkopi issue into another Hopi land grab.

Under the Steiger proposal, a super-Moenkopi area is created, to be added to the new super-Hopi Reservation.

Again land is to be taken from Navajo people and over 2,000 Navajos are, in this case, to be driven from their homes. In this case, there isn't even a judicial determination available to justify the Navajo evictions. Here the Steiger proposal starts from scratch. Even Assistant Secretary Loesch admitted in his testimony before your committee last year that some of the area to be conveyed to the Hopis was Navajo land which was to be taken simply to connect the Moenkopi area to the new enlarged Hopi Reservation.

That, Mr. Chairman, would clearly be a taking of land from us in which we have a vested property right. But there was not a word in the Steiger proposal to arrange for a determination of the amount of land that was being taken from the Navajos, of the value of that land, and of the compensation to be paid to the Navajo Tribe.

Not that we want compensation. We think there is no justification for taking this land from us. We simply want to point out that the proposal as it was submitted to the Congress was plainly unconstitutional.

Accusations have been made against the Navajo Tribe for its failure to cooperate, for its failure to negotiate.

Mr. Chairman, I do not know of all the problems and concerns which made my predecessors act the way they did. But I have been in office for 2 years now and on behalf of myself and my administration, I want to assure you that I shall go anywhere at any time to try to work out a just solution to this problem.

I am prepared to negotiate and cooperate, but I believe that negotiation and cooperation must start from one premise: In the long run absolutely nobody, nobody will gain from your throwing people, Navajos or Hopis, off their land. All of us, Navajos and Hopis, are poor people, living on poor land.

What we should all do is work together for a better life for all our people, Hopis and Navajos alike.

As much as I would like to see today that a settlement be made between the two tribes through negotiation, but if we have to, we can go through Congress and have a bill imposed upon two tribes.

Mr. Chairman, I am submitting to you with this statement the draft of a bill which I plan to present to the Navajo Tribal Council for its consideration. It is a bill which would fully respect the human rights and the property rights of the Navajo and Hopi Tribes.

[The draft bill follows:]

A BILL

To provide for resolution of the conflicting interests of the Hopi and Navajo Tribes in the Reservation established by the Executive Order of December 16, 1882, and for other purposes.

CONGRESSIONAL FINDINGS

Sec. 1. (a) The Congress, after review of the decision of the United States District Court for the District of Arizona, Civ. No. 579, entered on September 28, 1962 in the suit captioned Healing v. Jones and reported at 210 F. Supp. 125 finds in conformity with that decision:

(1) that 2,453,294 acres were withdrawn from the public domain under an executive order signed by President Chester A. Arthur on December 16, 1882 and were 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;

(2) that the creation of the Executive Order Reservation did not vest any rights in the Indians for whom it was set apart but constituted them tenants at the will of the Government whose use and occupancy could be terminated by the unilateral action of the

United States without legal liability for compensation;

(3) that the Executive Order of December 16, 1882 did give the Moqui, now known as the Hopi Indian Tribe, a non-exclusive right to use and occupy the reservation;

(4) that pursuant to the terms of the Executive Order of December 16, 1882, the Navajo Indian Tribe was impliedly settled on the reservation from February 7, 1931 on and thus also acquired a non-exclusive right to use and occupy the reservation;

(5) that Navajos had lived on a substantial portion of the land located in the Executive Order Reservation both prior to and since December 16, 1882;

(6) that the Hopi Indian Tribe was found by the court to have, under the provisions of the Act of July 22, 1958, Pub. L. 85-547, an exclusive interest in that portion of the Executive Order Reservation known as land management district 6, containing 631,194 acres, and that the Hopi and Navajo Tribes were found to have joint, equal and undivided interests in the remaining 1,822,080 acres contained

within said Executive Order Reservation (such 1,822,080 acres referred to hereinafter as the Joint-Interest Area);

(7) that Hopis have traditionally lived within the area of district 6, have made such use of the Joint-Interest Area as "cutting and gathering wood, obtaining coal, gathering plants and plant products, visiting ceremonial shrines, and hunting" and that other Hopi use and occupancy of the Joint-Interest Area was "de minimis".

(8) that on April 24, 1943, the Office of Indian Affairs had divided the Executive Order Reservation between an area of use and occupancy set aside for the Hopis (district 6), and an area of use and occupancy set aside for the Navajos (the remainder of the Reservation, now the Joint-Interest Area); when this division was made "[m]any 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 personal hardships were undoubtedly experienced by some."

(b) The Congress further finds:

(1) that the question of the disposition of areas in which the tribes had a joint interest was left by the Act of July 22, 1958, Pub. L. 85-547, for future determination by the Congress;

(2) that the continued undivided joint ownership by the Hopi and Navajo Tribes of the subsurface rights in the Joint-Interest Area is feasible and practical;

(3) that any diminution of the use and occupancy by the Navajos of the surface of the Joint-Interest Area would create serious hardships for the Navajo people and that the expulsion of Navajos from any portion of the Joint-Interest Area would do permanent and irreparable harm to the families affected;

(4) that the ultimate cost to the United States of any program of expulsion of Navajos from the Joint-Interest Area would far exceed the present value of the interest of the Hopi Indian Tribe in the surface of said area.

Sec. 2. All coal, gas, oil and minerals of every kind in the Joint-Interest Area shall be managed jointly by the Hopi and Navajo Tribes, subject to such

supervision and approval by the Secretary of the Interior or as otherwise required by law, and the proceeds therefrom shall be divided between the said tribes, share and share alike.

Sec. 3. Within ninety (90) days from the enactment of this Act, the Navajo Tribal Council and the Hopi Tribal Council may enter into negotiations for the purpose of reaching agreement as to

(a) which lands within the Joint-Interest Area were on July 22, 1958 used by Hopi Indians for residential or agricultural (including grazing) purposes and which lands were on that date used by the Navajo Indians for such purposes;

(b) which lands within the portion of the Joint-Interest Area which on July 22, 1958 were on or about July 22, 1958 used by Hopi Indians for the purposes of wood cutting and gathering, obtaining coal, gathering plants and plant products, visiting ceremonial shrines and hunting.

After reaching such agreement the parties shall notify the Secretary of the Interior and within an

additional ninety (90) days file a report describing the lands at issue by metes and bounds, and illustrating their findings where necessary by field notes and plats. As to areas found to have been used by Hopi Indians pursuant to clause (b), the report shall describe such uses.

Sec. 4. If the parties have not filed a timely notice with the Secretary of the Interior to the effect that they have reached agreement, or after having reached agreement in principle, cannot reach agreement on a report, a Board of Arbitration (hereinafter referred to as the "Board) shall be appointed, whose task it shall be to prepare and file the report described in Section 3 within six (6) months from the date of its organizational meeting.

Sec. 5. The Board shall consist of three (3) persons, namely a designee of the Navajo Tribal Council, a designee of the Hopi Tribal Council and a designee of the President of the United States.

Sec. 6. (a) Members of the Board shall receive compensation in the daily equivalent of the rate provided for grade GS-18 in Section 5332 of Title 5, U.S. Code, for each day they are engaged in the business of the Board, and shall be allowed travel expenses, including a per-diem allowance, as authorized by Section 5703

of Title 5, U. S. Code, in connection with their services for the Board.

(b) The Board shall appoint such staff as shall be requisite to conduct its business.

(c) The Board shall have the power to call upon any of the departments or agencies of the United States for any information it may deem necessary in carrying out its functions under this Act.

(d) The Board shall continue in being until such time as its work under the provisions of this Act shall have been completed.

Sec. 7. Within ninety (90) days following the filing of the report under Section 3 or 4 hereof, the Secretary of the Interior shall appraise the value of the respective interests described in said report and shall make public the results of such appraisal.

Sec. 8. Immediately following the issuance of the appraisal report, the Secretary of the Interior shall cause to be served on the Navajo Tribal Council and the Hopi Tribal Council, the form of an order which shall provide that

(a) all lands identified by the report under Section 3 or 4 to have been used and occupied by Navajo Indians on July 22, 1958 in accordance with clause (a) of Section 3 shall be held by

the United States in trust for the Navajo Tribe of Indians;

(b) all lands identified by the report under Section 3 or 4 to have been used and occupied by Hopi Indians on July 22, 1958 in accordance with clause (a) of Section 3 shall be held by the United States in trust for the Hopi Indian Tribe;

(c) all lands identified by the report under Section 3 or 4 to have been used by Hopi Indians on or about July 22, 1958 in accordance with clause (b) of Section 3 shall be subject to easements in favor of the United States in trust for the Hopi Indian Tribe;

(d) the amount of money, if any, which shall be authorized to be paid by the United States to the Navajo Tribe of Indians or the Hopi Indian Tribe upon the effective date of the order shall be paid to that tribe, if any, which receives under this section surface interests in land whose total appraised value is less than one-half of the surface interests in the Joint-Interest Area, the amount payable being the difference between the appraised value of such one-half interest and the appraised value of the surface interests conveyed to that tribe.

Sec. 9. The order provided for in Section 8 hereof shall take effect sixty (60) days from the day on which it is served on the tribes, provided that the party affected by subsection (d) of Section 8 may prior to the expiration of sixty (60) days file an appeal from the Secretary's determination of value in the United States District Court for the District of Arizona. Such appeal shall not affect the finality of those portions of the order which comply with the requirements of subsections (a), (b), and (c) of Section 8.

Sec. 10. The Secretary of the Interior is authorized and directed to use such funds as may be paid under the provisions of subsection (d) of Section 8, with the consent of the tribe, for the purchase of land, which shall thereafter be held by the United States in trust for such tribe, or for such other purpose as the tribe may specify.

Sec. 11. There is hereby authorized to be appropriated such sums as are necessary to carry out the provision of this Act.

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Senator ABOUREZK. Thank you, Mr. MacDonald.

In 1962, the district court in the *Healing* v. *Jones* decision, gave the Navajo and Hopi Tribes a joint and undivided and equal interest in the lands that are in dispute.

The legal action which led to this decision was agreed to by both tribes at the time.

My question to you is, does the Navajo Tribe accept the judgment of the court as valid?

Mr. MACDONALD. That is the law of the land today, yes.

Senator ABOUREZK. You do accept it as valid?

Second, I would like to ask, Mr. MacDonald, why has the Navajo Tribe never taken positive action to allow the Hopis to enjoy their half-interest of the surface of the joint area.

Mr. MACDONALD. Simply because we have never been able to get together as to even to begin to discuss ways in which that particular decision can be implemented.

In other words, we just can't move in. There has to be a procedure, a plan of operation by which the two tribes can begin to implement that decision, if it can be implemented.

Senator ABOUREZK. Has the Navajo Tribe invited the Hopi Tribe to come in and talk about allowing their use of their joint interest in the disputed area?

Mr. MACDONALD. Yes, definitely; on several occasions.

On a couple of occasions, I visited with Hamilton and on another occasion, I invited Chairman Hamilton and his general counsel, John Boyden to appear before the Navajo Tribal Council and discuss ways in which we can begin to get together; work the problems out.

Senator ABOUREZK. But it was specifically to offer them the use of their interest in that area?

Mr. MACDONALD. However way we can get to that solution, yes; and the last meeting we had July 8 in Albuquerque where we actually set down some guidelines by which we would begin to talk about implementing *Healing* v. *Jones*, and that plan of operation which we agreed upon was rejected by the Hopi Tribal Council.

Senator ABOUREZK. Do you believe that the Navajo Tribe or Navajo individuals in the joint area have a duty to compensate the Hopi Tribe for the Navajo use of the Hopi half interest since 1962?

Mr. MACDONALD. I do not see why they should, because they had the land—they did not take the land away from the Hopis.

It was their land, just as the settlers settled wherever they did and they didn't have to compensate anybody for it.

Senator ABOUREZK. If you agree with the decision of the court, then certainly you ought to agree they own the half interest, and if they are not using it, and if it is Navajos who are, should not the Navajos pay them something for it?

Mr. MACDONALD. The Navajo position is that the court decision which was as a result of the 1958 congressional action really was because of the Navajos in the area who were not fully informed of what was taking place, and as a result of those who live in the area, feel and have rightly felt, that they have a right to that land, and there is no reason why they should either move or compensate for the use of that land, although we recognize that the law of *Healing* v. *Jones* is the law, and that is the reason why we are saying we must probe

into additional facts that led to the decision in 1962, and even the act of 1958 if we are to truly understand the positions of the Navajo.

Senator ABOUREZK. What kinds of border incidents have occurred along the district No. 6 boundary line during the past 10 years?

Mr. MACDONALD. Mostly sheep and cattle and horses trespassing over into the Hopi side of the reservation.

Senator ABOUREZK. Do you know how often these incidents have happened?

How frequently have they happened?

Mr. MACDONALD. Probably, I would say, on the average of maybe once a month over the past year.

Senator ABOUREZK. Do you know the location of these incidents?

Mr. MACDONALD. Yes, mostly in the northern part of the Hopi Reservation.

Senator ABOUREZK. Along the district No. 6 boundary line?

Mr. MACDONALD. Yes, right, northern and western sections.

Senator ABOUREZK. Is there any specific reason why it would only occur there?

Mr. MACDONALD. I imagine because of the land in that area was heavily settled by Navajos for some time and that they—most of it, where these incidents occurred, Navajos lived as much as 50 feet from the line and the sheep corral is as much as a hundred yards from the line.

So any time they open up the corral, the sheep just move out and consequently just move across the line.

The Hopis know where these locations are. So, recently, they have intensified their patrol in these areas and all they need to do is sit there and watch the Navajos open up their corrals and once they pass over it, they confiscate it.

Senator ABOUREZK. Are these incidents mostly Navajo livestock going into Hopi land, or is it the other way around?

Mr. MACDONALD. Yes, just the Navajo livestock going into the Hopi Reservation because there are not that many Hopi livestock in that area.

Senator ABOUREZK. Are not the trespass problems related to the fact that no adequate fence exists along the district No. 6 boundary.

Mr. MACDONALD. Definitely.

Senator ABOUREZK. Why has not a fence been built?

Mr. MACDONALD. We offered to build one.

We appropriated over $300,000 of tribal moneys to build a fence for the Hopis all the way around.

It was rejected by the Hopis and rejected by the Bureau of Indian Affairs.

Senator ABOUREZK. Are you not entitled, though, to build a fence on your own without asking for permission from the other side of the dispute?

Mr. MACDONALD. That is what we thought.

Senator ABOUREZK. Are you willing to build a fence now at this time?

Mr. MACDONALD. Definitely.

Senator ABOUREZK. You are certainly entitled to do it without asking the Hopis.

Do you have any plans to do that, then, Mr. MacDonald?

Mr. MacDonald. Well, as long as the BIA tell us to go ahead and do it.

In fact, one time the people in the northern part there, started a fence of their own, with their own moneys privately collected, and after they had gone about a mile or so, the Hopis, with their BIA superintendent assistance got some bulldozers and bulldozed the fence down.

That was last summer.

Senator Abourezk. The Hopi Tribe has called for a partition of the joint area on a 50–50 acreage split.

Each tribe will have exclusive jurisdiction over its own area.

Navajos on the Hopi portion will have to relocate elsewhere and the Hopis claim that this solution is the only way they can gain control of their half interest of the surface of the joint area.

What problems does relocation pose for the Navajo residents who will have to move from the joint area?

Will you give us a brief comment on that?

Mr. MacDonald. I don't know how I can picture it so that it can be comprehended by everybody, the kind of tragedy and consequences that will put upon the people who will be asked to move.

I have only experienced those who have moved off district 6 recently and if that is an indication of the kind of problems that we are facing, then it is a great tragedy, a tragedy that we may not have seen in our lifetime, through many wars and many other incidents throughout the country.

Because it means leaving your country, it means leaving to go into a strange land where there is no room for you, no one wants you, and the very economic livelihood that is destroyed—not only that, but the kind of social and emotional problems, psychological problem that is going to affect the individual—it is going to be severe.

In fact, we have a man here, Mr. Dandy George who had suffered such experience by being relocated off district 6, and he has testimony and I would like to have him address himself to that question.

But, as I stated before, it is just like asking the residents of Arizona to move into Siberia, leave all their assets here, just be loaded in a cattle truck and move into Siberia, and you just cannot imagine the kind of suffering, the kind of heartbreak that Mr. Steiger might feel when running through the cold snow in Siberia, shoveling salt and what have you.

No longer a human being.

Senator Abourezk. You have a draft bill which I have not yet read and I assume that provides alternatives to partition and relocation and so on.

Would you state at this time what you think the alternatives ought to be?

Mr. MacDonald. Well, the alternatives which are more detailed in the proposed bill, in the testimony here talks about recognizing that there is a joint interest, as the *Healing* v. *Jones* decreed.

If that is so, then the joint interest can be recognized, and be divided without moving people around.

In other words, the subsurface joint interest, 50–50 interest, there is no problem with that, I am sure, for oil, coal, uranium and other minerals below the surface.

We have no qualms.

The biggest problem is the joint use on the surface.

The suggestions I make in the bill are that we return—the kind of usage that the two tribes have presently——

Senator ABOUREZK. Would you suspend just a minute?

Go ahead, Mr. Chairman.

Mr. MACDONALD. Anyway, I was saying the subsurface—I see no problem with that.

The surface, where we have joint use, I think it can be determined by more investigation into that area as to the actual usage by the two tribes since 1958 when the law was established up to today, and give cash for land where the actual usage was determined, so that no one would be moved from the areas, and that the Hopis retain the customary usage for their religious and other purposes that they had been using for generations, by gathering wood and going into various areas of the joint use for religious purposes.

Senator ABOUREZK. Did the Navajo actively participate in the discussions with the Government and Hopi officials to determine the joint area partition boundary in Congressman Steiger's bill?

Mr. MACDONALD. No, no participation of any kind.

No, it was surprising to me myself that such a bill was being drafted, and in fact, it had been drafted for a couple of years before we knew what was happening.

Senator ABOUREZK. Thank you.

Senator Fannin, do you have any questions you would like to ask?

Senator FANNIN. Yes, Mr. Chairman.

I do commend you, Chairman MacDonald, for your statement in which you say what we should all do is work together for a better life, for all our people, Hopis and Navajos alike.

Certainly, we are all in agreement, I hope, that out of these meetings, that we continue on that path to bring about our goal.

Unfortunately, this dispute has procrastinated too long already.

If we are to have any settlement, we must proceed from the legislative and judicial decisions to date. Those past decisions of Congress and the courts, do you agree with that?

Mr. MACDONALD. Yes.

Senator FANNIN. We can go back over the years—my very wonderful Senator, Senator Carl Hayden, went into this when he was a Congressman back in 1920. After all those years, Senator Hayden had been in the Congress we are considered what is best for all of the people involved.

From our previous decisions, legislation resulted in 1958.

Public Law 85–547—I do not want to extensively discuss this—but under that act the Hopi Tribe instituted an action against the Navajo Tribe in the district court and the famous 1962 decision of *Healing* v. *Jones* resulted.

This decision answered three crucial questions:

No longer would it be tenable for the Hopis to take a position that no Navajos had been validly settled on the reservation.

No longer would it be tenable for the Navajos to take the position that they gained exclusive rights and interests in any of the reservation, and No. 3, no longer would there be uncertainty as to the boundaries of the area of exclusive Hopi use and occupancy.

The court concluded that:

> It will now be for the two tribes and Government officials to determine whether, with these basic issues resolved, the area lying outside of District 6 can and should be fairly administered as a joint reservation.

District 6 was determined to be that area that was exclusively Hopi.

We have all covered that many, many times.

But, here we come down to October 14, 1972, when Judge Walsh stated:

> Defendants shall forthwith commence reduction of livestock in the joint use area of the 1882 Executive Order Reservation and within one year from the date of this Order complete reduction of Navajo livestock to one half of the carry-capacity, as determined by the soil and range inventory of the 1882 Executive Order Reservation.

And my question to you, previously and now is, have you abided by that decree?

Mr. MACDONALD. Yes; because that is a legal question, and we have not exhausted all legal remedies in that particular case.

Senator FANNIN. Could you explain the position in which you are in today?

Mr. MACDONALD. We are looking for a solution and method by which that particular court order could be carried out.

If that cannot be done, I am sure there are other remedies that the tribe has.

Just as the Hopis would have if they did not appreciate the method suggested.

Senator FANNIN. Mr. Chairman, I am not trying to condemn you in any way. I am just trying to clear up the record even though you have appealed the decision, the order has not been stayed pending that appeal so my question was, are you abiding by that decree?

You say no, you are appealing. But the court order stipulated that it should be done by October 14, 1973.

Mr. MACDONALD. October 1973 has not come about yet.

We still have some time.

Senator FANNIN. My question to you is, not only whether you are abiding by it, but are you taking steps to abide by it?

Mr. MACDONALD. Yes, we are taking steps. In fact, we were just in court Saturday.

Senator FANNIN. I mean, have you taken steps to abide by the order to reduce the stock?

Mr. MACDONALD. Yes, by going to the court and trying to find out how we are going to do it.

Senator FANNIN. You certainly have not answered my question, if you do not desire to do that, that is your prerogative.

Thank you.

Mr. MACDONALD. If you want a real good answer, I can ask my lawyer to answer that question.

If that is a legal question, if you want a good answer, as our general counsel.

Senator FANNIN. I would like to have the counsel comment.

Mr. MACDONALD. That breaks the precedent we established.

Senator FANNIN. Counsel, would you care to comment?

Mr. VLASSIS. Am I to understand that I am permitted to make a comment to that effect now?

Senator FANNIN. It may be lengthy and time is of the essence.

Perhaps, if you would submit a written answer to the question, please.

Senator ABOUREZK. Senator Fannin, if you will yield at this point.

What we would like to try to do is to just have the local people testify, rather than make this an equal time situation where the attorneys for the other side might want to come in.

It would be better if we had a written answer, I believe.

Senator FANNIN. I was hoping for a yes or no, but that is all right.

Mr. MACDONALD. Some answer you cannot say yes or no to it.

Senator FANNIN. We will proceed to another question.

As I understand it, Mr. Chairman, the Navajo alternative proposal is to compensate the Hopis for the taking of the surface area and then grant them more than one half interest in the subsurface.

How can your alternative proposal be a fair solution to this land dispute when it would require the Hopis to give up that which they are fighting for?

Mr. MACDONALD. The answer to that question is, the Hopis do not—it does not specify that they have just a right to that land. They can get compensation for it, just as we have from claims, which were adjudicated in the Indian Claims Commission, we stated that we had this Winslow land, the land in Flagstaff, land north in Utah and Colorado belonged to the Navajos, and it was Navajo. It was the decision made.

But the court said we can only get compensation for it. I am just thinking about it in the same terms. So no one would be moved.

Senator FANNIN. I was just asking, Mr. MacDonald, why do you think the Hopis would be willing to take compensation?

Would the Navajos be willing to take compensation?

Mr. MACDONALD. No; just as the towns of Winslow and Flagstaff are not willing to take compensation, we would like to take the land back.

Senator FANNIN. So if the Hopis offered the Navajos the same compensation deal that you have offered them, you would not accept the offer?

Mr. MACDONALD. Yes, because we are already there. We do not want to move.

Senator FANNIN. Thank you, Mr. Chairman.

Thank you, Mr. Chairman.

Mr. MACDONALD. We are in the same position as Flagstaff is.

Senator ABOUREZK. We have no further questions of the Chairman as to this time.

I do want to thank you very much for the testimony, Chairman MacDonald and hope you will stay for the remainder of the hearings today in case we have some other questions that might come up during the testimony, that you can perhaps answer.

Mr. MACDONALD. Thank you very much. I will be here as the witnesses come here.

Senator ABOUREZK. Before we go to the next witness, I want to call a 5-minute recess.

I understand there are several hundred people outside.

But, I would like the people taking care of the building to set up their chairs in front during this 5-minute break so that you do not disrupt the hearings later on.

Then, we will have those people who are standing, as many as we can get to come up and take a chair.

[A short recess taken.]

Senator ABOUREZK. The hearings will now resume.

Chairman MACDONALD. Will you tell us who the next witness is?

Mr. MACDONALD. Mr. Chairman, the next witness will be Mr. Dandy George.

He was one of the men that was evicted out of district 6 just recently.

His interpreter is the gentleman on his right, Mr. Carl Beyal.

Senator ABOUREZK. Mr. George, would you proceed with your statement?

Please feel free, if you want to, summarize or highlight your statement.

You may read it if you want to, or you can just give the summary.

STATEMENT OF DANDY GEORGE, MEMBER OF THE NAVAJO TRIBE, READ IN NAVAJO AND TRANSLATED BY CARL BEYAL

Mr. GEORGE. Mr. Chairman and Senators, in making my statement I would like to be very brief and to express my appreciation for being given this opportunity to appeal before you.

Until November of last year, my home and my land were in district 6 above the place we call Echo Canyon.

In November, I was expelled by the Hopis from the home I had lived in all my life. I am now left without a home or a place that I can call home. I am without roots. I can't eat right or sleep right or even travel about.

I can no longer live in a normal way like greeting my friends and neighbors and mixing with the people.

I was a neighbor and relative of the Hopis and even helped them. Navajos had lived in district No. 6 where I was born as far back as any of us can remember. Our grandparents and their parents were born and lived there.

Now we suffer loneliness, sickness, and heartaches. This is the result of forcing a person to abandon his normal livelihood. There is no way to again step on good ground as we had known before.

If we were ever allowed to return, I know that this would be corrected.

We would again be with our Hopi friends and other neighbors. Living again like this would be the beauty way, a way without hurting one another and without disturbances.

Senator ABOUREZK. Thank you, Mr. George.

Senator Fannin, do you have any questions?

Senator FANNIN. Mr. Chairman, no questions.

I just want to commend the gentleman. I certainly realize the hardships and sympathize with him and his family, and we know that we hope we can alleviate this to the greatest extent possible.

Senator ABOUREZK. I want to thank Mr. George for appearing here to testify today.

Thank you for your statement.

Mr. MACDONALD. Mr. Chairman, I just want to remind the Senators that this is the type of person that you get information from as to the question that was raised earlier—what happened to the person when he gets moved.

Senator ABOUREZK. Thank you.
Who is your next witness from the Navajo tribe?
Mr. MACDONALD. Chester Yellowhair.
Senator ABOUREZK. Please proceed, Mr. Yellowhair.

STATEMENT OF CHESTER YELLOWHAIR, MEMBER OF THE NAVAJO TRIBE

Mr. YELLOWHAIR. Thank you, Mr. Chairman, members of the Senate Subcommittee on Indian Affairs.

My name is Chester Yellowhair. I was born in 1912 in Blue Canyon, which is located within the 1882 Executive order area.

I attended the Keams Canyon School; in fact, I was brought there on horseback by my father, who left me there after cutting my hair. Most of my fellow students at the school in Keams Canyon were Navajos, not Hopis.

My father, who is still living, was born near the Pinon area over 80 years ago. My mother was born west of the present Hotevilla village. She was born before the village was established. My father at the present time lives at my hogan on Howell Mesa, about 6–7 miles from the district No. 6 border on Highway 264.

Before 1943, my family resided 2 miles north of Hotevilla village, within the district No. 6 border. Even though Hopis lived nearby, we did not think of this as Hopi land, we always thought it was our land.

My father had many friends among the Hopis. The Hopis did not treat us like foreigners and never disputed our right to the land.

Nevertheless, when the 1943 lines were drawn, our family was forced to move.

We moved 5 or 6 miles across the line to Howell Mesa where we now live.

Mr. Chairman, I am a judge of the Navajo tribal court in Tuba City District and make a very fair living by Navajo standards.

However, I have a large family of six brothers and four sisters.

All but one of my brothers and sisters live near the hogans on Howell Mesa. Only one of these brothers and sisters has a permanent job, and they are able to survive on welfare, occasional temporary jobs, and a few sheep and cattle.

I own 130 sheep, 25 or 30 head of cattle, and only 2 horses. My sister watches over the sheep. Our livestock is used to support my relatives who are not as fortunate as I. Without the livestock I would not be able to give them the support necessary for their lives.

Even without the needs of my family, I would still need some sheep and cattle because I often give them to my neighbors for ceremonies or when my neighbors have need of the sheep and cattle for food.

I have had a great deal of contact with Hopi tribe during my lifetime. Because we lived near district No. 6, I became friends with many Hopi people. We often exchanged food and wood with one another. We respect each other's way of life and religion.

As I mentioned before, I am a Navajo tribal court judge and in my position as a judge I have heard many cases involving Hopis and have never heard any complaints that I have not treated Hopis fairly.

As a matter of fact, very recently, I heard a case involving two Hopis who were fighting over a piece of land in the Moencopi area.

The case was originally sent to Keams Canyon, but was referred back to me. The parties told me that they were satisfied with my decision.

In addition, to trying to split the 1882 Executive order land, the Steiger bill would give to the Hopis a large part of the Navajo Reservation which has nothing to do with this area. I am referring to the land between Tuba City and the western border of the Executive order area called 1934 Navajo Reservation.

Aside from the Hopi village at Moencopi and the area nearby, the Hopis have never been on any of the 1934 Navajo Reservation. Navajos have lived there for over 100 years and still live there.

My people want me to tell you particularly that this land should not be considered as part of the 1882 Executive order area.

Mr. Steiger says that many Navajos have moved into the 1934 Navajo Reservation and the 1882 Executive order area in the last 10 years. This probably is not true. I know of no Navajos who have moved into these areas for the last 20 to 25 years.

The families that live there have lived there for many generations. They were encouraged to live there by the BIA. They were encouraged to build their schools there and improve our stocks on their land. We did this in good faith, and now Mr. Steiger would tell us that the land is no longer ours.

I do not think that the Hopis really know what the Steiger bill would do to my Navajo people.

Aside from causing great suffering among the Navajos, the Steiger bill would destroy many long friendships and make relations between the tribes and their peoples very difficult.

Some people have said that we Navajos have overgrazed our land. If this is true, then we will suffer from the overgrazing. Since it is our land, and has been our land for hundreds of years, we should be able to do with it as we wish.

My parents, my grandparents, and the Navajo people have lived on this land for hundreds of years and were in fact encouraged to live on the land by the Government.

If the Government has made a mistake, why should innocent Navajo people have to pay for it?

I have a great deal of sympathy for the Hopis, but their problem should be remedied either by giving them compensation or by giving them unused land and not by throwing the Navajos off the land which is already in use.

What is even worse is that if the Navajos are thrown out, the Hopis will not move in and use the land.

I know that in district 6 the Hopis don't live anywhere more than 10 miles north of the Hopi villages on the mesas.

My suggestion is that there be a separate bill for the 1934 area. Furthermore, let the tribes sit down and settle the problem by understanding and not by fighting.

All that removal will accomplish will be for both tribes to hate each other.

Mr. Chairman, the Hopis will really gain nothing from the Steiger bill, since they will not use the land—the Navajos will suffer greatly.

There is only one party who will enjoy a comfortable life from the Steiger bill.

We Navajos are a religious people who have great respect for the land and the earth.

We pray often to the hills and to the mountains. They sustain us. Please do not take them away from us.

Senator ABOUREZK. Thank you very much.

Senator Fannin, do you have any questions?

Senator FANNIN. No questions.

Senator ABOUREZK. Thank you for coming up here and giving us this statement today.

The committee appreciates it very much.

Thank you.

Chairman MacDonald, who is the next witness?

Mr. MACDONALD. The next witness will be Mary Lou White.

STATEMENT OF MARY LOU WHITE, MEMBER OF THE NAVAJO TRIBE

Miss WHITE. Mr. Chairman and Senators:

I am Mary Lou White and come from White Cone, Ariz., 10 miles west of White Cone, Ariz.

I am 37 years of age and not very old but I remember my grandparents and how they made their living. I will use my immediate family as an example for I am speaking on behalf of my people.

The land we live on is located on the 1882 Executive order area and is priceless to us.

My great grandfather, Hosteen Nez, and great grandmother and my grandfather, Hosteen Lewis, and my grandmother lived in the place I am speaking of.

They worked at and fixed the land so we could plant corn, melon, squash, and other vegetation and started herds of cattle, sheep, and horses.

They even taught my parents, aunts and uncles how to use this so they could take care of themselves.

My grandparents had very large families. Today I have parents and aunts and uncles that have large families on this land.

I believe that my grandfather and grandmother planted a root for us on this land with a prayer saying that some day my children will continue to use this land.

I was 18 years of age when my grandfather, Hosteen Lewis died of old age.

I remember we had peaceful lives with the Hopis. My grandfather was a medicineman and made many trips to Hopiland. He shared his beliefs with the Hopis and they in turn shared their beliefs with him.

I am speaking on behalf of my people. They too had elders just like my parents. They make their living the same way we do. They had little or no education. They were at peace with the Hopis at one time They have livestock and this is their only means of support. They built homes on this land as nice as they could afford.

I am trying to say that we oppose the Steiger bill and pray that we may continue to stay on our land and in those homes we have built.

Today my people and I respect the word "peace" for our elders lived at peace among themselves. I have relatives that served in

Armed Forces. My immediate family lost a loved one, my brother-in-law in the Vietnam war.

Today, I have a nephew that is fatherless so we could live at peace.

I pray that you'll consider the presentation I have made and ask for your consideration. I have here a resolution that was adopted on March 2, 1973, by the people of the Whitecone chapter. It explains their feelings about the Steiger bill and how much their homes and livestock mean to them.

[The resolution referred to follows:]

RESOLUTION OF WHITECONE CHAPTER

WHEREAS:

1. The Navajo people living in the disputed Navajo-Hopi land area and their ancestors have lived in this area for many generations, long before any land boundaries were established, and

2. The Navajos living in the disputed land area were born and raised in this area, like their ancestors and have made life time improvements of dwellings and livestock facilities that cost thousands of dollars, and

3. These Navajo people have sentimental feelings for the land, their homes, sacred places, watering places, field gardens, and grazing lands, and

4. These Navajos have good community relations with their Hopi neighbors, especially the older people and have lived beside them in harmony for many years, and

5. If these Navajo people are subjected to forcible removal from their dwelling places, they will lose thousands of dollars, suffer physical impairment, and be in great turmoil.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Chapters and people demand and urge all concerned not to remove any Navajo people from their dwellings by force, as has been done in the past, and

2. The Chapters and people demand and urge the responsible parties to consider the plight and feelings about the peoples' dwellings, and

3. The Chapters and people demand and urge all responsible parties to let the people in disputed land areas resolve their own differences without hostile, forcible and harrassing procedures.

4. The Chapter has its share of veterans of foreign war of World War I and II and the recent Viet Nam war. The fact that they have given their lives and dedication to preserve their safety and freedom and justice by upholding the American freedom of choice. The Chapter hereby demands that they remain at their present home and will not be moved from their ancestral home for no amount of money.

CERTIFICATION

We, the undersigned officially certify that this resolution was duly considered and adopted at a regular chapter meeting where a quorum was present and passed by a vote of 54 in favor and 0 opposed.

Councilman Dudley Yazzie

Chapter President

Chapter Vice President

Chapter Secretary

Senator ABOUREZK. Thank you, Miss White.

We appreciate your coming here and giving your statement. Senator Fannin, do you have any questions?

Senator FANNIN. I would like to commend Miss White for her statement and for bringing out the wonderful services to their country that the Navajos have performed.

Senator ABOUREZK. We will read the resolution, Miss White, and it will be printed in the record, and we will be sure to read it in full.

The next witness?

Mr. MACDONALD. Mr. Peterson Zah, witness No. 5.

Senator ABOUREZK. You may proceed with your statement, Mr. Zah.

Mr. ZAH. Thank you, Mr. Chairman and Senator Fannin.

I have a written statement submitted in the package that you have all received. What I will do is talk a little bit about what I have written and some of the things that I have thought of since participating, or listening to the hearings.

Senator ABOUREZK. Without objection from the other members of the committee, we will put your statement in the record in full as though you read it and we would welcome your comments.

STATEMENT OF PETERSON ZAH, MEMBER OF THE NAVAJO TRIBE

My name is Peterson Zah and I am originally from the Low Mountain chapter area, which is in the joint use area. I was born in 1937 several miles north of Keams Canyon where my parents and many relatives still reside today.

My testimony before this committee will come from two sources; one from the personal side, as I grew up in the Executive order area, went to school with many Hopis, and had many Hopi friends during my school days. The other sources will be from the professional side describing the Navajo-Hopi land dispute activities with DNA legal services program of which I am the director.

In 1943 many of the families presently living in the Low Mountain community were forced to move out of what is now known as district 6 at the insistence of the Hopi Tribe. These people clustered themselves in a small area with all their livestock plus whatever they were able to salvage from their old homes.

With a rapid increase in population, Low Mountain has grown into a community with approximately 1,000 residents today. The unmarked boundary line separating district 6 and the Executive order area is 2 miles away. There is a Bureau of Indian Affairs boarding school in this community. The people of Low Mountain are like any other Americans—they want to live peacefully and have their basic human needs satisfied. The problem with having to live in the joint use area is lack of any improvements or development unless the two tribes consent to the project. The end result of this Interior Department policy is lack of progress and human suffering. Today communities such as Low Mountain cannot build a chapter house, permanent health facilities, additional water wells for people and livestock or all weather roads, and we cannot bring electrical power into this area for our homes. Yet while we are being denied power because of this freeze, the Navajo Tribe is producing and transporting power to most major cities in the Western United States.

For this community to be forced to move again will be an inhuman disaster. It will be like the earlier drastic experience we have lived through, the "long walk" and the 1934 livestock reduction. The psychological effect, damage and human suffering caused by relocating 10,000 people would be something that the Navajos would not outlive

again during this century. With a trend in Indian activism among our young people, I do not know how the proposed Steiger law will be met, once the Federal Government starts implementing its objectives and goals. This will especially be true if the bill is ramrodded through in the way it passed the House last year. Congressman Steiger with this bill was trying to create hatred and hostility between two different tribes that have peacefully lived side by side for centuries. In my view there were some reasons for this. Mr. Steiger wanted the two tribes to fight over the joint use area controversy, to distract both tribes from Black Mesa and what the big power companies are doing there. One only wishes that the two tribes would put their differences aside and fight the common enemies—the whiteman's disease: graft, discrimination, and dishonesty, and so forth.

I say this because I hear and see it everyday at work. You see I am employed by a legal services program where we receive all these problems from clients. Ironically, we receive some of these complaints from Hopi people, as we also represent them in both tribal and State courts.

Where the DNA program becomes involved is where individual Navajos are being prosecuted in Hopi courts for livestock trespass. The Hopi Tribe passed a law providing for forfeiture of livestock seized on Hopi lands. Their law did not allow any hearing on whether the animals were legally seized, and we had complaints of Hopi policemen coming across the line onto Navajo lands to seize animals. So we challenged the Hopi law in court, and the Hopis amended the law, so now a hearing is provided in the Hopi courts.

But even the amended livestock laws make the animal trespass a crime, not only for the herdsman but for the livestock owner as well. It is not enough to seize the livestock and obtain its forfeiture; the Navajos go to jail as well.

Based on all the cases we have had in Hopi tribal court, we think the overall purpose of the Hopi livestock trespass laws is harassment, rather then legitimate law enforcement. The Hopi chairman wasn't satisfied with the aggressiveness of his own police and courts, so now he has an Anglo policeman, an Anglo prosecutor, and an Anglo judge. The policeman is the most serious problem. We have report after report that he has provoked confrontations and has come across the line to seize animals. He arrested a very old man, whom Federal records show will be 100 years old this year, and roughed him up so much as to require medical treatment. He justified this treatment because the old man didn't obey his order—although the old man is so hard of hearing he couldn't hear any order.

Just last week this same policeman arrested a 12-year-old girl, who had custody of three goats that had crossed the line. He then came across the line and seized her entire flock of sheep, which had not trespassed.

It is clear to us that these tactics are pure harrassment, to gain publicity for the Hopi chairman. He has so little support for these tactics from his own people that he must use hired Anglos to carry out such policies. Even his statements are written by public relation firm up in Salt Lake City.

I would like to make one thing clear.

I don't know if this is really understood by Senator Fannin, that my understanding about the court case now, which has been in the

press for the last 2 or 3 weeks, down in Tucson, is that there have been two proposals submitted by the Government.

A third one was submitted by the Hopi Tribe and this was only a recommendation to Judge Walsh down in Tucson and he hasn't really acted on those three proposals that were submitted by these various groups.

I didn't really understand what the implication of those questions were, but I thought I better make it clear.

The other thing is, I am here today testifying for a community called Low Mountain.

You might wonder why I have driven from Window Rock to testify here today.

One of the problems, I think, with the Executive order area is the freeze that has been put on by the Department of the Interior. It has affected the lives of many people in the Executive order area because we cannot put in or we cannot make any improvements.

We cannot develop it if we want to.

There are many people living in that area where schoolchildren have to be in school, where we need health facilities but we cannot erect some of those buildings for these purposes.

So that there is a freeze on and there is a lot of progress that has to be made.

But, we are unable to do it because of the imposition that the Department of the Interior has imposed upon both tribes.

So, I am here representing that committee and some of the leaders are unable to drive here because of muddy roads. Even if we want to, we can't put any roads in that Executive order area community or communities, so that the people are having a hard time in that area with the weather like it is now.

So, it is pretty hard to go in and pretty hard to come back out.

I thought that rather than try and to compose some of these restrictions or freezes on improvement, I thought that the people should have it first hand insofar as what ought to be imposed on them by the Bureau of Indian Affairs.

The other thing is, I think all of us are here today trying to resolve the problem, and as I understand people, I think the gigantic problem at hand has to be more or less left up to the two tribes that are affected.

I think by proposing a bill such as the one that has been proposed by Congressman Steiger is sort of giving the problems back to Washington, and I don't know if the Washington people have the answer to this problem here. I don't know that they have the solution, and I think if we can leave it up to both tribes to negotiate, give them enough time—I think I look at the Hopi people as reasonable people, as are the Navajos, and I think given enough time, I think they will come together like humans and negotiate on what ought to be in the settlement.

I also would like to express some concern that I have as the director of a program called DNA legal services program.

We have many complaints, both from the Hopi Tribe and from the Navajo Tribe—the Navajo individual, I mean—where many of our Navajos are being picked in a disputed area for many things that the Hopis claimed that the Navajos have committed.

I am a great believer in Indian self-determination, and I think that this whole subject is left up to the two tribes, the two tribes can sit down and come to a reasonable settlement.

I would like to conclude by saying that as a person, as an individual, I oppose the Steiger bill that has been introduced in the last Congress, and I think has been reintroduced this session.

I would just like to plead with the two gentlemen here, that I think it would be a drastic thing to evict some people, to evict some Navajos who are living in that area.

Imagine all the psychological effects and human sufferings that the eviction will bring, because to the Navajo the meaning of land is completely different than what the meaning of what land might be to the Anglo people, and it means their culture. If there is a livestock reduction to be imposed upon the Navajos in the Executive order area, livestock means different things to us—I guess to many people it is animals.

But to a Navajo people, it does not mean that it is a wealth. It is something we grew up with. It means food, and the land is the same way.

It means many other ways than what it might mean on the surface.

So, that I am pleading with the committee members here, Mr. Chairman, and Senator Fannin, that I think the solution could be gained, or the answer could be gained to this problem by imposing something where the people would be the least affected by this whole controversy.

I thank you very much.

Senator ABOUREZK. Thank you, Mr. Zah, for your very lucid explanation of your view of the problem.

I want to comment on what you said about the two tribes reaching their own solution.

I personally am in favor of that, and I hope that if the two tribes themselves can come to a solution—I just want to say that if they do, I think that solution would be preferable to one that the Congress might impose.

Because if the two sides solve it themselves, at least they will, each side will be happy with what they have done. I am not sure they will be happy with what the Congress might do.

I am not sure either side would be happy with it. So I would very much underscore what you are saying, that the two tribes ought to come together.

Senator Fannin?

Senator FANNIN. Thank you, Mr. Chairman.

I agree, Mr. Chairman, with your statement, that if they could mutually agree on a settlement, it would be preferable.

We support self-determination, and I feel this would be the best conclusion to the controversy.

Mr. Zah, you questioned my statement about Judge Walsh's order.

I do want you to know I was reading from a copy of the exact order.

Senator ABOUREZK. Do you want to respond to that, Mr. Zah?

Mr. ZAH. Yes, I want to clear on what the implications were.

I just wanted to make it clear that if that is the way it is, that is the way it is, that is the way it is. I guess.

I was just sort of misunderstanding the whole thing.

Senator FANNIN. I will be glad to show you this, and it is an exact copy of Judge Walsh's order.

Mr. ZAH. Thank you very much, Mr. Chairman.

Senator ABOUREZK. Who is the next witness?

Mr. MACDONALD. The next witness is Mr. Donald Mose, Sr., No. 8.

STATEMENT OF DONALD MOSE, SR., NAVAJO TRIBAL COUNCIL

Honorable Chairman and honorable Senator, my name is Donald Mose, Sr. I am presently a member of the Navajo Tribal Council as the representative from the Pinon chapter.

Navajos have lived in the Pinon area for over 100 years. My own roots in Pinon are deep for that is where my great grandfather was born, where all of my grandparents were born, where my parents were born and where they still live. I too was born near Pinon as were my wife and our seven children.

Except for several years at a BIA boarding school in nearby Keams Canyon and 3 years in the U.S. Navy during World War II, I have lived my entire 54 years in and around Pinon. My family, like the other families in the area, has no other home and no other land and no other life. Until very recently it never occurred to me that our Government would once again say, as it did in the past, "Move on, Indian, we have better use for your land." We have moved enough in the past.

The Hopi lawyer says that the Navajo and Hopi have never lived in peace and that at this very time we are engaged in a range war. If we are engaged in a range war, I have not seen it. However, if violence does come it will come only because the Hopi leaders and their counsel have encouraged it. I have always had good friends among the Hopis, including Dewey Healing, the former Hopi chairman and the Healing of *Healing* v. *Jones;* Logan Koopee, the current vice chairman; Jerome Shupla and Travis Maho. I have had these and other Hopis in my house and have been in their houses. I have given them sheep even though I have not had many sheep of my own.

I have always lived at peace and in friendship with the Hopi. Although I have not had any contact with any Hopis since March of last year, that is not because we don't get along, but because the Hopi leaders have dictated a policy of hostility. If the Hopi leaders tell their people that the Navajos are their enemies again and again and again, it is not hard to understand that in time the Navajos will be viewed as enemies. But surely this kind of policy is not to be rewarded with Navajo land.

I do not mean to say that all Hopis at all times have gotten along with all Navajos. We have had our differences like all people. But the people of both tribes are basically friendly to one another. Even today I feel safer on Hopi land than I felt in Washington where I was told to lock my room and not walk the streets at night. Has anyone ever seriously suggested that the streets should be given to those who make them unsafe so that there will be no bloodshed?

The Hopi lawyer says Navajos do not make proper use of the land and therefore it should be taken from us. This land, as you will see, is barren and dry, but it is our land and we make the best of it. In past years we farmed our land, but because of the drought in recent years farming has been difficult. The only dependable resources for almost every family are a small number of sheep and the land they graze on.

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Given the choice between starving and overgrazing, the Navajo will not starve. Sure our land is overgrazed, inside the joint use area and elsewhere on the reservation. But the solution to overgrazing is not less land.

In blaming us for the condition of our land, the Government conveniently forgets that our best grazing lands in western New Mexico were given to or taken by the Anglos at the time of the Long Walk. This was our traditional land. We understand that under your law we cannot have this land back. But we don't understand why that same law does not protect our land in the joint use area.

Our land is without paved roads, yet it is our land. During the winter it is difficult to travel even a few miles. A horse drawn cart is still the most dependable form of travel. Rather than talking about how to make life more miserable for us, you should be considering how to make it better. Rather than the Steiger bill, you should be considering paved roads for the joint use area.

One of my sons, Larry Mose, served in Vietnam in the infantry. He left a healthy boy but returned completely blind in one eye and almost blind in the other. Now Larry babysits while his wife is a teacher's aide in Mexican Hat. Larry wants to return to Pinon to lead a useful life. Although Larry is limited in what he can do, he can be a shepherd. He can return to his family. Life will never be easy for Larry, but he should be allowed to return to his home and live in dignity.

Although our land is poor, it does provide us with food and shelter. It is where our ancestors chose to live. It is where we chose to live. It is where our children and their children will live.

Senator ABOUREZK. The committee thanks you, Mr. Mose, for your statement and for coming up to testify today.

Does Senator Fannin have any questions?

Senator FANNIN. No questions.

Senator ABOUREZK. Thank you again.

Who will the next witness be?

Mr. MACDONALD. The next witness will be Mr. Marlin Scott, number nine.

I would like to say, Mr. Chairman, that over here on the board, you will see two maps.

The one at the top indicates the windmill and other improvements that the Navajos have made in the joint use area, and the bottom map indicates the residents and homes of the people who have lived or who are living in the proposed partitioning of the joint use area.

I would like to have you gentlemen keep this in mind as the witnesses elaborate and I want you to see what kind of development they are considering and doing on the land and what kind of development they are getting.

Senator ABOUREZK. Are you providing those maps for the committee?

Mr. MACDONALD. Right.

Senator ABOUREZK. We can take those with us?

Mr. MACDONALD. Right.

Senator ABOUREZK. Mr. Scott, you may proceed.

STATEMENT OF MARLIN SCOTT, MEMBER OF THE NAVAJO TRIBE, READ IN NAVAJO AND TRANSLATED BY CARL BEYAL

Mr. SCOTT. Mr. Chairman and Senators:

I am Marlin Scott. I am the councilman from the Teestoh chapter which is part of the 1882 Executive order area and chairman of the Navajo-Hopi Land Commission.

This is where I was born and raised. My father and mother were also born and lived in the Executive order area. My grandfather was born and lived in what is now known as district 6, at a place called Tula Hogan. My family and their neighbors were forced to move from their homes in 1943 when the district 6 boundary lines were drawn.

Today I have 32 cows grazing in the Executive order area. I also have 10 acres of farming land where corn, watermelon, squash, and pumpkins are grown. I support seven people.

There are approximately 200 families living in the Executive order area of the Teestoh community. These families didn't move in recently; their parents and grandparents also lived there. Contrary to what Congressman Steiger says, no new families are moving into the Executive order area.

We Dineh—what we Navajos call ourselves, "the people"—are a very religious people. We believe that the Creator of the Universe has given us this land. To us land isn't just earth, it is our holy land. It is our mother. It is something that is really sacred. There are many sacred places in the Executive order area where medicinemen pray. The land is something that we depend on for our everyday lives. To us that part of earth that we live on today is something that God has given to us to live on and to enjoy.

We have songs and prayers from the four sacred mountains—Mount Blanca, Mount Taylor, San Francisco Peaks, and San Juan Mountains—that are important to us. Mount Taylor means turquoise to us and San Fransicso Mountain means abalone to us. Sand from the mountains are bundled with turquoise, abalone, and our prayers and is used by our medicinemen.

We love our land even though we are poor we are very happy there. We also say that the sky is our father. We Dineh believe that we live on this earth and our father is looking over us every day from above.

The hogan that the Navajo lives in isn't just a shelter. To the Navajo his hogan is very sacred; it is built with great care and planning. After all, it will be used for eating, living quarters, sleeping quarters and ceremonial purposes. Removing people from their hogans will cause people to suffer.

We have already seen that Joe Kabinto died because he was forced to leave his land. If 6,500 people are forced to leave, there will be many more Joe Kabintos.

As I have stated in my remarks, we do consider the earth to be our mother, and you will notice that the color of land is usually tinted red, the same way with the color of the Indians.

So surely there is deep relationship.

I also stated that we have sacred prayers and our beliefs in these various religions of ours. Our God has provided various things for us in which to believe, such as the four sacred mountains that I have referred to. There are the additional two—these were all provided

for us and we believe in these as we have it in our songs and in our prayers.

I have stated that we have a true belief in what has been provided for us, and certainly we hold very clearly to all of these that I have mentioned.

It has been stated that the Navajos should be moved from where they have lived. Certainly, it is just like taking a young from its mother.

This is just exactly what it is turning out to be. Certainly, it wouldn't work because the mother and young would miss one another if ever separated.

So I only wish to use it as an illustration as to what would be happening.

Senator ABOUREZK. Thank you very much.

Senator Fannin, do you have any questions?

Senator FANNIN. No questions.

Senator ABOUREZK. Thank you, Mr. Scott.

Who is your next witness, Mr. Chairman?

Mr. MACDONALD. Next witness will be Mr. Glenn C. George, No. 6.

Senator ABOUREZK. You may proceed, Mr. George.

STATEMENT OF GLENN C. GEORGE, MEMBER OF THE NAVAJO TRIBE

Mr. GEORGE. Mr. Chairman and Senators my name is Glenn C. George. I am 46 years old and am the councilman from the Tuba City chapter and president of the 18 chapters comprising the Tuba City agency.

My parents moved to Tuba City in 1934 and that has been my home ever since. I served in the Air Force for 20 years and returned to Tuba City permanently in 1966. My parents live south of Tuba City in the area that Congressman Steiger would give to the Hopis. My sisters live in this area close to my parents, and the small number of sheep that they have provides food for the family group.

I would like to direct my remarks to that portion of the Steiger bill which would carve up the 1934 reservation and give a substantial part of it to the Hopis.

First, it should be clear that this area has never been a part of the Joint Use Area. The decision in *Healing* v. *Jones* and the legislation that preceded it had nothing to do with the 1934 area. I do not understand why Congressman Steiger included our lands with a bill designed to solve problems in the joint use area, nor do I see how the two matters are at all related.

Second, the part of the 1934 reservation surrounding Tuba City and described in section 5 of H.R. 1193 has been occupied and used by Navajos for over 100 years. I have here a report prepared by David M. Brugge and J. Lee Correll in April 1972 entitled "Historic Use and Occupancy of the Tuba City Moencopi Area" which establishes Navajo occupancy in the area from an early date. With your approval, I would like to make this report a part of the record. The report concludes that Hopis occupied the area around Moencopi but that prior to 1900 no tribe could make a good case for exclusive use and occupancy for any extended period of time.

[The report referred to is in the appendix.]

I don't think there is much dispute that during this century the Hopis have occupied only a very small portion of the 20,000 acres that Congressman Steiger would attach to the Hopi Reservation. There are approximately 900 Hopis in the area and 70 percent of them live in Moencopi, just south of Tuba City.

More than 50 percent of those Hopis who have jobs work for the BIA. While some of the 3,000 Navajos who live in the area also work for the BIA, approximately 70 percent of the Navajos depend upon sheep that graze on the land for daily food and as a supplement to other income. The land in this area is relatively good for grazing but not very good for farming, the traditional Hopi use of land.

For all practical purposes, Navajos have been in exclusive possession of all areas outside Moencopi for at least three generations.

Third, recognizing that much of the land in the 1934 area is occupied by Navajos and that very few Hopis live outside of Moencopi the proposed boundary lines seem purposely designed to create the maximum amount of hardship for the maximum amount of people. I understand that Harrison Loesch, the former Assistant Secretary of the Interior for Public Land Management, testified at the hearings before the Senate in September 1972 that the boundaries were designed to follow contour lines on maps.

That is precisely the problem with the Steiger bill—as it applies to the 1934 area and the joint use area. Even assuming that partition is desirable, boundary lines should be drawn around people, not around mountains. I suppose that Congressman Steiger feels that it is easier to move people than it is mountains, and while this may be true as a matter of physics, this seems unduly harsh and shortsighted.

Fourth, it is bad enough that boundaries are drawn without regard to where people are located and have been located for decades, but to give the best lands to the Hopis makes a bad bill even worse. As noted by Vice Chairman Skeet in his testimony before the Senate in 1972, the land which would be given to the Navajos constitutes the land least suited for the raising of livestock.

Fifth, although relations between the tribes have been somewhat strained in recent times, the Hopi and Navajo people are generally friendly. Indeed, there are a number of Hopis who work on the Navajo Reservation.

Just the other day I visited the BIA school in Kaibito, which is on the Navajo Reservation, and found five Hopi women supervising one dormitory.

When I testified before this committee in September 1972, I told you that my constituents were disturbed and concerned about the Steiger bill. This is still true today. On Sunday my chapter met and adopted a resolution which they asked me to read to you. I don't think time will permit my reading the resolution in its entirety and accordingly, I would like to have it entered in the record.

Senator ABOUREZK. Without objection it will be printed in the record.

Also, I would like to have entered in the record two resolutions adopted by the Cameron chapter recently which set out various alternatives to the Steiger bill that I think are fair and just to all concerned.

Senator ABOUREZK. Without objection, those will be entered in the record.

[The resolutions referred to follow:]

RESOLUTION OF THE TUBA CITY CHAPTER
TUBA CITY, ARIZONA

Requesting the Senate Interior Committee to Delete 1934 Area from "Steiger Bill" and 1882 Executive Order Area

WHEREAS:

1. Congressman Steiger of Arizona introduced a Bill, H.R. 11128, in the 92nd Congress on October 6, 1971, and

2. The Bill, H.R. 11128, was tabled by Senate Interior Committee in 1972, and

3. The 93d Congress convened and the Steiger Bill, H.R. 1193 (11128), was re-introduced, and

4. The Senate Interior Committee hearing is scheduled on March 7, 1973, in Winslow, Arizona, and

5. The 1934 Boundary Area has never been a part of the controversy which led to the introduction of the Steiger Bill, and

6. The people of the community of Tuba City oppose the 1934 area being included in the Bill concerning the 1882 Executive Order, and strongly recommend that the 1934 area be deleted from the Steiger Bill, and

7. The people of Tuba City oppose the removal of people by relocating them and if the Bill is passed, it will effect over 200 families in the 1934 area.

NOW THEREFORE BE IT RESOLVED THAT:

1. The Tuba City Chapter hereby request the Senate Interior Committee to delete 1934 Boundary Bill Act area from the Steiger Bill for the reasons as follows:

(a) The 1934 area is not part of the controversy between the Navajo and Hopi Tribes.

(b) Justice can be best served by allowing the two Tribes to negotiate any land problems to find solutions and settlement.

(c) There is no violence between the two Tribes as stated by the Hopis during the hearings in the House and Senate in 1972.

2. BE IT FURTHER RESOLVED THAT we ask the Senate Committee to recognize our grief and to serve us justice by allowing us to settle our own problems for the betterment of both Navajo and Hopi.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the Tuba City Chapter at a duly called meeting at Tuba City, Navajo Nation (Arizona), at which a quorum was present and that same was passed by a vote of 74 in favor and 0 opposed, this 4th day of March, 1973.

Dillon E Edgewater
Presiding Chairman

Daniel Tallsman
Vice-President

Marjorie Thomas
Secretary

CONCURRENCE:

Eleanor C Jones
Council Delegate

PROPOSED RESOLUTION OF THE CAMERON CHAPTER

Requesting the Senate Interior Committee to Conduct a Number of Field Hearings in the 1934 Navajo Reservation & the Joint-Use Area of the 1882 Executive Order Reservation.

WHEREAS:

1. Congressman Sam Steiger (Arizona) introduced a Bill H. R. 11128 in the 92nd Congress which proposed to partition the surface rights in the Joint-Use area of the 1882 Executive Order Reservation, and the surface and subsurface rights in the 1934 Navajo Reservation between the Hopi and Navajo Tribe, to provide for allotments to certain Paiute Indians and other purposes; and

2. The 92nd Congress tabled H. R. 11128 and formed a Special Subcommittee with members Senator Paul J. Fannin (Arizona), Senator Frank Church (Idaho), and Senator Frank E. Moss (Utah) to study the Navajo-Hopi Dispute on sight, but the Special Subcommittee was abolished; and

3. The Subcommittee on Indian Affairs chaired by Senator James Abourezk (South Dakota) assumed responsibility of the field hearings; and

4. The Field Hearings will be held March 7 - 8, 1973 in Winslow, Arizona, a place not affected by the Steiger Bill.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The people of Cameron Chapter respectfully request the Senate Subcommittee on Indian Affairs, to conduct a number of hearings to thoroughly become aware of the Navajo-Hopi Dispute and the injustices the Steiger Bill will do if passed.

2. The Cameron Chapter further request that the field hearings be conducted in locales affected by the Steiger Bill, specifically in the vicinity of Tuba City, Arizona, and the Joint-Use area of the 1882 Executive Order Reservation.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the Cameron Chapter of the Navajo Tribe at a duly called meeting at Cameron, at which a quorum was present and that same was passed by a vote of 79 in favor and 6 opposed this 25 day of Febry, 1973.

Alex Charles
Chapter President

Chapter Vice President

Joe [illegible]
Chapter Secretary

CONCURRENCE:

Seymour Fog Sr. (Council Delegate)

PROPOSED RESOLUTION OF THE CAMERON CHAPTER

Requesting that Alternatives to the Steiger Bill Be Considered by the 93rd Congress

WHEREAS:

1. Congressman Sam Steiger (Arizona) introduced a Bill H. R. 1193 in the 93rd Congress, which if passed, would partition the surface rights in the Joint-Use area of the 1882 Executive Order Reservation and the surface and subsurface rights in the 1934 Navajo Reservation between the Hopi and Navajo Tribe, to provide for allotments to certain Paiute Indians, and for other purposes; and

2. Passage of H. R. 1193 would deprive over 6,600 Navajo people unjustly of lands upon which they have lived and have grazed livestock for many generations before the arrival of the white man in the area; and

3. The Navajos have a very deep attachment to the land because it pervades their whole way of life - religiously, socially, and economically; and

4. H. R. 1193, if passed by Congress, would mean a mass expulsion of people from their homelands and will force them onto welfare rolls on the Reservation which is definitely in conflict with President Richard Nixon's plans for American Indian self-determination; and

5. There are about 4,500 Hopi Indian people as opposed to over 134,000 Navajo people which means that a reduction in the land base upon which the Navajos reside would bring even greater hardships to the Navajo people.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The people of the Cameron Chapter of the Navajo Nation strongly oppose the Navajo-Hopi Bill H. R. 1193 which would result in the partition of land in the 1882 Executive Order area, and the expulsion of more than 6,600 Navajo people from their homelands.

2. The people of the Cameron Chapter of the Navajo Nation request that the following alternatives be seriously considered by the 93rd Congress:

(a) That the Secretary of the Interior appraise the value of the surface of the 1882 Executive Order Reservation outside District 6, and award the Hopis their one-half interest in the surface of the land and let them buy other lands with that money.

(b) That the Navajos remain where they have always occupied and distribute the subsurface mineral, oil and gas royalties on a 75% to 25% basis, i.e., 75% for the Hopis and 25% for the Navajo.

(c) That the Secretary of the Interior indentify Bureau of Land Management lands lying immediately south of the Navajo Reservation which would be appropriate for conveyance to the Hopi Tribe, and convey such lands together with other adjacent lands which he may acquire and hold in trust for the Hopi Tribe, such lands to be of a value equal to the amount previously determined to be the Hopis' entitlement.

CERTIFICATION

We hereby certify that the foregoing resolution was duly considered by the Cameron Chapter of the Navajo Tribe at a duly called meeting at Cameron at which a quorum was present and that same was passed by a vote of ~~[illegible]~~ 63 in favor and 6 opposed this 25 day of February, 1973.

Ace Charles
Chapter President

Chapter Vice President

Jon Allen Ely
Chapter Secretary

CONCURRENCE:
Seymour Taylor
Council Delegate

Mr. GEORGE. If I may, I would like to point out something that is really distinctly different in the Steiger bill.

Senator ABOUREZK. Go ahead.

Mr. GEORGE. Mr. Chairman, this is the map that is in the bill.

This map right here, the square shape is 1882. The one that I am talking about in my prepared statement is this, right here.

This area has never been in the controversy, but this area has. I would like to point out, Mr. Chairman——

Senator ABOUREZK. Just a minute, Mr. George.

For the purposes of the record, I would like the record to show that when you said, "this area has not been involved in the controversy", you are pointing to the so-called corridor on the western part of the boundary of the disputed area that encompasses part of Moencopi?

Mr. GEORGE. Yes, this area here is known as 1934 area, which doesn't have anything to do with the 1882 area.

I believe Congressman Steiger and Hopi attorney, Boyden, are trying to pull a sneaky Pete on us right here.

I would like to ask the committee to delete this area from the bill.

Thank you very much.

Thank you very much for allowing me the opportunity to explain why we are concerned about the Steiger bill.

Senator ABOUREZK. Thank you.

Next witness?

Mr. MACDONALD. Sam Wilson, No. 10.

Senator ABOUREZK. Is witness No. 2 not here at all?

Mr. MACDONALD. No.

Senator ABOUREZK. Go ahead, Mr. Wilson.

STATEMENT OF SAM WILSON, MEMBER OF THE NAVAJO TRIBE

Mr. Chairman and Senators, my name is Sam Wilson. I was born 60 years ago near Hardrock Mission, within the district 6 border. This is where my parents and grandparents were born and died. My grandparents, unlike other Navajos, did not take the long walk to Fort Sumner, but stayed at their home. Their home and mine is where I will die also.

I feel that I have a special obligation to talk about the Steiger bill. Last year the Steiger bill was known as H.R. 11128. My census enrollment number with the Navajo Tribe is also 11128. So that the record will be clear, I am opposed to the Steiger bill by whatever number it is known.

In the past years we raised crops such as corn, squash, and pumpkins, but because of the drought in recent years we do not do much of that. Like almost all Navajos, my family raises livestock. We depend on sheep to provide wool for blankets our women weave and for mutton our families eat. My family has a small flock of sheep—about 50—and since we eat 15 to 20 each year, we cannot get along on less sheep.

I have heard it said that Navajos want sheep merely because it is in our tradition to have sheep. Yes, it is in our tradition to have sheep, but to the people in the joint use area, and elsewhere on the reservation, a few sheep are the difference between life and death. You may wonder why we can't buy mutton from traders. The simple answer is we can't afford their prices. One leg which provides about 10 servings costs $7.50 from a trader. A whole sheep provides 75 servings. If a Navajo does not have sheep of his own, he can buy one from his neighbor for $15 to $20.

The Steiger bill will bring suffering to a people who have already known hardship for many years. Because of this dispute with the Hopis, the Government has told us we cannot build any more buildings. For the past several years we have not been able to build schools, hospitals or even improve our hogans. Because of this policy, many families are often crowded into one small hogan. For example, my daughter and her family live in my hogan, making six in a room 12 feet by 15 feet.

It is true that Navajos believe that we must live with nature, as best we can. That is why we have survived in our harsh and cruel world. We have even accepted the rules of the Government, even though they often make no sense, but we should not be forced to live under greater hardship which would result from the Steiger bill.

It seems strange that I am here pleading with you to leave us alone when I should be pleading with you to help us. We need roads, clinics, hospitals and housing, but we are denied these things because the Hopis will not allow us or the Government to build.

The Hopis have not been hurt by the freeze on construction but the Navajos have already suffered greatly. It is time to call an end to our suffering, not increase it.

Despite the hardship imposed by the Government in recent years, our young people do not leave. Some find work on the railroads but they always return.

We Navajos have dreams like those of other Americans—dreams to live in peace and see our children grow and prosper in our homeland.

If you will not help our dreams come true, at least do not turn them into nightmares.

Senator ABOUREZK. Thank you, Mr. Wilson.

I understand we are visiting your home tomorrow, is that correct?

I want to thank you and any questions, Senator Fannin?

Senator FANNIN. Thank you, Mr. Chairman.

I would just like to say to Mr. Wilson, we look forward to visiting with you at your home and we agree, we should be helping you to make your dreams come true.

We look forward to doing just that.

Mr. WILSON. Thank you.

Senator ABOUREZK. Chairman MacDonald, the next witness is William K. Wilson.

I just want to say that we have five witnesses, including Mr. Wilson.

We are approaching the two and a half hour time period which will be roughly at my calculations at 12:25.

Does that roughly agree with what you have? Have you been keeping time? Is that close? We will allow the attorney to nod his head yes or no. He just nodded his head yes.

So, if any of the witnesses, after we have gone through the next one or two wish to submit their statements for the record, we will receive them so that we believe after witness No. 12, we will probably reach the time period allotted in the two and a half hour time period.

If the other witnesses wish to submit their statements, we will welcome that in an effort to save time and so that we can avoid an equal time situation this afternoon in order to find additional time for people left.

Is that objectional to you?

Mr. MACDONALD. No, that is fine.

Senator ABOUREZK. We probably ought to ask the witnesses themselves if they want to do that.

I would appreciate it if somebody from your staff will ask witnesses Nos. 13, 14, and 15, Mr, Nelson, Mr. Beck and Mr. Williams—will you ask them if they would be willing to submit statements rather than read them into the record?

Then we will go to the next witness, No. 11, William K. Wilson, will you please come forward?

Please proceed, Mr. Wilson.

STATEMENT OF WILLIAM K. WILSON, MEMBER OF THE NAVAJO TRIBE

Mr. WILSON. There is a mistake here. It is me that you Senators are going to visit in my home instead of Sam Wilson.

I think that is a mistake.

Mr. Chairman and Senators, my name is William K. Wilson. I am 38 years old, married and am the father of three children.

I was born and raised in district 6, as were my parents and grandparents. I attended the boarding school at Keams Canyon and at the time I was attending school there were only 12 Hopi students enrolled. The majority of the students were Navajos.

The Hopis argue that they were in the Executive order area first and that the Navajos came much later. I don't think there is any

dispute that Navajos have lived in the 1882 Executve area including district 6 for over 100 years and I think even longer.

There are over 10,000 Navajos in the 1,800,000 acres outside of district 6 and less than one-half that many within district 6. As far as I know, few, if any, Hopis have resided outside of district 6 for many years. If one plants a seed and watches it grow, its fruit will be more plentiful than that from a seed planted much later. The Hopis say that they were planted here first and the Navajos much later. I don't know who was where first but I do know that that part of the Executive order reservation outside of district 6 has been used and occupied only by Navajos during my lifetime.

I live several miles from the Jeddito Chapter House, just a few hundred feet from the district 6 border. Unlike other locations on the Executive order reservation, there is a fence marking the district 6 border here. I am employed by the Office of Navajo Economic Opportunity as a bus driver for the preschool at Jeddito. Even though I have a job, my income is too low so I have to supplement it by raising sheep. Our family owns 34 sheep which are used for food. We also have a 2-acre farm plot on which we plant corn, melons, and vegetables. I have another source of income, but I could not survive without my 34 sheep. Others who do not have a job and depend solely on sheep for wool and mutton are much worse off.

As I mentioned before, I was raised in district 6. When I was very young, the district lines were established and we were forced to move out of district 6. Not only did we lose the grazing areas and possessions we had in district 6, but also we were required to reduce our livestock so that other people in the Jeddito area would not be crowded with additional livestock.

The Hopis say that they need our land for the grazing of their sheep. This is not true. The Hopis do not raise sheep nor do they live on the land as we do. As you will see for yourself from your flight over the Executive order land, there are many Navaho homes spread throughout the area. Almost all of the Hopis live on top of mesas; hardly any of them use the range lands which are within district 6. I do not understand why the Hopi lawyer is now encouraging the Hopis to abandon their way of life. I strongly believe that if the Steiger bill is passed much of the land that is now occupied and used by the Navajos will not be used by the Hopis.

The Steiger bill would create much suffering by moving thousands of Navajos, who for many years developed the joint use area. The Navajo Tribe has poured hundreds of thousands of dollars into the area for the development of windmills, wells, and schools.

There are preschools at almost every chapter and boarding schools at chapters such as Pinon and Low Mountain which would be abandoned if the Steiger bill became law.

I do not think that our Government wants to waste the investment it and the Navajo Tribe have made over many years.

I have been forced to move once in my lifetime. In my heart, it hurts me to see my land across the boundary, which my family once grazed, not being used. I will not bear this pain again.

Senator ABOUREZK. Thank you, sir.

Senator Fannin, do you have any questions?

Senator FANNIN. No questions.

I want to commend Mr. Wilson and we look forward to visiting your place tomorrow.

Mr. WILSON. Thank you.

Senator ABOUREZK. Mr. Joe Yazzie, step forward—witness No. 12. Please proceed, Mr. Yazzie.

STATEMENT OF JOE YAZZIE, MEMBER OF THE NAVAJO TRIBE, READ IN NAVAJO AND TRANSLATED BY CARL BEYAL

Mr. YAZZIE. Mr. Chairman and Senators:

As a person who was born in the Tolani Lake area of district 5 and having lived there my whole life, I wish to ask that you seriously try to understand what this Steiger bill is doing and would do. This is a very undesirable proposal and would be very harmful to both the Hopi people and the Navajo people.

We have lived with the Hopis as neighbors and relatives and we have not been fighting with one another. We have heard of false reports about fighting and rumors that people were being killed, animals being shot, and water developments being damaged. I trade regularly with 50 Hopis—none of whom have ever expressed support of the Steiger bill. We would like to request that you observe these lands and the people closely so that you will find the truth.

You should understand the untold damage that would be brought upon the lives of the Navajos as well as the Hopis if this Steiger bill should be approved. The bill is a creation of lawyers and Anglo officials and we believe that the BIA as our guardian should prevent the passage of such a bill. What has happened is that this bill is causing us to differ with the Hopis. This is a very undesirable thing to happen to the Hopis and the Navajos.

The Navajos have been living in the Executive order land for a long period of time. Our grandparents and their parents were born on these lands and have lived and died here. We feel that the court decision of 1962 was erroneous and it is now leading to the cutting of the areas and the lands which is hurting the Hopis and the Navajos.

If there were any questions about settlement of these lands, they should have been left for the people themselves to negotiate and settle. We know that we belong here and to request the people to leave the area is unthinkable. From the days of the Fort Sumner treaty agreement we had the understanding that that treaty and others would prevent people from being uprooted from their homeland. Many Navajos died of heartache and loneliness at Fort Sumner and this will happen again if people are moved again.

We have heard that if the people are expelled they should move to the Navajo Indian irrigation project area. This is an impossible thing to ask of the people because we do not know anything about irrigation and that type of agricultural work and we won't fit into that type of living.

The people here know only about raising of livestock for their livelihood. I myself support a family of 23 with my livestock.

Senator ABOUREZK. Thank you.

Do you have any questions, Senator Fannin?

Senator FANNIN. No questions.

Mr. YAZZIE. I wish to make a brief statement.

Senator ABOUREZK. Before you do that, have the other witnesses been contacted about submitting their statements?

Mr. MACDONALD. Yes, they have.

I have them here.

Senator ABOUREZK. Do they have any objection to doing that?

Mr. MACDONALD. They did have objection, but if time does not allow them to present their statement, a verbal statement, they will submit them.

Senator ABOUREZK. I hate to bar anybody from testifying if they had already been scheduled. But, I sincerely hope that they understand the time limitations involved here, and if they are in the audience now, I want to express my appreciation and gratitude to them for helping these hearings along by submitting their statement.

We will insert them in the record without objection. I can assure you that I will read, and the members of this committee will read your statements in full, so that please do not feel that your testimony is wasted.

It will be very valuable to the committee.

Please make your statement, Mr. Yazzie.

Mr. YAZZIE. I would like to in very brief form say this much: That I have heard much false publicity about we Navajos. Therefore, I would like to direct my remarks to Mr. Sam Steiger, that he should be truthful in making his presentation and making his reports.

I would like to say the same thing to the Hopi Counsel, Mr. John Boyden, that if he is to make statements, that they should be truthful in his remarks about the Navajos.

Then, finally, I would like to request of our Hopi friends to do the same, that they should avoid any false statements, that we should get together in having faith with one another and we should leave false reports out of our contacts.

I think this is the only way we can get at the matter and try to have it resolved.

Senator ABOUREZK. Thank you.

Senator Fannin has a comment to make before we adjourn for lunch. I would like to ask the name of the interpreter, at this time.

Mr. BEYAL. My name is Carl Beyal.

If the Chairman wishes, I would like to supply you with a form that I have which would be in your records.

Senator ABOUREZK. A form of what?

Mr. BEYAL. Identification.

Senator ABOUREZK. If you will do that, we will put it on file with the committee.

Thank you for your services here this morning.

They have been excellent. You take good shorthand, I must say.

Mr. BEYAL. That is the only way.

Senator FANNIN. Thank you, Mr. Chairman.

I want to commend you, Mr. Chairman, that you have given a very fine presentation this morning.

We want to be fair and impartial in any decision pertaining to this legislation; we want to be helpful as we can be.

The testimony of almost all the witnesses was very objective, cooperative and helpful. But one was antagonistic and incredible in his written remarks, although it was not evident in his stated remarks.

I refer to the remarks of Mr. Peterson Zah, and I resent what was written and I will tell you why.

He said that, "Congressman Steiger with this bill was trying to create hatred and hostility between two different tribes that have peacefully lived side by side for centuries. In my view there were some reasons for this. Mr. Steiger wanted the two tribes to fight over the joint use area controversy, to distract both tribes from Black Mesa and what the big power companies are doing there. One only wishes that the two tribes would put their differences aside and fight the common enemies—the white man's disease: graft, discrimination and dishonesty, and so forth."

You are not that type of person, Chairman MacDonald. I respect you highly and I do not think you appreciate what Mr. Zah had to say, and I would like your comments on that.

Mr. MACDONALD. I would say this, that the statements are made here by the witnesses are their own statements and do not have censorship.

I want them to say what is in their hearts. Therefore, if you have questions regarding Mr. Zah's statement, I have not read that either, and I think maybe you ought to recall Mr. Zah back here.

Senator FANNIN. I think that is in order. I feel that this statement is certainly farfetched. It is not in compliance with, I am sure, what your objective is here this morning.

Senator ABOUREZK. Mr. Yazzie, you may be excused. We thank you for your statement.

Mr. Zah, are you still in the room?

Mr. ZAH. Mr. Chairman?

Senator FANNIN. Mr. Zah, I would like your explanation of the statement you made, starting on the first page of your remarks, although you did not make the remark—you did not use this testimony—and I am just wondering if you wrote this testimony, if this is your feeling.

STATEMENT OF PETERSON ZAH, A MEMBER OF THE NAVAJO TRIBE—Resumed

Mr. ZAH. Senator Fannin, as I sit back there, you know, I went to school and I read a lot of books, and I have a college education, and it just sort of kills me and gives me an uneasy feeling for the two tribes at this time to be fighting over a little piece of land.

While I like to think ideally that the two tribes will really combine their efforts and be able to work together, perhaps to take some of the land back away from the white man, that's really my feeling.

Senator FANNIN. You have made a condemnation of the white man.

I think it is very much out of order. It is not helpful in these hearings, and I certainly resent it.

Mr. ZAH. Thank you.

Senator FANNIN. The hearings will be adjourned until 2 o'clock.

[Whereupon, at 12:30 p.m., the hearing was recessed, to reconvene at 2:05 p.m., same date.]

[The following statements were submitted by Navajo witnesses who were not able to testify due to the time limitation:]

STATEMENT BY FINLEY NELSON

BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS

March 7, 1973
Winslow, Arizona

Mr. Chairman and Senators:

My name is Finley Nelson. I live in the Jeddito Chapter just across the District 6 boundary line. I used to do railroad work and now my wife and seven children live on my social security of $128.00 per month and my livestock. Even with the livestock my family's life is difficult now. Without the livestock I don't know what we would do.

Until this talk about the Steiger Bill, many of us did not take an active part in chapter meetings. Now chapter meetings in Jeddito, where I live, are well attended and there is much concern. Many of the people who live in the Jeddito area were forced to leave their homes in District 6 years ago. We thought that when the District 6 lines were drawn this would put an end to our moving and, therefore, we wonder why the boundary lines should be changed again.

We have learned what suffering it brings when you expel people from their lands and homes like what happened in District 6 just recently. The suffering is extreme and in fact forcing people from homes has killed an elderly man already. I don't believe the white people see the seriousness

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and the danger these proposals will bring upon the people. I wonder where those people are who had been taken from their homes. Such actions hurt people and won't work.

We have seen money of the Hopis, money of the Navajos, and money of the Government being wasted in taking care of expenses which were caused by drawing up these boundaries. The lawyers and others who are responsible for creating these boundaries have caused the losses. We only wish that instead, the officials or the Government would expend their energies and this money to build schools and do other improvements for the Hopi and for the Navajo people. I only wish that they could do this instead of bringing something which is hurting us.

I would like to see the day when friendship is restored and the people can go back to the way they have been living together. I remember with pride my grandfather Mr. Redman and his father Mr. Tall Hunter and others who were here since the Fort Sumner days of the Navajos. I hope my descendants can do the same.

STATEMENT BY CLIFFORD BECK, SR.

BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS

March 7, 1973
Winslow, Arizona

Mr. Chairman and Senators:

My name is Clifford Beck, Sr. I am a Navajo 67 years old. I am from Pinon, Arizona. I was born in the Executive Order Reservation and have lived there all my life. Like most people in the area, my parents and grandparents were also born in the Executive Order Reservation.

My family owns about 200 sheep and goats which graze on three sections of land near Forest Lake. We also own 16 head of cattle which we graze on leased land off the Reservation near Holbrook at $4 per head each month. The leased land is expensive and we don't make much from our cattle but we must use off-Reservation lands because there is no more grazing land available on the Reservation.

The Hopi lawyer says that there were no Navajos on the Executive Order Reservation before the Long Walk. This is not true. Navajos lived in the mountains at the time of the Long Walk. It is well known that the U.S. Cavalry rounded up Navajos as far away as Black Mountain. Some people did not go. When I was young I remember an old man named Gitsille who said he escaped the Long Walk by hiding in the mountains. It is true

that our people did not live in open spaces in those days but even as early as 1882 we occupied much more of the Executive Order Reservation than the Hopis.

Many of our religious songs refer to places in the Executive Order Reservation, such as Black Mesa. To take away our land would be to take away our religion too.

I was a member of the Navajo Tribal Council from Pinon area for 20 years. I was a member of Navajo-Hopi Negotiations Committee for several years. The reason these negotiations never produced a solution was the language of the 1962 court decision. That decision said the Navajo and Hopi have an undivided half interest in the Executive Order Reservation. In our attempts to negotiate with the Hopi, they refused to discuss ways to resolve the dispute even though Commissioner Nash said no Navajos would have to move. They consistently insisted on a physical division of the land. They maintained that this is what the court gave them. The Navajos, on the other hand, offered numerous proposals, one of which as to have the Federal government pay the Hopis for their interest in the land. One of the defects of the 1962 decision, from my own observation and experience, is that the decision is difficult to follow because the Hopi and Navajo use land in a different manner.

The Navajos raise sheep, cattle and horses for a livelihood; this requires a large area for grazing. The Hopis, on the other hand, live in villages and make their living by farming and by selling their products from their arts and crafts.

This way of life requires much less land area. It is true some Hopis raise sheep and some are cattle ranchers, but these are few in numbers.

The 1962 court decision failed to take into consideration our different ways of life. I believe that the decision was based more on sympathy for the Hopi than on the use of the land.

Now I wish to bring to the Committee's attention that following the court's decision, the Interior Department and BIA made a policy, whereby no development on the Joint-Use Area would take place unless the two tribes consented to it. This policy has placed a hardship on the Navajo people living in the disputed area. For example, we cannot build additional school facilities, we cannot build a health facility, we cannot have power into the area, and we cannot develop new water wells for our livestock. In effect, the Executive Order Reservation has been frozen for any improvements or development. All these improvements and additional facilities is a must to the well-being of the Navajo people. The Hopi, on the other hand, enjoy the normal development on their Reservation. They do not suffer any hardship or difficulty from the decision. In fact, the Hopi not only gained rights to a portion of the Executive Order Reservation, but also got a Reservation in District 6, which up to this time was just a land management district.

The need for educational and health facilities should take preference over the land dispute. The land dispute can be

solved over a period of time but it requires negotiation between the parties involved. Even the Hopis said this in our joint meetings. However, the educational needs, the health needs and the need for development is here and unless these needs are met now the Navajo will suffer greatly.

I urge you to give consideration to the human needs that exist because of the freeze on development. The two tribes can begin serious negotiation if you will tell us to negotiate in the context of our culture. This is the only way to achieve a solution which will be acceptable to all parties.

STATEMENT BY BRUCE WILLIAMS

BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS

March 7, 1973
Winslow, Arizona

Mr. Chairman and Senators:

My name is Bruce Williams. My present home is in the Sand Springs area, just southwest of the District 6 boundary line. I work for the BIA and I have a small number of sheep at my home to support myself, my wife and our eight children.

I was born in the northern part of District 6 about 25 miles southwest of Hotevilla, Arizona. My parents and grandparents were born nearby in the Executive Order area. In my younger days, no District 6 line existed, but in about 1934 a District 6 line was drawn and I was forced to move south. Each time the District 6 line was moved south, three times, I was also forced to move south to my present home. The only time I have not lived in the Executive Order area was the four years I was serving in the army, after Pearl Harbor.

I still have many Hopi friends in District 6. In my work for the BIA as an instructional aide, I talk to many Hopis daily. Not one of them has ever mentioned that he wanted the Steiger Bill. I cannot believe that the Hopi people want us to endure the hardship that the Steiger Bill would cause. I know that the Hopis do not use the lands that we were forced to abandon

thirty years ago and I do not believe that they need or would use lands outside of District 6 now. I invite the Senators to visit my area to see these things for themselves.

We are like the Hopis in that we wish to build good homes and have nice cars, but one cannot have these things under current conditions. More importantly, we can't sleep or eat right for fear that our very land will be taken. Every Navajo who resides in the Executive Order area is very much concerned over the Steiger Bill and this is affecting the well-being of our people even now. I cannot speak for all Navajos, but even if given plenty of money, I would flatly refuse to move if the Steiger Bill was passed.

I also wanted you to know there is no over-grazing in my part of the reservation. Because my land is good, I hope to retire on my land in a few years and make a living from livestock so I don't have to depend on the Federal Government in my old age.

As I mentioned before, I am still friendly with many Hopi people and I think that this is also true of older Navajos and Hopis. However, I do not think this is true of the younger generation. I think it is unfortunate, but I think that the remarks and actions by the Hopi leaders have made relations between the two tribes more difficult. Passage

of the Steiger Bill would only increase the difficulties between the two tribes. Our problems can be resolved by discussion in the traditional manner if we are left alone.

STATEMENT BY BILLIE SHONE

BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS

March 7, 1973
Winslow, Arizona

Mr. Chairman and Senators:

My name is Billie Shone. I am 57 years old and I was born in Keams Canyon. I have lived approximately 35 years in the vicinity of Pinon. My home is one mile North of the District 6 line and eight miles directly South of Pinon, Arizona.

I raise livestock in order to support my family which consists of six people. We have seventy sheep, thirty cows and nine horses, all of which I take care of. In prior years before the drought I had a small piece of land on which I raised melons, corn and squash.

I have many Hopi friends and even with the present troubles I have continued to maintain my friendship with the Hopi people. In fact, in the past I have had agreements with two Hopis (Paul Hunt, and another whom I know only as Jerome) by means of which we took care of each others livestock. As I said before, in spite of the troubles caused by the Steiger Bill, I am still friendly with these people.

My parents and grandparents spent their lives in Keams Canyon and are buried there. In the days when my parents and grandparents lived in Keams Canyon it was entirely Navajo land and there were no Hopis in the area.

I have spoken much with the people of the Pinon Chapter concerning the effect the Steiger Bill has on everyone. All of the people in the Chapter oppose the Bill because the Steiger Bill does not take into account the needs and problems of the Navajo people and should be rejected.

I have seen and heard of what happened to the Kabintos who were thrown out of their homes in District 6. They are people without a country, and neither I nor the people from the Pinon Community wish to become people without a country.

STATEMENT BY ASON BAZH NOIH DAH

BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS

March 7, 1973
Winslow, Arizona

Mr. Chairman and Senators:

First, I would like to thank you for the opportunity to talk with you Washington people. We not only have the Navajo-Hopi land dispute problem, but many Indian problems which were neglected by the United States Government for years. I just hope that you will realize our problems here today.

You will have to excuse me for my awkwardness because age is closing in on me. It is probably not age alone that is killing me but the Steiger Bill as well. I do not fully understand the Bill but from what I am told, Mr. Steiger is planning to take our land away again. This is the only land we know. I am very old and know that my great grandfather was born and raised near Black Mesa many years ago. I was born not too far from Pinon.

My grandfather and grandmother endured many hardships since the coming of the white man. I have within me the memories of my father, grandfather and great grandfather. One thing that I shall always remember is the Long Walk. My grandparents were given a few head of sheep upon their return from Fort Sumner. At that time, the Government told our people to conserve and use sheep to make their living. Raising sheep is the only way we know how to sustain our existence. As you can see for

yourself I am not fit for any other job. We are constantly told that we are over-grazing our land. The reason for the over-grazing is not that we have too many livestock but because of the prolonged drought condition that existed. This land is sacred to us. I could tell you for hours about the many stories, songs and prayers about our land but due to the lack of time, I will not. But our land nevertheless has religious significance that you should know.

I am an aunt of Joe Kabinto who was forced to move from District 6 several months ago. I am conviced that Kabinto became ill as a result of the forced relocation. Navajos do not think of the mind and body as being separate. In the Navajo tradition, when one's mind becomes sick or troubled so does his body. This is what happened to Joe Kabinto and what would happen to other Navajos if they were forced to move from the Executive Order land.

Anglos do not understand why the land is important to us. It is in our tradition that the Navajos were given all of the land between the four sacred mountains and that we are tied to the land. Traditional Navajos bury the umbilical cord of newborn babies in the sheep corral or cornfield. We believe that this act increases the flock or crop and makes the boy a good shepherd and a good worker. Sometimes a girl's cord will be buried on the west side of a hogan and it is our belief that this will make her a good housekeeper. Thus, Navajos become tied to the land on which they were born.

I have known from personal experience the hardship of livestock reduction and the freeze on construction in the Joint-Use Area. I wonder what kind of Government it is that requires us to endure hardships such as the Long Walk, the livestock reduction and the freeze on construction. I thought those days were gone forever.

About Sam Steiger, I cannot tell you exactly how I feel. He hurts my heart and will no doubt break many hearts if his bill is enacted. I only wish he would realize this. I am sure if someone told him to move out of his house his little heart would be broken too.

I am pleading with you Washington people to help us stay here on our land. Let us live here where our Lord placed us.

STATEMENT OF BURKE YAZZIE

BEFORE THE SENATE SUBCOMMITTEE ON INDIAN AFFAIRS

March 7, 1973
Winslow, Arizona

Mr. Chairman and Senators:

My name is Burke Yazzie. I am 51 years old and live in that part of the Joint-Use area which Mr. Steiger wants to give to the Hopis. My grandparents lived in the vicinity of Pinon and this is where I was born and raised. I am married and have nine children. We presently live with one of my step-sons and his family. They have two children.

We have one house that measures 25 feet by 45 feet. And with 12 people in a small house, you can see how uncomfortable it would be. Because of the recent court order that stops any new construction in the Executive Order Area, we cannot build a better house. Many of the people in the Executive Order Area are always asking why we are suffering and how long we will continue to suffer. We want to be happy and make a decent living.

I pray that you Senators will consider us as humans and let us keep the land that Sam Steiger wants to give to the Hopis. As I and other people see it, the Hopis do not have a need for additional land because they are few in number. Many of my Hopi friends admit that they do not need additional land. I believe that the Hopi people themselves do not want to cause suffering and misery among the Navajos.

One incident involving Navajos and Hopis may give you some idea of the true problem between Navajos and Hopis. In April of 1972 I was foreman of a crew hired by the Pinon Chapter to construct a fence to prevent our livestock from wandering into District 6. On April 14, while we were completing this fence, the Hopi Tribal Police, accompanied by 20 to 25 men in a BIA pickup truck, range police truck and Hopi police panel truck, arrived at the fence site. In addition, there was a CBS television crew. The Hopis proceeded to destroy the barbed wire fence and pick up and burn the wooden fence poles. This incident was filmed by the CBS crew. I arranged for the Navajo Tribal Police to be called, and they came in time to see the fire from the burning of the poles.

I cannot understand why the Hopis would do this, except that it is part of some scheme designed by the Hopi leaders and their lawyer to provoke the Navajos. Even though we had spent over three weeks building the fence and the damage was almost $5,000, we did not respond to the Hopi acts.

You have heard about the four sacred mountains on the Navajo Reservation. Not only is our land sacred to us, but we have to make a living off of it--we have no choice. Please understand that we love our land as you love your children.

THE NAVAJO TRIBE
WINDOW ROCK, NAVAJO NATION, (ARIZONA) 86515

PETER MacDONALD
CHAIRMAN, Navajo Tribal Council

WILSON C. SKEET
VICE CHAIRMAN, Navajo Tribal Council

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THE NAVAJO TRIBE
LEGAL DEPARTMENT

March 1, 1973

M E M O R A N D U M

TO : Samuel Pete, Assistant Director, Navajo-Hopi Land Dispute Commission

FROM : Elizabeth Beyal, Director, Tribal Work Experience Program

SUBJECT: Information Related to Navajo-Hopi Land Dispute

The following statements and/or observations are based on close working relationship with the people at grass-roots level, including the communities located within the Executive Order Area. The statistics in this report deals more specifically with the areas included in the proposed bill, HR 1193.

POPULATION

The approximate population including men, women and children is 6,628. Of this figure, 55.4% or 4,428 are children under 18 years of age.

TWEP OPERATION

Approximately 31.1% or 2,061 persons receive financial aid through BIA general assistance program. One can readily see that the rate of unemployment is high and that job opportunities are practically non-existent.

More importantly, the Tribal Work Experience Program has made a very substantial impact in these communities. Latest statistics show that 25.9% or 535 general assistance recipients are voluntarily involved in various community improvement projects. A total of 210 community improvement projects varying in size and complexity are completed per month. It is evident that a strong interest is evolving on the worker's part to actively participate in community growth and development; to contribute to building stronger inner family structures and to be a constructive and responsible member of his community.

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PROJECTIONS

The Navajo people have been subjected to at least three major incidents in the past; (1) the forced removal to Fort Sumner, (2) forced removal of children from parents to be placed in schools and (3) the disastrous livestock reduction. The effects, cultural shock, despair, futility, destruction of Indian self-reliance, loss of identity, alienation from culture, disruption of homes and disorganization of family units have left deep and lasting emotional scars.

The lingering effects of these impositions have been passed from one generation to the next, so that today, the future of the 4,428 children is one of deep serious concern directly related to yet another impending incident. The continuity of the Navajo Nation, its hopes and dreams of progress and development for a better future rests in the hands of our children.

To develop the potential of a child so that he can become a strong and responsible citizen is a frightening prospect to any parent. Indian parents bear a heavier burden in this area due to their own limitations as a result of loss of identity. The parents of these 4,428 children are engaged in a perpetual up hill struggle to alleviate depression, regression and hopelessness so that the end result can be the emergence of young adults full of confidence, responsibility; possessed with the ability and desire to take up the challenges to accomplish whatever needs to be done for a meaningful existence.

A forced removal as proposed in HR 1193 will completely erase all hope for these children with devastating results. Mental and physical growth will be stunted perhaps to such an extent that many will not survive the transition. This bill represents, in essence, a case of real estate versus children.

Elizabeth Beyal

Elizabeth Beyal

EBEYAL:as

cc:

Byron Houseknecht, BIA Social Services
George Young, Division of Human Development
Johnnie Francis, Work Experience Program
Andrew Benallie, Vice-Chairman's Office
Tommy Anderson, Chairman's Office
Marshall Tome, Office of Operations

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NAVAJO HOPI LAND DISPUTE COMMISSION

AFTERNOON SESSION

Senator ABOUREZK. The afternoon session of the Subcommittee on Indian Affairs of the Senate Interior and Insular Affairs Committee will reconvene.

Senator Fannin is on his way here and will be here very shortly.

I would like to ask if Clarence Hamilton, chairman of the Hopi Tribe is here in the audience.

If he is, would you please step forward with any members of your staff that you would like with you, or your attorney, to sit with you?

Please feel free to do that.

Mr. HAMILTON. Mr. Chairman, before I start on my presentation, I would like to have two of my own people sit up here with me, since this is all Indian testimony to be given, so at this time, I would like to have them step up here.

Senator ABOUREZK. You are very much entitled to that, if you wish. Please ask them to come up.

Could we get the spelling of the names of your people sitting with you, for the court reporter?

Mr. HAMILTON. On my right hand side is Abbott Sekaquaptewa, S-E-K-A-Q-U-A-P-T-E-W-A. He is also the chairman of the Hopi negotiation committee.

On my left hand side is Emory Sekaquaptewa. They are brothers. He is also a member of the negotiation committee and former chairman of the negotiating committee, also. He is also interpreter for three of our witnesses.

Senator ABOUREZK. I wonder if I could ask you again to pull that microphone up. I think the people in the back of the room are probably having a hard time to hear.

Please proceed when you are ready.

STATEMENT OF CLARENCE HAMILTON, CHAIRMAN OF THE HOPI INDIAN TRIBE, ACCOMPANIED BY ABBOTT SEKAQUAPTEWA AND EMORY SEKAQUAPTEWA, JR.

Mr. HAMILTON. Gentlemen, Senator Fannin.

I am Clarence Hamilton, chairman of the Hopi Tribe. I have held this elective office since 1969.

My purpose in addressing you today is to present the position of my people concerning the need to partition the 1882 and 1934 reservations.

The Navajos have opposed partition of these areas for obvious reasons. They have, over a number of years, simply taken this land from the Hopis. The reason why they have been able to do this is because their population enables them to exert considerable physical and political pressure.

As a result, the aggressive Navajos have been able to move into the traditional Hopi areas without any governmental restraint. The Navajos are now fearful that to clearly designate which land belongs to the Hopis and which land belongs to the Navajos will prevent the Navajos from continuing to take what does not belong to them.

In 1962 the court declared that all of district No. 6 inside the 1882 area was exclusively Hopi land. But because the Navajo herds do not have sufficient feed due to uncontrolled overgrazing, the Navajos

have continued to and still do encroach upon Hopi land, taking what does not belong to them.

Last fall, a U.S. district judge held that although the Hopi people are entitled to one-half of the joint use area in the 1882 reservation, the Navajcs and the Federal Government have denied the Hopi people that use and have ousted the Hopi people from that area.

As confirmed by the Supreme Court of the United States, the Hopis are entitled to one-half of this area. Yet, the Navajos continue to call it the disputed area.

What do we need to do to settle this question in the minds of the Navajos?

They still call it the disputed area after the highest Court in the land has ruled on the question.

As we Hopis see the issue, the Supreme Court said that the Navajos and the Hopis were each entitled to an undivided one-half. This is settled. The only question remaining is how can the judgment be enforced? The Navajos have refused to relinquish any of this land to the Hopis—despite the Supreme Court's decision, and the writ of assistance issued by Judge James A. Walsh directing Peter MacDonald and the Attorney General of the United States to forthwith commence reduction of Navajo livestock and grant the Hopi joint use.

We are now asking Congress to tell us which half is ours. The three judge court has said it has nc authority to partition. We want Congress to settle this issue once and for all. It will enable our tribe to fence our rangeland, graze our cattle and to develop our reservation without theft, and violence.

Some people have asked how we Hopi people have been placed into this desperate situation. The courts and Indian Claims Commission decisions shed some light on this question. The Indian Claims Commission has held that in 1882 the Hopi Indians controlled all of the 1882 reservation and a large part of the 1934 reservation. Since that time we know and the courts have held that the Navajo simply moved onto our lands and took over. Because the Government took no action to stop them, the Court said the Secretary of the Interior "impliedly settled" them on the lands that were originally set aside to protect us from the Navajo depredations. That is how we have lost one-half of our original interest in the 1882 joint use area.

The Navajo for the last 11 years have been doing everything possible to force us to abandon our remaining one-half interest in the joint use area.

To stop this wrongful taking of our ancestral lands, this legislation is necessary. The Navajos have demonstrated over the last 11 years that even a decree of the U.S. Supreme Court is not sufficient to prevent them from continuing to take what does not belong to them.

The Navajos have raised a number of objections to this legislation which are merely designed to cover up their fears that they might be required to obey the courts of this land.

Let's look at some of these objections:

First, the Navajos say this legislation would be a tragedy because it would create ill feelings between the tribes. I do not believe this to be true. The friction between the tribes commenced when the Navajo first came to our country. The Navajos have attacked our people, killed our livestock and damaged our property because they

do not want us to use our rightful share of the joint use area or our ancestral areas in the Tuba City region.

I believe that if the joint use land were partitioned and each tribe given an exclusive area, then we would get along much better.

Individual Navajos may be angry for a short period of time as a result of a move, but Hopi people have been angry for generations because of the Navajos taking our land.

Relations between the tribes will be enormously improved by a good act of Congress.

Second, the Navajos have called this a "Navajo expulsion bill." They have stated that large numbers of people will be injured by settling this controversy. The numbers thrown around by the Navajos are exaggerations of the actual situation.

You can inspect the dwellings in the area concerned. Many of these are abandoned or not used. The Navajos frequently abandon their hogans for various reasons. Also, many Navajo sheepherders will have several dwelling places for their families to live in, moving from one to another as the season progresses.

Where grazing conditions are poor, homes may be vacant for several years. So, it is not at all unusual to find that one Navajo family will have several hogans. This means that hogans do not reflect the presence of an equal number of families. Instead, the actual number of families is much less.

You will see this for yourself as we travel over the reservation land.

Third, the Navajos claim that displacement of these families will create harsh economic problems. I would suggest that these families are now living under conditions which could only be improved by resettling them elsewhere. The Federal court has decreed that the overgrazing of this range must stop. At this date, there are still 400 percent more livestock on that range than it can support.

And so, you can see, that the court is requiring the Navajos to remove three out of every four sheep, cattle and horses they have there now. When this is done, the Navajo will still have to remove one out of every two head of livestock remaining to make room for the Hopi livestock.

This means that a Navajo shepherd with 60 sheep today will end up with only 7 or 8 when he has complied with the basis of the court's decree.

Everyone acquainted with the problem knows there is not sufficient grazing land available to let every Navajo herd livestock as he pleases. Someone must find the answer to the Navajo population explosion. No just answer can be found in allowing the Navajo to continue to take and despoil Hopi property.

A third objection raised by the Navajos is that somehow the Hopis have allotted to themselves the best land in this proposed partition. This is not true. A serious effort has been made to divide the land equally and fairly. This has been done even though the Hopis still strongly feel that the Navajos have stolen this land to begin with.

The Hopis see this complaint of unfair division like the situation where the cattle rustler has stolen 100 head of cows and then complains

when he has to give back 50 because the 50 he ends up with do not look as good as the others.

The Hopi people have taken better care of the lands they now control in spite of Navajo trespass. That is why district 6 looks so much better than the joint use area.

But there are also many sections of the proposed exclusive Hopi area which are sandy, rocky and steep—just like some of the proposed Navajo lands. The Hopi know that they will not abuse the land and even bad areas may be made fruitful again—as they once were many years ago.

Yet another objection raised by the Navajos to this solution is that the Hopis will get more minerals than the Navajos. The proposed legislation partitions only the surface of the land and not the minerals under the surface. Both tribes do now and will continue to share in the development of any mineral rights in the joint use area, share and share alike.

Now, concerning the problem of violence, the Navajos have tried to smooth things over by saying that this problem is exaggerated. In fact, Mr. Vlassis has said this is a "mythical problem". He obviously has never had his head bloodied, his house burned, his water tank destroyed, his corral ruined, or his cattle killed. He would not call this "mythical" violence if he had suffered as some Hopis have.

At this time, Mr. Chairman, I would like to bring forth a man who actually had his head open one time, with your permission.

Senator ABOUREZK. Yes, please do.

Are you going to have him testify?

Mr. HAMILTON. No, I want to show you the Navajo trademark. I want to show to the committee which scar has been made here, right here.

He got hit with a four by four.

Senator ABOUREZK. I want to caution the audience not to demonstrate or to create any undue noise because it does delay the hearings.

We want everybody to have a chance to be heard and seen.

Mr. HAMILTON. Mr. Chairman, I want to show you some of these scars—it is a Navajo trademark—on this policeman and it happened while he was on duty and I would like to at this time to have him come up.

Senator ABOUREZK. If you would state your name, please?

Would you tell us how you got that scar and the date it happened, please?

Mr. SILAS. Matthew Silas, Hopi Police Department. Happened on June 22.

Senator ABOUREZK. What year?

Mr. SILAS. They had a trespass and they broke out. They were after a ranger.

Senator ABOUREZK. Who is "they"?

Mr. SILAS. Navajo. They were trying to get the range rider and I went up to help the ranger and instead of him getting it, I got it.

Senator ABOUREZK. Who hit you with the four by four?

Mr. SILAS. Navajo.

Senator ABOUREZK. You were hit with a piece of four by four piece of wood?

Mr. SILAS. Yes, bridge decking at Thornton Maho Ranch near Hard Rock, Ariz.

Senator ABOUREZK. What happened, you had to go to the hospital to get it stitched up?

Mr. SILAS. There were several that got wounded up there. We decided to let go and after—one boy, he took off and I do not know what happened after that. But one guy was charged.

Senator ABOUREZK. Can I ask you exactly where this took place?

Mr. SILAS. This took place near Hard Rock.

Senator ABOUREZK. In which area was that located?

Is that district 6 area?

Mr. SILAS. Yes.

Senator ABOUREZK. Or the joint use area?

Mr. SILAS. Took place in district 6.

Senator ABOUREZK. Within the Hopi Reservation?

Mr. SILAS. Right.

Senator FANNIN. Mr. Chairman, I would just like to ask—you say a four by four.

Was that a fence post?

Mr. SILAS. A four by four bridge decking—it is quite long.

Senator FANNIN. Do you have pictures that were taken at the time that the gentleman was treated?

Mr. SILAS. I think they took pictures at the hospital.

Senator ABOUREZK. Do you have those available, those pictures?

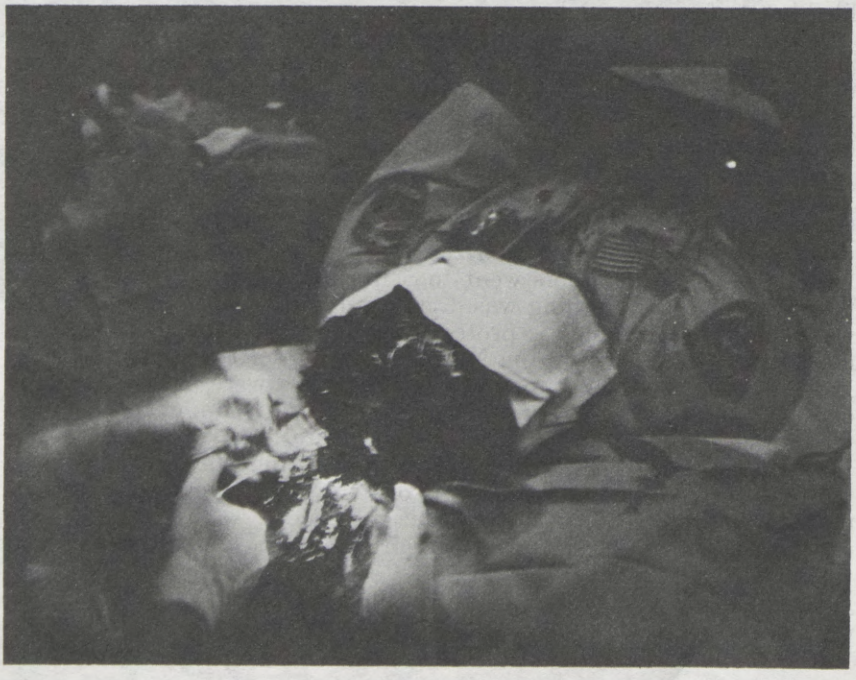
Mr. SILAS. I don't know.

Senator ABOUREZK. Mr. Hamilton, would you furnish those photographs to the committee?

Mr. HAMILTON. Yes, sir.

Senator ABOUREZK. Thank you.

[The photograph referred to follows:]



Senator ABOUREZK. If you will return to your statement now.

Mr. HAMILTON. He was also hit by a shovel one time when he was on duty.

That happened about a year before.

Senator ABOUREZK. Who hit him with the shovel?

Mr. HAMILTON. It is a Navajo. I believe it was two Navajo boys—they were under the influence while driving the vehicle on the reservation and they were apprehended, and they turned right around and hit him right on the head with the shovel.

So there was a good relation for over a 100 years, I guess.

Senator ABOUREZK. Mr. Chairman Hamilton, I have a question that I would like to ask.

These acts of violence, do you think that is a policy of the Navajo Tribe, or are they individual fights between individual people?

Mr. HAMILTON. That is pretty hard to say, whether it is a policy. But a lot of incidents have happened like that.

Senator ABOUREZK. How many in the last year have happened that you know of?

Mr. HAMILTON. Actually, I knew one of them because I was with one of them on a raid. At that time, I helped on this roundup of these trespassers and actually, I have seen it myself.

Senator ABOUREZK. All right.

We will get into that a little bit later. If you would like to finish your statement, go ahead.

Mr. HAMILTON. You yourselves can inspect the scars and see the ruins.

The very real problem is, what force is necessary to make the lawless Navajos conform to the law.

I believe partition would greatly lessen tensions and also the likelihood of further violence.

We have come to Congress again for action when our exclusive area is becoming overgrazed because we have been prevented from using our share of the joint use area. The House of Representatives passed this bill last session. Unfortunately, the Senate ran out of time before it could pass the bill last fall.

For over a hundred years we have been asking for help from the Federal Government, not for favors, but for equal protection under the law. It is now time to act.

In conclusion let me summarize.

In 1850 our Hopi elders went to Santa Fe seeking protection from thieving Navajos. Nothing was done until 1882 when the reservation was set up for the Hopis to protect them. But even then, the Government did nothing to stop the Navajos' further encroachment.

Finally, in 1962 the Supreme Court said we were entitled to only one-half of the largest part of our reservation. But even then the Government did nothing to protect our interests.

In 1972 the court ordered the Government and Navajos to comply with the Supreme Court's order. As of today, over 4 months after the most recent ruling and 10 years after the decree, we still do not have our one-half interest—let alone the original area which was allotted to us nearly 100 years ago.

Yes, now is the time for the Government to act. Do not force us to endure further generations of abuse, violence, and injustice.

We ask you, Senators, to make this generation one to be remembered by the Hopi people hereafter as the generation which restored peace and dignity to our lands once again.

Thank you.

Senator ABOUREZK. Thank you for your statement.

Chairman Hamilton, were you present in the audience this morning when Chairman MacDonald testified?

Mr. HAMILTON. Yes, sir.

Senator ABOUREZK. Were you able to hear him discuss his desire, the desire of the Navajo Tribe for negotiations directly between the Hopi and Navajo Tribe as a means of resolving this dispute?

Mr. HAMILTON. Yes, sir, I heard Chairman MacDonald make this statement.

I do not know what he would call a negotiation between the two tribes.

Senator ABOUREZK. You do not know what?

Mr. HAMILTON. I do not know what he meant by negotiating between the two tribes.

Because in 1963, the Hopis formed a negotiating committee, and also, the Navajos had a negotiating committee, and the first meeting they had, it was discussed in 1963.

From 1963 up to 1969, we have not negotiated between the two tribes.

But nothing has come out from that negotiating all that year.

I also, I must state, that in 1970, I had met with Mr. MacDonald. My vice chairman was with me, and his vice chairman, and at that meeting we discussed how we can improve the 1882 reservation and we agreed on certain things that should have been done in 1882 reservation, and at the end of our discussion on this improvement, I asked Chairman MacDonald, let's talk about the 1882 reservation, and he said, "Oh, let's not talk about it, let our attorneys do the fighting."

This is the statement that he had made the first time when we met in Window Rock.

Senator ABOUREZK. The reason that I asked you that question, because I want to ask the same questions that I asked him, and get your position on negotiations within the coming year.

Before I ask the questions, I will state roughly the same thing I said this morning, that I believe it would be better if the two tribes could negotiate this themselves, for two reasons.

One, I believe that both sides would be happier with the result if they could negotiate—much happier. I am afraid that if the Congress deals with it and settles the dispute itself, that neither side will be happy with what the Congress does.

Both sides will probably be very unhappy with what the Congress does.

We will settle it before the end of this session of Congress, as far as I am concerned, in my duties as chairman of the Indian Affairs Subcommittee.

We do not want to pass the buck to anybody else, except, we want to pass it on to the two tribes, which is where it really belongs.

I want to say this, that if the tribes cannot settle it themselves, then we certainly will. And so I want to ask you, after saying that, Mr.

Chairman Hamilton, are you willing to enter into negotiations with the Navajo tribe on the same basis that I discussed this morning?

Mr. HAMILTON. Well, Chairman, we have tried for over 10 years.

Like Peter MacDonald stated, within 1 year there should be something of a decision—a decision between the two tribes.

Well, that 1 year will be another 50 years or more than that before the two tribes can come to some kind of an agreement.

In my position, I don't think it is—let's get over with this, and we have been dealing with this for over a hundred years now.

Senator ABOUREZK. Do I understand your position to be that you do not favor any direct negotiations with the Navajo Tribe?

Mr. HAMILTON. That is correct.

Senator ABOUREZK. That is your position?

Mr. HAMILTON. That's right.

Senator FANNIN. Before you continue, I would like to be sure that we understand what Chairman Hamilton has stated, because I have not heard that before.

May I?

Senator ABOUREZK. Please go right ahead.

Senator FANNIN. It is your statement that you are not willing to negotiate with the Navajo Tribe?

Mr. HAMILTON. That's right.

I think we have already for 10 years, these two tribes tried to solve their own problem.

So, I don't believe wasting a lot of time on this, and there is not not going to be any kind of answer that we have to start off again.

Senator FANNIN. Thank you.

Senator ABOUREZK. I wonder, Chairman Hamilton, if your lawyers have explained to you the meaning of the joint interest in land?

Have they explained to you as a nonlawyer what that does mean?

Mr. HAMILTON. That's right.

Senator ABOUREZK. What is your understanding of what a joint interest is?

Mr. HAMILTON. Well, a joint interest, according to the court decree is that we are entitled to share and share alike.

Senator ABOUREZK. Do you understand that to mean that a joint interest means that you get one-half the land, or do you also understand it to mean that if a court or the Congress partitioned the land, that you might, instead, be paid money in place of the land?

Mr. HAMILTON. Are you interpreting to me on the lawyer's side, or what?

Senator ABOUREZK. I am asking you, what understanding you have of the meaning of joint interest?

Mr. HAMILTON. It means both tribes own the land, all of it, outside of district No. 6.

Senator ABOUREZK. Is it also your understanding that the Congress can make a decision if they want to—I do not know if they will or not—I am not going to say this is going to be their decision—but do you understand the Congress can say that a joint interest means that you can be paid in cash for your interest instead of getting land itself?

Mr. HAMILTON. I could say the same thing to the Navajos.

Senator ABOUREZK. I mean, do you understand that?

Mr. HAMILTON. Yes, I do.

Let me get this thing straight here.

We are not asking any additional land. That 1882 reservation was set aside for the Hopis and still we are asking for our own piece of land.

Senator ABOUREZK. I understand, though, that you can be paid for your half interest and not be given the land, though.

Is that your understanding?

Mr. HAMILTON. I don't go along with selling my land.

Senator ABOUREZK. I understand that you may or may not agree with it.

I understand you do not agree with it.

Mr. HAMILTON. I don't agree with getting any money from that land.

Senator ABOUREZK. I want you to understand that that is the one thing Congress can do.

Congress can give you your half interest by paying you compensation, paying you money for that particular half interest, instead of giving you the land.

I just want to make sure that that is what your understanding is, that that is one of the alternatives Congress has.

I am not saying we will do it. Please understand that. I am just saying that is one of the alternatives.

Mr. HAMILTON. I understand that.

Senator ABOUREZK. All right.

Or, it could happen the same with the Navajo. Does not have to be on one side.

What I am trying to make clear is, that a joint interest in legal terms means that each has an undivided half interest, that if the court, or in this case the Congress as well wanted to divide that interest, they could either divide it by giving half the land, according to what they consider the value to be, or they could give money to either side and say that they cannot have the land.

I just want to make that clear to you so you understand.

Now, in the Senate hearings last year, Mr. Emmett R. Navakuku of the Hopi Tribe stated, and I am quoting, "* * * an exclusive Hopi reservation is the only way possible to raise an economic herd and to encourage other Hopi people to go into livestock business."

My question, Chairman Hamilton, is that, would not a tract of land off reservation owned and administered by the Hopi meet this commercial need of the tribe?

Mr. HAMILTON. Well, I do not see a point to that.

Because all we are asking is what is ours in the 1882 reservation.

I don't think we are interested in anything outside of the 1882 reservation.

Senator ABOUREZK. I understand your position there.

But, do you believe, Chairman Hamilton, that land where you can raise an economic herd, no matter where that land is, would provide the economic sustenance the tribe needs, no matter where it is?

Mr. HAMILTON. Yes, I believe in that, but still that doesn't answer our problem.

Senator ABOUREZK. Would the Hopi tribe, you as chairman of the Hopi tribe, would you consider this possibility, other land, as a realistic alternative to partitioning the joint area land?

Mr. HAMILTON. No.

Senator ABOUREZK. Why do you not consider that an alternative?

Mr. HAMILTON. Well, like I said, this is our ancestral land.

Senator ABOUREZK. I did not hear you.

Mr. HAMILTON. The 1882 is our ancestral land. We have an attachment to that.

Senator ABOUREZK. It is your ancestral land?

Mr. HAMILTON. Yes, sir, the Hopi people lived on that land historically.

Around 1741, the Spaniards found the Hopis roaming around that area.

Senator ABOUREZK. Do you believe that a partition of the 1882 joint area would decrease the danger of intertribal conflict and violence?

Mr. HAMILTON. Decrease it?

Senator ABOUREZK. Yes.

Mr. HAMILTON. Yes, it will.

I just made the statement that I think this is the only solution that we are going to have to go by.

Senator ABOUREZK. I wonder if you would go into a little bit more detail for the committee the types of border incidents that occur between the Navajos and Hopis along the district 6 boundary.

I would like to know the reasons behind these incidents, if you know, and how frequent they occur, and where they occur, and what you think can be done to prevent them from occurring in the future.

Mr. HAMILTON. Well, only two times that I have experienced it—actually myself—as I stated before, I helped round up some of these trespassers on livestock.

That happened at a time when—I know one of the witnesses—his home was burned down and everything, and the policeman that just stated the incident that happened to him, and there is also—there was an incident that happened above Keams Canyon where they were pointing a rifle at our range rider, and these are the things that are going on, and the Navajos stated that this is part of the harassment that we are doing to them.

But, if they could only understand that district 6 is just for the Hopi people—I have talked to Mr. MacDonald a year ago to go out to each chapter house and try to educate these people about this court decree.

I think we have approximately, about three trespassing incidents that happen each month—yes, each month. Because yesterday we had found 59 head of cattle again.

Senator ABOUREZK. Mr. Hamilton, if the joint area is partitioned, what will the Hopi tribe do with their portion of that partitioned land?

Mr. HAMILTON. Well, I don't think we are going to use it until the grass comes up—we are going to have to wait at least 10 years for the vegetation to be where it used to be.

Right now, I wouldn't even suggest anybody to go out there and try to run any kind of livestock. After 10 years, if the vegetation is satisfactory, then I think we would be able to move out.

Senator ABOUREZK. You do not think any Hopis will move on it before 10 years, then?

Mr. HAMILTON. Some already are out there.

Senator ABOUREZK. But any significant numbers of Hopis will be able to move on is my question.

Mr. HAMILTON. Oh, yes.

Senator ABOUREZK. Your statement is inconsistent.

I understood you to say that nobody could move on it before 10 years because of the overgrazing.

Then, in the next sentence you said they are there and will move on.

Would you clarify that?

Mr. HAMILTON. Yes, I can clarify that, because some of the stock that belongs to the Hopis are already in joint use area.

But I think if we are really going to practice land management, I think we are going to have to permit just so much on 1882 reservation even after it is partitioned.

But, I am not so sure whether 10 years is long enough to have vegetation come up like it used to be.

Senator ABOUREZK. The main income for the Hopis is in grazing, livestock, and farming, is that right?

Mr. HAMILTON. That's right.

Senator ABOUREZK. If they cannot use the land, then they probably will not move on to it right away, is that right?

Mr. HAMILTON. They can farm out there in the joint use area, which some of our people are doing right now.

Senator ABOUREZK. What percentage of the Hopi people are farmers and what percent run livestock?

Mr. HAMILTON. That's pretty hard to tell.

But, I would say the farming would be about 50–50, the same as livestock. We are dependent on two sources of livelihood.

Senator ABOUREZK. Do the Hopi people have a wage income in addition to farming and running livestock?

Mr. HAMILTON. Yes.

Senator ABOUREZK. What percentage of the people have a wage income?

Mr. HAMILTON. That's pretty hard to answer, but I believe it would be about—around——

Senator ABOUREZK. Would you want to get that figure and supply it to the committee?

Mr. HAMILTON. Yes, we will.

Senator ABOUREZK. We will ask you to do that.

So, you believe that before the lands are heavily used, they ought to be restored properly so far as their grazing purposes?

Mr. HAMILTON. That's right, that is my belief.

I mean this is the court order handed out on October 14, at Tucson.

Senator ABOUREZK. How many Hopis do you believe will move into the joint area on a permanent basis if there is a partition made?

Mr. HAMILTON. We have several people just living on the borderline of district No. 6. I think as soon as we get this partition settled, they will all be moving out. We have at least about 45 permit applications right now.

Senator ABOUREZK. You believe about 45 families will move out?

Mr. HAMILTON. This is about 10 years ago when this first started, you know, and we learned that we have, just as the Navajos, and I believe it will be more than 45.

Senator ABOUREZK. How many do you think will want to move out if it is partitioned?

Mr. HAMILTON. I would estimate—I just have a rough guess on this—I would say maybe 80 families will be moving out.

Senator ABOUREZK. On a permanent basis?

Mr. HAMILTON. On a permanent basis.

Senator ABOUREZK. What kind of structures—what kind of buildings would the Hopis build in their portion of the joint area if they moved out there?

Mr. HAMILTON. You mean homes?

Senator ABOUREZK. What kind of buildings do you think they would build?

Mr. HAMILTON. The typical type that our Hopis always have, a stone house.

Senator ABOUREZK. Would they build permanent homes?

Mr. HAMILTON. Oh yes, they will.

Senator ABOUREZK. I want to talk about negotiations a little bit more with you.

Can you give the committee any reason that you know of, why the negotiations have failed to produce a settlement?

Mr. HAMILTON. Well, I state this on the basis of record, and Mr. Abbott Sekaquaptewa, he has been chairman of the negotiations committee since 1963.

I have been to only one meeting and that was the time I got to be chairman in 1969 in Albuquerque.

In the Albuquerque meeting, on an average, they walked out of that meeting because their attorney wouldn't be able to attend the meeting.

The Hopis were the only ones who had a meeting with Assistant Secretary Loesch at that time.

Senator ABOUREZK. Is part of the problem on negotiations that have failed in the past because both tribes, both negotiating committees could not make a decision right on the spot, they always said they had to go back to their tribal council—they tried to get an okay on each point?

Is that part of the problem?

Mr. HAMILTON. Not always like that. Because I also read the minutes of the meeting in 1968 and I believe that was in Phoenix—that took place when the commissioner held the meeting.

At that time, according to the minutes, the Navajos, they only give the boundary at one village. They said that is all they are entitled to.

Senator ABOUREZK. If, in your past negotiations, if there had been a third party mediator helping along the way to kind of get both sides together, do you think that would have helped the negotiations?

Mr. HAMILTON. Yes, I think so.

Senator ABOUREZK. Do you also think that if both committees had been able to make decisions right down to the final agreement during the negotiations, that they possibly could have made better results that way?

Mr. HAMILTON. No, I don't think so.

Senator ABOUREZK. You do not think that would have helped?

Mr. HAMILTON. No. I think I already put my position there. I think there is no sense in negotiating any more.

Senator ABOUREZK. Yes, I understand that.

Mr. HAMILTON. I feel this negotiating stuff is exhausted.

Senator ABOUREZK. I want to ask you a question or two about the Moencopi area.

Would you tell the committee what rights and what interests you believe the Hopi Tribe or individual Hopi Indians have in the Moencopi-Tuba City area, quoting from the act of 1934?

Mr. HAMILTON. Equally with the Navajos, because the Hopis were there before the Navajo had come to that area.

At least I heard a statement the day before yesterday, in 1926, there were only about five families in Tuba City.

Senator ABOUREZK. Five what kinds of families?

Mr. HAMILTON. Navajo families.

And they are all from——

Senator ABOUREZK. I want to caution the audience to please not demonstrate. I want to ask you not to continue that kind of activity.

Since the Hopi rights of interests were not specifically stated in the 1934 act, how do you believe those rights and interests should be determined?

Do you think they ought to be determined by a third party, by Congress, or by a court or by some other means?

Mr. HAMILTON. I believe Congress would be the quickest way of doing it, because we have been in litigation for a long time.

Senator ABOUREZK. Last year the Hopis supported the passage of the Steiger bill, H.R. 11128 which would give the Hopis exclusive rights to the surface and subsurface, of 208,600 acres of land around Moencopi.

Is this all the land the Hopis claimed under the 1934 act, or does that figure of 208,600 acres represent a compromise figure?

Mr. HAMILTON. It is a compromise thing.

Senator ABOUREZK. How much land do you think the Hopis really have coming around Moencopi, if you forget about the compromise?

Mr. HAMILTON. What I always think, we have laws through the court decree in 1962 that should be replaced in an area for the Hopis.

Senator ABOUREZK. I mean, there should be an exclusive Hopi area established around that area?

Mr. HAMILTON. That's right, I am for that.

Senator ABOUREZK. As I understand, then, the thrust of your testimony, Chairman Hamilton, you believe the Hopi claims in that area, in both areas are based on the fact that those are your ancestral lands?

Mr. HAMILTON. Yes, sir.

Senator ABOUREZK. Senator Fannin, do you have any questions?

Senator FANNIN. Yes, I do; Mr. Chairman. Chairman Hamilton, I appreciate your testimony. You express yourself quite well as to the hope you have.

You said you want to make this generation one to be remembered by the Hopi people hereafter as the generation which restored peace and dignity to our lands once again.

That is our hope, that we can help the Navajo Tribe and Hopi Tribe accomplish just that. We want you both to be pleased, and of course, that is reaching for a great deal. But legislation is the art of the possible, What can be done?

That is the problem we have, and we are reaching for a solution, the fairest and most equitable possible, based upon the legal rights involved.

You have talked about negotiations. Would you negotiate if your rights, as determined by *Healing* v. *Jones* were protected?

Mr. HAMILTON. Well, Senator Fannin, I think the Navajo Tribe, if they seriously negotiate, not taking advantage of one tribe, because like I stated here, at the hearings where they gave Moencopi—not even a yard for them. I think it is something we are going to have to really give serious consideration to, not taking advantage of one another and they have not been serious all this time.

Senator FANNIN. Mr. Chairman Hamilton, you stated flatly that you would not negotiate. From previous testimony, you have given at the meetings in Washington, I assume that if your rights under *Healing* v. *Jones* were protected, you would be willing to negotitate. If I am wrong, I want you to tell me so.

Mr. HAMILTON. Well, Senator Fannin, I think I already stated my point there, because I think this negotiating is already exhausted now.

Senator FANNIN. We have several proposals, as you know, Chairman Hamilton, I do not like to be repetitious. but I feel it necessary to consider what alternatives you have: Pass the Steiger bill, which is a congressional partition, of the joint use area.

Then, No. 2, Congress can amend the Steiger bill with a procedure which would allow a period in which the two tribes would be compelled to negotiate a settlement upon pain of enactment at a self-executing date of the Steiger bill, or another proposal if negotiations failed.

Is No. 2 completely out as an alternative?

Mr. HAMILTON. I think like I already had pointed out in my speech there, the only way we can solve this problem is to have a congressional partition and I think right now the Steiger bill is fair to both tribes.

Senator FANNIN. You say you want a congressional partition. We are looking for a solution and the best solution for everyone involved. Now, I am not saying that one is better than the other. I am just trying to determine what alternatives we have and what the cost will be under those alternatives.

No. 3, Congress could cure the court's lack of jurisdiction to partition the joint use area thus allowing the court to conclude the business it began. It could give the court the power of condemnation to find contiguous land for resettlement as well as funds to ameliorate any relocation. Now, what I am trying to determine, would that be an alternative that would be satisfactory to you?

Mr. HAMILTON. Senator Fannin, I think we have heard from Chairman Peter MacDonald about this court order that has been given by Judge Walsh on October 14, and he stated that his attorney didn't even give him any kind of information and the statement the attorney made in Tucson just last week, Saturday—what avenue should we go where the people in the Navajo area will have respect for that kind of decree?

They don't want to go along with any kind of court decree. I think my statement has already been stated plainly, that in order to solve this problem, the Congress will have to do something about it.

Senator FANNIN. There is not any doubt about it that Congress is going to do something about it.

What we want Congress to do, is what is most fair and equitable for the two tribes that are involved.

Now, we have reached an impasse to a certain extent. I do not say it is a complete impasse, because there is still legislation under consideration. So, as long as it is under consideration, there is not a complete impasse.

But, what I was hopeful for, is that we could get some thoughts from you that might be beneficially utilized—I know Congressman Steiger feels he has a good bill. But, he said this morning, he said if nothing else could be done, Congressman Steiger is continuously open for suggestions from both of the tribes.

I cannot speak for Congressman Steiger, but that is what I am intending to find out, if you would be willing to go for any negotiations?

Mr. HAMILTON. Senator Fannin, I think we would be negotiating for the boundary line, but we are not going to negotiate for our rights.

Senator FANNIN. The legal right that you feel has been established in accordance with the court decision, and I am not disputing that—that is why I asked you the question the way I did.

Now, to go further, since we have not reached a definite conclusion in that regard, I would like to probe into some of the other alternatives, perhaps, from the standpoint of satisfying the Navajos and Hopis, both.

Mr. HAMILTON. This has all been going on, trying to satisfy the Navajo people since 1869—they were given a reservation and from there to 1934, there were 14 additional lands given to the Navajo.

Senator FANNIN. Mr. Hamilton, we have been discussing that for a long, long time. I agree with you, that it is regrettable we have not been able to get it resolved.

But, we must face the fact that we have not resolved the issue and we are trying this time to determine what steps can be taken.

As an alternative, the Navajos have proposed that the Hopis be compensated, and I understand the Hopis will not accept that.

Is that the way I understand it, the answer of the chairman?

The question was, as an alternative, the Navajos propose to compensate the Hopis for the taking of the surface area and than grant them more than one half interest in the subsurface, for the joint use area, plus an increased share in the subsurface rights. Would the Hopis accept such a proposal?

I am not asking that again, and I do not mean to be repetitious, but I just want to be sure that I understand how you answered the chairman.

Mr. HAMILTON. Absolutely not. I wouldn't go along with that.

Senator FANNIN. One question that arises, when we are talking about how many Hopis live in the joint use area, and we started to get into numbers, we have considerable difficulty, and I heard your answer as to the number of families that might be involved in the joint use area—how many Hopis would move into the area.

The chairman asked you how many Hopis would move into the partitioned land if Congress did make this partition we are discussing.

You answered 60 familes as a rough guess. But don't about 6,000 Hopis live in district 6, and aren't they potential people who could

move into such land? In other words, you mentioned very few potential people. Are you referring to those who would be willing to move onto the land immediately knowing how overgrazed the land is? You feel the land should be set aside until it has been reasonable recultivated so it could be grazed.

Is your answer, though, as far as the number of families that could be moved into the area, that would move into the area if it were made available correct from the statement you made to the chairman, or would you have the potential of all the Hopis that are living there now who could move in onto such land?

Mr. HAMILTON. Yes.

Senator FANNIN. That is not the answer you give now, would you use these lands if they were made available to you? Would you use them beneficially? We want this issue clarified.

Mr. HAMILTON. I can't give you a definite answer on that.

Some of our people will move onto joint use have to change their lifestyle of living, and I know there are some already—like I said before—we have 45 permits pending to go out in. This is already in my statement.

I think there are more than 45 that are ready to go any time when the partition is made.

Senator FANNIN. I do not know that we have made it clear. I do not know whether I have made it clear to you what really is involved. I know the chairman certainly did explain to you very clearly the alternatives that we have in the Congress, and so in looking at the equities that we have involved we must consider whether or not this land would be utilized by the Hopis, whether they would be in a better position if they were paid, and just what would be better for the Hopis.

So, if you feel that they are going to use the land, and need it for the economy of the Hopi people, that is a great consideration.

I understand that you want to make it clear that you are standing on your legal rights that you feel have been proven by the courts.

Mr. HAMILTON. Senator Fannin, I have 12 witnesses and I am sure one of these witnesses will answer your questions.

Senator FANNIN. Thank you very much.

Senator ABOUREZK. Thank you, Senator Fannin.

Chairman Hamilton, before you complete your testimony I want to try as best I can to explain to you and your people that the Congress has the alternative—in other words, they have the legal right to partition the land any way they see fit.

In other words, Congress can say that the Navajo will stay on the land and the Hopi will get some money, or the Congress can say the Hopi would get a percentage of the surface rights of the joint area and another different percentage of the mineral rights or subsurface rights, or there are any number of ways Congress can do this.

Nobody here today knows exactly what the Congress will do. Certainly, I do not know.

But I just want to make certain that we have made our position clear by saying that we can do any one of these number of things, and of course, so far as I am concerned, and I know as far as Senator Fannin is concerned, we want to do what we believe is the right thing.

I come here with a completely open mind today and I have not

balanced myself either for one side or for the other. But, we do want to try to do the right thing and we want to make that position very clear to you and your people, as well as to the Navajo people, because they are all here today as they were this morning.

So, I want to thank you very much for your testimony and for your answers to the questions, and I appreciate the efforts and time that you put in that.

Thank you very much.

Mr. HAMILTON. We have a change.

On the third one, we would like to put Donald Antone of the Intertribal Council of Arizona.

Senator ABOUREZK. You are going to take out Titus Lamson, is that correct?

Mr. HAMILTON. He will come next after Mr. Antone.

Senator ABOUREZK. He will come after Mr. Antone?

Mr. HAMILTON. Yes, sir.

Senator ABOUREZK. But other than that, I can call the witnesses in the order that you have given here?

Mr. HAMILTON. That is right.

Senator ABOUREZK. Thank you very much.

Next witness is Logan Koopee, vice chairman of the tribe.

STATEMENT OF LOGAN KOOPEE, VICE CHAIRMAN OF THE HOPI INDIAN TRIBE

Mr. KOOPEE. First, I would like to express my respect to the request made by Mr. Yazzie, about telling the truth, and will attempt to stay close to that, by telling as close to the things I have seen.

My name is Logan Koopee, vice chairman of the Hopi tribe.

I was elected in 1969 to a 4-year term of office by a majority of tribal members voting in a general election throughout all Hopi country.

I am a traditionalist from the First Mesa Consolidated Villages which are still organized according to the traditional Hopi pattern and the lives of our ancestors. As a traditionalist and tribal officer, I appear here in support of legislation to partition the land in which the Hopi and Navajo tribes have an undivided, joint and equal interest.

We are asking about land. The Navajo want land, the Hopi want land. We both want land. The fact is that the Hopis came in this area from time immemorial. We feel, we have right to say this is my land.

In 1958, the Congress of the United States enacted a law authorizing a special three judge court to rule on the conflicting land claims between the Hopi and Navajo tribes in the 1882 Executive order reservation.

The court found that although the Secretary of Interior had never officially settled any Navajos on the 1882 reservation, that because of the actual possession of the Navajo tribe of a great portion of that reservation, the interest of both tribes outside of district No. 6 was to be joint and equal.

While we were unhappy to lose one-half of the land outside of district No. 6, we were pleased to know the Navajo tribe could no longer make claim to all of our lands.

We are a peaceful people and we have sought simple justice in the courts of this land. We all had faith that the established system would bring to us what was rightfully ours and stop the Navajo depredations which have plagued us for over 100 years.

We took great comfort when the Commissioner of Indian Affairs wrote to Mr. Graham Holmes, the Navajo area director, on July 8, 1966, regarding the Supreme Court decision. May I quote from Commissioner Bennett's letter:

> DEAR MR. HOLMES: The conflict between the Navajo and Hopi Tribes over their respective rights in the Executive Order Reservation of 1882 was resolved by Healing v. Jones. The decision in that case unequivocally and finally gave joint common ownership to the surface and sub-surface of the 1882 Executive Order Reservation lying outside of District 6 to the two tribes.
>
> Thus, the ownership and rights in that particular area are forever settled insofar as this Bureau is presently concerned. All actions whatsoever taken by officials of the Bureau (rights-of-way, traders licenses, leases, etc.) which hypothecate in any way the resources of the jointly owned area of the 1882 Executive Order Reservation must be guided by the reality of common ownership.

To our amazement and disgust, the Navajo tribe and the officials of the Bureau of Indian Affairs failed to recognize the Court's decision and the Hopis have not been allowed to exercise their equal rights in the joint use area.

For all practical purposes, the Navajos exercise exclusive possession of the joint use area and the Secretary has failed to exercise his trust responsibility to protect the Hopi interest. Even though the Commissioner of Indian Affairs has told us that both tribes must be guided in their actions by the reality of common ownership, the Bureau of Indian Affairs itself failed to permit any of our stockmen to graze their livestock on the joint use area, saying that it was already overstocked by Navajos and that there was no room for us.

Why are Navajos permitted to break the law at our expense? Why does the Government turn its back on us after the Supreme Court has spoken? The Hopi people have always observed the law because it is our nature to be a peaceful people.

At one time, Hopis were heavily involved in cattle ranching outside district No. 6. Back in 1920, one of the most successful Hopi stockmen, Mr. Albert Naha, ran over 1,000 head of cows between Keams Canyon and Chinle and westward to White Cone in the joint use area.

A well-known Hopi trader by the name of Tom Pavatea for whom Joe Kabinto used to work, also raised between 400 and 500 head of cows in the joint use area above Keams Canyon, low mountain area, and toward the Jedito Valley.

George Lomayesva, Simon Scott, Roger Quochitewa, and Ralph Hootewa grazed cattle in the joint use area down toward Red Lake and on toward the Little Colorado River. In the northern part, Earl T. Albert and his brothers from Hotevilla grazed their cattle down in the Blue Canyon area. Toward Pinon the senior Mr. Maho and Grover Ova and their families raised their cattle in an area north of Pinon. In the low mountain area, Taylor Tahbo and his uncles raised numerous cattle.

Charles Sutta was probably one of the only Hopi sheepmen at the time having large flocks down by a home that he built near Como Springs near what is now known as the Sabedelkai School.

Then during the 1930's, all of these people were told that they had to reduce their stock and were all moved back into district No. 6.

They didn't like it and they complained to the Bureau of Indian Affairs, but were told that it was necessary to do this to conserve the land. Most Hopis obeyed the regulations, reduced their stock and moved into district No. 6. Other Hopis were so shocked about having to move from their traditional land that they refused to do so and were thrown in jail.

As soon as our Hopi people began reducing their stock, the Navajo people moved in; began raiding the Hopi lands, tearing down the Hopi buildings; one of the few Hopi homes left in the joint use area now belongs to Kirkland Polacca located near Burnt Cove, southeast of Pinon.

As the Government forced the Hopis to reduce their stock and to squeeze them into district No. 6, the Navajos quickly took over the space previously occupied by the Hopi. The U.S. Government is largely to blame for this outrageous treatment of the Hopi people.

These stockmen who were forced to leave their ancestral lands would have liked to have testified at this hearing. They would have wanted to tell you how the Government has broken their hearts and taken their land, but they have all gone to the grave waiting for the Congress of the United States to listen to their story. I will show you their lands, their broken homes, and the Navajo hogans built upon their traditional areas.

Albert Naha is dead. He died of a broken heart over 40 years ago waiting for the Government to restore his lands.

Tom Pavatea is dead. He died of a broken heart over 15 years ago hoping that Navajos would not be permitted to steal any more land from the Hopis.

George Lomayesva is dead. He died of a broken heart about 5 years ago, wishing the Navajos would be stopped from further acts of violence toward Hopi families and ranches.

Simon Scott is dead. He died of a broken heart 5 years ago, yearning for the day when he could return to the Red Lake area to herd his cattle once again.

Roger Quochitewa is dead. He died of a broken heart several years ago, supporting the Hopi Tribal Council in this battle to regain our lands.

Ralph Hootewa is dead. He died of a broken heart about 25 years ago, dreaming of the day that he and his family could again enjoy the range lands near the Little Colorado.

Mr. Maho is dead. He died of a broken heart 9 years ago, longing for the chance to return to the green grassland destroyed by the Navajo.

Grover Ova is dead. He died of a broken heart more than 15 years ago, hoping that his fight against Navajo aggression and Government indifference would not be in vain.

I could go on and on listing hundreds of honorable Hopi men and women whose ancestors have occupied this area for centuries—not just decades like the Navajo. These Hopis are dead now. They have not seen any help. Have their hopes and dreams been in vain? I don't think so. I think the Government will act now to end this insufferable period of injustice and frustration.

Now, Senators, may I say a few words about treaties. The Hopis were never at war with the U.S. Government, nor were we beaten into submission and required to sign a treaty. We are a peace loving people and still maintain our sovereignty as a tribal nation.

Although we have never fought a war, the United States has taken from us as though they were our conquerors and has given our birthright to the lawless Navajos.

I would like at this time to review some history with you for a brief moment.

The Navajo tribe first acknowledged the sovereignty of the United States in 1849 in a peace treaty. That peace was not lasting.

Another treaty was made and then broken again by maurading Navajos. Navajo Indians murdered, raped, and plundered white settlements in New Mexico and Arizona. They did the same to the Hopis and other neighboring tribes.

Finally, to put a stop to these lawless acts, Col. Kit Carson was assigned to restore order to the area. Colonel Carson took a large part of the Navajo tribe prisoner and marched them to jail in New Mexico.

It is this march to jail for their murderous crimes that these Navajos now refer to proudly as "The Long Walk."

In 1867, the Navajos were released from prison and sent back to their old lands and given a new supply of sheep by the United States.

But again, the Navajos broke their treaty by wandering into the lands of others.

Did the Government do anything to stop this continued lawlessness and theft? No. Instead, through a series of Presidential orders, the Navajo were given more and more land. Each time this was done, our traditional land was taken from us.

This Navajo land grab continued until 1962 when the Supreme Court at last called a halt. We thought then that the land grab was finally ended. But the Navajos and the Government have ignored that decision and have allowed the Navajos to take our one-half of the joint use area.

Now the Navajos are pushing into district 6. It is only with constant surveillance and enforcement at great expense to the Hopi tribe that we have been able to keep Navajos from overrunning district 6.

The Hopis are a religious people, and the Navajos take advantage of this. When our ranchers return to the village centers for religious observances, the Navajos steal our cattle, burn our ranchhouses, and take over our land.

My interest and security is the land on which I live. The Hopi is poor, but not without ambition. I am suffocated and I plead for more breathing space. Where is our brother and savior? Where are the people who love us?

There is no religious controversy or fight among us Hopis or between us as Indians and white men. We are all fighting for the freedom to live our lives as we choose, for freedom to worship as we choose, and for freedom to speak our thoughts freely without anybody being placed over us.

I am proud to be an American citizen, and I am just as proud to be a Hopi Indian. I do not see any reason why I cannot be both.

Peaceful Hopis do not intend that they shall be further stripped of rights and property. It would be sacriligious for us to even consider trading our lands for money. Do not force this upon us.

Now, in closing, let me say this: I have tried to give you a picture of our feelings and to outline for you why we think this partition bill is necessary.

In simple terms, this bill would prevent any further loss of Hopi land. It would return to us at least a modest measure of economic security and opportunity. It would help to insure our personal liberty and a voice in conduct of our daily life.

These objectives, I am convinced, are in keeping with the spirit of Congress and this administration. I think that you will look kindly upon my hopes for future peace and happiness.

Do not forget those Hopis who have passed on without enjoying the realities of the dreams of their hearts.

Reference has been made to Joe Kabinto. The Hopi people have been very kind to him. He lived in our exclusive area for 10 years after the court found he had no right, title or interest in it.

We were paid nothing. He died in a hospital on our reservation of pneumonia after a long illness extending back long before he was required to move, and he was buried on our reservation.

Because of the historical unwillingness and inability of the U.S. Government to control the Navajos and to protect the interest of the Hopis we see the Steiger bill H.R. 1193 permanently dividing the joint use area as the only fair and equitable solution to the problem.

We are not asking for anything that does not belong to us by all rules of justice and fair play. We only plead for a voice for the justice in defending of our rights and our one-half interest in the joint use area, which by law belongs to the Hopi tribe.

Please consider our pleadings very carefully, to neglect us would be unjust and un-American, who are trying to go forward and make progress.

Thank you.

Senator ABOUREZK. Thank you.

Do you have any question, Senator Fannin?

Senator FANNIN. No questions.

Senator ABOUREZK. We are going to call a 10-minute recess at this time.

I want to say to Chairman Hamilton and to the Hopi people, according to the time limitations authorized, we started at 10 minutes after 2.

We will have a 10-minute recess and go back into session at 5 minutes to 4.

We only have another 55 minutes of testimony and there are 11 more witnesses, and I wonder, if in the interest of making sure that as many of the Hopi witnesses can be heard, that if the remaining witnesses could be a little more brief.

If you want to make them more brief submit your entire written statements for the record.

It will be very well taken by the committee.

There will be a 10-minute recess.

[A short recess taken.]

Senator ABOUREZK. The hearings will now resume with the testimony of the next witness, Donald Antone.

Mr. HAMILTON. Mr. Chairman——

Senator ABOUREZK. Chairman Hamilton, do you have your next witness?

Mr. HAMILTON. I have a witness, but in order to clarify my statement previously, I would like to do that now.

Senator ABOUREZK. You may proceed to clarify.

Mr. HAMILTON. In order that there be no misunderstanding regarding the position of the Hopi Tribe, with respect to negotiations, I feel I should make an additional statement.

Historically, negotiations with the Navajo have been fruitless and nothing but a delaying device for them.

However, as chairman, I would welcome negotiations in the future as in the past so long as the Hopi people are not required to relinquish traditional and legal claims to our ancestral land in Moencopi and the joint use area.

The next witness will be Abbott Sekaquaptewa.

Senator ABOUREZK. Is that your statement, Chairman Hamilton?

Mr. HAMILTON. That is right.

Senator ABOUREZK. I want to thank you for your clarification. That will be in the record as a clarification of your previous statement.

I want to ask one further point of clarification.

Provided that negotiations could start up again, if that is going to be the case, are you willing to appoint a negotiating team, a small negotiating team with enough authority to negotiate an agreement to the end and then, only then, go back to the tribe for approval of that final agreement before it is approved?

Mr. HAMILTON. Yes, sir.

Senator ABOUREZK. Thank you very much.

Do you have another witness you would like to start in with?

Mr. HAMILTON. Abbott Sekaquaptewa.

Senator ABOUREZK. How about Donald Antone?

Mr. HAMILTON. We would like have him next in line after Abbott.

Senator ABOUREZK. You are entitled to put on any witness that you want, just so that we do it so there is not too much time elapsed because it just deprives your people of testimony.

STATEMENT OF ABBOTT SEKAQUAPTEWA, CHAIRMAN OF THE HOPI NEGOTIATING SUBCOMMITTEE

Mr. SEKAQUAPTEWA. Mr. Chairman, Senator Fannin, my name is Abbott Sekaquaptewa.

I am presently chairman of the Hopi Negotiating Committee assigned to deal with the joint use area and I have served as chairman of the Hopi Tribal Council.

I testified before the Senate Interior Committee on September 14, and before the House Interior Committee on April 18, of last year regarding the Hopi-Navajo land partition legislation. In my testimony on those two occasions I covered many problems which the Hopi Tribe has historically had with the Navajo Tribe and the Federal Government, which today make it impossible for us to entertain the idea of ever living in harmony with the Navajo Tribe.

Although the U.S. district court is now taking measures to finally implement its decree in *Healing* v. *Jones*, I am amazed and angered at how the Navajo has flaunted the court and totally disregarded its judicial decree for 10 years with impunity, while we are required to go back to the court time and time again just to get it to enforce its own decree and give it some meaning.

It is as if the Navajo are not subject to any law and can do as they please with immunity from the law.

I have cattle on the jointly owned area for the major portion of the year each year, and my family has done so for years.

I have had problems with Navajos driving my cattle from jointly owned lands on the basis of their contention that I have no range rights outside of the exclusive Hopi Reservation. I have personally stopped Navajos from driving my cattle several times, and photographed one particular individual doing it, whom I stopped three times in one day in 1971.

Yet this Navajo man lied under oath in testimony before the district court in Tucson on August 7, 1972, and problems which the Hopi Tribe has historically had with the Navajo Tribe and the Federal Government, which today make it impossible for us to entertain the idea of ever living in harmony with the Navajo Tribe.

I would suggest to you that you not be bullied into complacency and be mislead by the sweet talk of the Navajo leaders expounding compatibility of the two tribes. The facts do not support this contention.

It would be unnecessarily repetitive for me to relate what I have already put in the congressional record, with which I feel you are familiar by now. I do feel constrained, however, to try to convey to you the feelings of despair and frustration which we as Hopi people have been subjected to in the past 125 years, as the result of the the taking of our ancestral tribal lands by Navajos and the abject failure of the Government to live up to its trust responsibility to preserve and protect our land.

As I have stated before, the souls of our dead who were killed by Navajos and their land taken, cry out in anguish when Chairman MacDonald takes liberties with the truth in this matter, and seeks to tell that the land they took was unoccupied and unused, and they did not drive anyone out.

The Executive Order Reservation of December 16, 1882, was set aside to protect Hopi property and specifically names the Hopis, yet you are told that the Hopis did not gain an interest until 1958. How about the Navajo, who were never settled on this reservation either in writing or by word of mouth by 21 Secretaries of the Interior who served after 1882?

This same man attempted to deny under oath that his chapter, of which he was president at the time, ever talked about officially informing us to remove our cattle from jointly owned lands, again in spite of our exhibits of their meeting minutes showing this to be the case, and which we introduced in evidence.

I have already filed with the committee last summer two official letters from this chapter giving me an ultimatum to remove my cattle from joint owned lands. This is not an isolated incident. In all candor, I must say that in my opinion, it has been the rule rather than the exception throughout *Healing* v. *Jones* and at subsequent hearings arising out of that case. What do we do with people who have no qualms about lying in a court of law?

What can any honest man believe about what they say? I take no pleasure in talking about these things. But, it is high time that the citizenry of this State and country faced up to the realities of the Hopi-Navajo problem.

I firmly believe, that one of the problems that has contributed more than anything else to the lack of resolution of this problem, is the unwillingness and reluctance of the citizens of this country to believe that anyone in this day and age, in a supposedly civilized society, can conduct himself in the manner that the Navajos have and are perperating on the Hopis.

Chairman MacDonald assured you this morning that he would go anywhere at any time to try to work out a just solution to this problem, and that he was prepared to negotiate and cooperate.

We attempted for nearly 10 years in good faith to negotiate a settlement. The Navajo committee never made a serious attempt to negotiate, refused to recognize the decree of the district court confirmed by the Supreme Court of the United States, and then was dissolved by the Navajo Tribal Council.

Yet, they profess a desire to negotiate a settlement and loudly proclaim it to the world.

Chairman MacDonald of the Navajo Tribal Council expressed to me his desire to personally participate in negotiations nearly a year ago in Washington, and I have not heard from him since. The Navajos use these negotiations as a stall so they can continue to force us out of the area and delay this much needed legislation.

I would like to reiterate that we are not going to negotiate away our rights that have been adjudicated by the district court in *Healing* v. *Jones*. Those rights have already been compromised.

We would not object to negotiations if we were to negotiate a boundary. At every negotiation session that we have ever attempted with the Navajo Tribe, they started negotiations by offering us a cash settlement, and the only thing that we have ever gotten from them is that we give up our lands and they keep it.

Senator ABOUREZK. Do you take a different position from that of Chairman Hamilton on negotiations, or do you agree with him so far as being willing to negotiate at this time?

Mr. SEKAQUAPTEWA. I do not take a different position.

My contention is that we would not object to negotiations if we do not have to compromise our rights that have already been compromised in *Healing* v. *Jones*.

Senator ABOUREZK. That, of course, if you did not undergo negotiations again, that would have to be determined by the negotiating team, as you know, whether or not you are protecting your own rights.

But I am just interested in knowing whether you or any other people in the Hopi Tribe feel that you do not want to negotiate at this point?

Mr. SEKAQUAPTEWA. I think that if we would begin seriously not to be confronted by the Navajos with the notion that they would keep the land and that we would be compensated in some other form, then we would not have so much objections to negotiations.

This has been the problem in the past.

I must say that the committee has taken great care to impress, and rightfully so in our minds, that the Congress does have the right to do certain things, and we feel that the committee should impress the same fact on the Navajos today.

We are not here to negotiate with the committee.

Senator ABOUREZK. I said that, Abbott, for the hearing of everybody, both sides, that we do have the right.

I did not intend that just for Hopi ears alone.

Mr. SEKAQUAPTEWA. I think that we would appreciate it very much at this point, if it were clarified for the benefit of our people who are here today.

Senator ABOUREZK. Which point is that?

Mr. SEKAQUAPTEWA. The fact that the Congress could, if they wanted to, compensate the Hopis for their land, but that they could do the same with the Navajos, if the Congress so desired.

Senator ABOUREZK. I made that statement earlier today.

Apparently you did not hear it, but I will make it again to you.

That the Congress, under the Constitution, under the laws, has the power to make a settlement of this dispute in any fair manner that they do consider to be fair, and that includes taking the land and giving it to either one side or the other, or giving part of the land to one side or the other, and paying one side or the other to determine what we believe to be fair and right.

And that is intended for both sides to know. It could happen to either side. We do not know yet, as I said, exactly what the Congress will decide. I want to make one more remark, a question to you, before you continue.

Do you believe negotiations would be fruitful? Would they be productive if negotiating guidelines were established before the negotiations started?

Mr. SEKAQUAPTEWA. You realize of course, that for about a century now, we have experienced with the Federal Government trust responsibility and they have had a tendency to be partial to the larger tribe.

In considering such guidelines, we would have to have an active role in establishing them, and we would want to know who would establish those guidelines.

Senator ABOUREZK. They would have to be established with the assistance of both sides to the dispute.

Let me make it clear, nobody can negotiate if some solution is being forced on them. Nobody can do that.

The reason that we are asking about negotiations, is because we want to settle the matter yourselves, between yourselves. We would rather not settle it, but we will if we have to.

In order to establish guidelines for negotiations—in other words, we want to provide a system, if you did negotiate—we want to provide help to both sides that they need to finish the negotiations.

It is not enough for the Congress to say that we are going to put you two in a room, put the two sides in a room and say, "Go to it."

I do not think that is enough. I think the Congress has to provide the initiation of negotiation and I believe there ought to be a mediator present at all times—not an arbitrator, not a guy who is going to make a final decision—but a mediator who is going to get the sides together, help clarify points, and to, of course, determine whether both sides or one side or the other is or is not negotiating in good faith.

I think that is very important to do, otherwise the negotiations would be wasted.

That is my comment. You can comment on that or Chairman Hamilton, if you would like to.

Mr. SEKAQUAPTEWA. In the interest of time I would just like to say this—we have demonstrated our good faith in the past 10 years

and I think it is only fair that the other party demonstrate their good faith to us.

I would like to make one further point with respect to negotiations.

We do not intend to, and I don't think it is proper for us to expect us to negotiate away our rights in the Moencopi area in order to get a land settlement in the 1882 joint use land.

This is one thing that we are firmly set on.

Partition legislation is the only solution that has any chance of resolving this longstanding problem. The Navajo wants the Government to give us money so they can take the land. There are among Government officials the weak of heart who are tempted by this so-called solution and would do it tomorrow if they could.

But the *Healing* v. *Jones* decision that created the jointly owned reservation was a compromise of Hopi land rights. We cannot compromise what is already a compromise. It is immoral to even think of doing so.

We are told that the Navajos would be destroyed as a people if their land and livestock are taken away. What about the Hopis? Hopis are being destroyed because land and livestock have already been taken away and are still being taken today.

The Steiger partition legislation will establish a perimeter which we will have a better chance to enforce and patrol.

Navajo squatters gained an interest in Hopi land because it was said that the Government never did anything about it and allowed them to stay. Now that we are doing something about it to prevent Navajo takeover of exclusive Hopi lands, we are accused of creating incidents for publicity purposes.

Are we to stand by and do nothing while they take over the last vestiges of our homeland?

All the problems that you have read about; the trespasses, cutting of fences, burning of ranchhouses, and violence have all occurred within or on the fringes of what is supposedly exclusive Hopi land, not out in the distant reaches of the jointly owned land.

We have yet to regain substantial use of that area.

You are told that the trespass problem is due to the absence of fences along the exclusive reservation boundary, when in fact, barbed wire fences did exist along a good portion of the boundary discussed this morning, and was systematically cut by Navajos in order to drive their sheep through the Hopi range.

In addition, inroads are already being made into exclusive Hopi land by Navajo herds from jointly owned lands while Government officialdom procrastinates and gives in to Navajo pressure.

We have stood alone for over a hundred years. We are prepared to stand alone now. But it is about time that the Government gave some meaning to the concept of equal protection of the laws for the Nation's real minorities, the little tribes who have no political clout.

We heard this morning that the Navajo Tribe has been a victim of a tragedy of errors in the Government's handling of Hopi-Navajo affairs.

Was it also an error when 1,000 Navajo warriors attacked Oraibi whose population at the time of the attack consisted of barely that many men, women, and children all told?

We are not victims of a tragedy of errors. Navajo depredations

and appropriation of Hopi lands over the last 100 years have been carried out systematically and without compassion for the Hopi landowners.

Unwillingness of the white man's government and its officials to handle the Navajo problem suggests a critical question: Is the Hopi Tribe now to be sacrificed to ease the white man's conscience concerning his past handling of Indian affairs, when he took land from the Indians and removed them to other places?

White men took Indian land; now they are afraid to remove the Navajo from our midst even though they have stolen our land.

The Navajo Tribe has said, and makes no secret about it, that if the white man can do it, so can the Navajo.

The predominant argument which the Navajos have presented as a basis for their claim to exclusive occupancy rights to the joint use area is reminiscent of the doctrine of manifest destiny which the Europeans relied on in justifying their settlement of lands on this continent while these lands were yet occupied by the Indians.

That doctrine advances the notion that the right of use and ownership belongs to one who has better use of it. By this argument, the Navajos and all others who adhere to this doctrine, have in effect rejected the most fundamental principle of self-determination; that is, the right of a people to make their own judgment of what is good, what is right, and what is just.

This doctrine is not only inconsistent with the concept of living in harmony with the land, but ironically, it is questionable as to its validity in this country where ethnic and cultural separateness find support under the philosophy of self-determination.

That principle of manifest destiny has now been embraced by the Navajo to take away all Hopi land. The white man's conscience tells him it was wrong for him to do it, but they are unwilling to tell the Navajo it is also wrong for them to do it.

We are accused by the Navajo of not using the land. Our fathers and grandfathers ranged vast herds of cattle far beyond the bounds now established by the jointly owned reservation as Mr. Koopee has already testified. The cattle began disappearing soon after Navajo squatters began settling in this area. We are also accused of not using the land because we do not roam about the land like nomads.

Are we to be required to change our lifestyle just to accommodate the Navajo concept of possession? Why should we be required to live by someone else's standards or lack of them?

We are not fooling ourselves that the partition legislation is going to settle this problem overnight. On the contrary, we know that we will have problems for a considerable time.

Historical evidence and contemporary behavior of the Navajo indicates that even congressional enactment may be flouted by them. Even now, they are prostituting the processes of justice by having the gall to appeal an order rendered by the district court on mandate from the U.S. circuit court of appeals.

Here is a situation where the district court has been told to enforce its decree, does so, and the Navajos appeal it to the same court that issued the mandate after having heard the merits of the case. Are we to try this same case over and over again for the rest of our lives while the decree of the district court and the Supreme Court of the

United States are cast aside as being so much trivia, by the mighty Navajo?

Where do we go to gain justice?

Indeed, is there such a thing as justice for the Hopis?

When a thief takes property and is caught, the courts don't worry about hurting his feelings, they just make him give it back.

In the Hopi-Navajo case, the thief has taken nearly 2 million acres of land. Not only is he to be allowed to keep half of the loot, but the Government is afraid of hurting his feelings by making him give back the other half.

Not only that, the thief will also be given millions of dollars to move away.

It seems like a total abdication of responsibility not only by Government officials, but by the Navajo leadership in allowing their people to go about disregarding the rights of others without restraint, and thereby putting them in a situation which gains them much material benefit but strips them of all dignity.

Justice is but a dream to us now; it disappeared like a vapor with the dawn of our awakening to the realities of the Navajo presence in our midst. The Navajo and the Government can never give us anything because they have always taken away. But the Government at least can return to us a small portion of what is our birthright, by enactment of the partition bill.

Thank you.

Senator ABOUREZK. Thank you.

I want to get one clarification from you, so far as your statement.

Is it not true, that following the 1882 Executive order, that the Bureau of Indian Affairs led both tribes to believe that they could live on that land?

In other words, each time more Navajo people moved onto the land, did not the Bureau of Indian Affairs acquiesce in that and did they not build schools for the Navajo and did they not in effect fail to enforce your interpretation of the 1882 Executive order?

Mr. SEKAQUAPTEWA. I will respond to the second point of your question.

They did not lead us to believe. They did fail to control the Navajo encroachments on Hopi land because the Hopi Tribe has always believed and now believes that all of that land rightfully belongs to us.

Senator ABOUREZK. By the fact that the, Bureau of Indian Affairs built Navajo schools, schools for the Navajo, is that not a kind of implied consent?

Mr. SEKAQUAPTEWA. That was the findings of the court in *Healing* v. *Jones*.

Senator ABOUREZK. What was?

Mr. SEKAQUAPTEWA. That by doing these things, the Government implied rights in the 1882 reservation.

Senator ABOUREZK. Do you agree with that?

Mr. SEKAQUAPTEWA. I do not agree with that.

Senator ABOUREZK. You do not think the fact that they built schools there gave some kind of implied recognition or consent?

Mr. SEKAQUAPTEWA. No; I do not.

Because the language used in the Executive order is a routine phrase that was used in many other Executive orders withdrawing land for Indian purposes.

In the interest of time, I would like to, unless—I would be very, very happy to answer further questions, and I am ready to do so.

I would like to make this one statement, that we recognize the decree in *Healing* v. *Jones* is now law and we will abide by that as long as our rights are protected under that decree.

Senator ABOUREZK. I have no further questions.

I want to thank you for your statement.

Senator Fannin?

Senator FANNIN. Just one question.

You say in your testimony: "In my testimony on those two occasions, I covered many problems which the Hopi Tribe has historically had with the Navajo Tribe and the Federal Government, which today make it impossible for us to entertain the idea of ever living in harmony with the Navajo Tribe".

This is in connection with the hearings in Washington, and is it not your feeling partitioning of the land will make it possible for the two tribes to live in harmony?

Mr. SEKAQUAPTEWA. Yes; I believe it will.

Senator FANNIN. Then the way in which you made your statement, I think it is a little misleading, but I understand now.

Mr. SEKAQUAPTEWA. I think the point is clarified by my further statement in the presentation I just made.

Senator FANNIN. Thank you.

Senator ABOUREZK. Thank you.

Mr. HAMILTON. We would like to put our time to the best use.

The following order that will now prevail will be Philip Talas who will be the next witness.

STATEMENT OF PHILLIP TALAS, HOPI TRIBAL COUNCIL MEMBER

Mr. TALAS. Good afternoon gentlemen.

My name is Phillip Talas. I represent the people from Moencopi Village. Mr. Boyden is putting up the map which I will use later on.

If you will look at the map over there, you will see the 1882 Executive Order. We the people in Moencopi Village believe that if the Hopi people are to relinquish 1,917,000 acres in the 1882 reservation and we the people in Moencopi Village it should be given back to the Hopi people in the 1934 reservation.

This gives me undisputed undeterminated rights upon that ground. So I would say here and now, if that is the case, half of that reservation belongs to the Hopi people. So, therefore, at this time I would like to enter a map of this kind, a reproduction which I will give to you, of the change which the Hopi people would like to make in this type bill.

We do not think our demands are too great. People in other countries, small countries get themselves in a bind and scream help and the United States answers. But, in your own backyard, your own citizens holler and plead and you turn your head.

When is the United States going to stop—and once again listen to the American Indian? I do not think our beef is with the Navajo. I believe our beef is partly with the U.S. Government—dereliction of duty.

You created a reservation, a reservation of 1882, and you have not

fulfilled your obligation to protect the rights of the Hopi people in the 1882 reservation.

In the peace treaty which you signed with the Mexican Government, stating that he will protect the Hopi rights, the Hopi property and the Hopi religion—this is what you signed in that treaty, and yet you have failed in your obligation to the Hopi people.

Let us go back a little further, back to approximately 1540 when Coronado came to this country. He knew that the Hopi people were here. In your old Spanish maps, you will not see the word "Navajo". We were here.

The statement was also made today that this was our ancestral lands. Also, in the Moencopi area they say that the Hopi wasn't there, but a short period of time. In a diary of a Franciscan monk, Francisco Garcias, 1776, people in the Moencopi were tilling the ground, working the ground and had a field, cattle which were left by a Mexican.

As Mr. Sekaquaptewa said and Mr. Koopee stated, we had use of the land. Our herds were all over this part of the country.

In fact, my grandfather was said to be once the richest man in the Hopi Reservation for the vast number of cattle.

Over here, I would like you to take serious consideration of my proposal in the changes of the Steiger bill.

I believe firmly—so do the people of the Moencopi village and Moencopi area that if the Hopi people are relinquishing 1,917,000 acres in the 1882 reservation, therefore it must be returned to the Hopi in the 1934 reservation.

I thank you gentlemen.

Senator ABOUREZK. Thank you.

I want at this time, if the attorneys for each tribe are here—is there somebody here from the Navajo Tribe?

How about the Hopi Tribe? Are their attorneys here?

I would like each attorney to send to the committee within a 30-day time period from today, their own opinion as to how the 1934 act ought to be construed? How you construe those opinions?

We would like to hear from both sides on that. Is there any question of clarification on that from either side?

We want to know about the rights and interests. If you have any questions, you might call up the committee when you return to your respective offices, and we will try and clarify exactly what we need.

That is one request we would like to make of each side.

[The full statement of Mr. Phillip Talas follows:]

STATEMENT OF PHILLIP TALAS, HOPI TRIBAL COUNCIL MEMBER

My name is Phillip Talas. I am a representative to the Hopi Tribal Council from the Village of Moencopi, duly elected pursuant to a Constitution adopted by the Village and in accordance with the Constitution of the Hopi Tribe.

I testified before the Sub-Committee of Indian Affairs of the Committee of Interior and Insular Affairs of the House of Representatives in the last session of Congress with respect to the Hopi claims in the Moencopi area. This is the first time I have testified before any Committee of the Senate.

Since your Committee has determined to hold this hearing in Winslow, it is my obligation on behalf of the Hopi Indians residing in the Moencopi area to present their position to you. I will not talk concerning the 1882 Executive Order Reservation. That matter has been and will be covered by other witnesses. The

interest of the Hopi Indians in the 1934 Reservation was not a matter of concern for the three Judge Court in the case of *Healing* v. *Jones*, because that case was restricted to the Executive Order Reservation. However, we are not without some judicial determination as to our interest.

The Indian Claims Commission in Docket 196 determined that in 1882, the Hopi Indians had aboriginal possession of all of the land described in the Steiger Bill that passed the House at the last session. It also included other lands outside of the Executive Order Reservation. When the House delineated the area that should be ours outside of the Executive Order Reservation, it did not give us all that we still had possession of as late as 1934. But it did make a line that we believe is reasonable, which we hope can be enacted into law and properly defended against further Navajo aggression. When the original Executive Order areas in the Western portion of the 1934 Reservation were established, they were not withdrawn for the Navajo Tribe, but the terms of those Executive Orders "for Indian purposes" or similar language was used, indicating that it was not simply for the Navajo Indians.

In a letter dated July 1, 1966, the Associate Solicitor for Indian Affairs wrote the Commissioner of Indian Affairs on the subject of our interest in the area outside of the Executive Order and within the description contained in the Act of June 14, 1934. There it was stated:

"It is beyond quibble that Hopi Indians resided in the area defined by the Act at the time of its passage. The history of the Act discloses beyond quibble that Congress recognized this fact and included the 'other Indians' provision for the express purpose of protecting Hopi rights."

I want to file a copy of that Solicitor's opinion to be made a part of the record.

Our experience in this area is no different than the experience of the Hopis in the other area. The Navajos continue to come forward in greater numbers each year and with large flocks of livestock, overrunning our fields and pastures and committing depredations against our property. On several occasions in recent years, the Commissioner of Indian Affairs for the Secretary of the Interior has endeavored to restrict the onward march of the Navajos but the government has never enforced its decrees and thus we are today being subject to the same injustices which have grown in size and number as the years have passed. During my time, it has become a matter of common knowledge that about 10 Hopi families who resided in the Moenave area about seven miles west of Tuba City were forced by the Navajos to leave their farms. This action was not only tolerated by the local superintendent for the Navajos, but was sanctioned. No action was taken to protect the Hopis on those farms. These were permanent homes with fruit trees and gardens and a water supply. Because of superior numbers and unwillingness on the part of the government to protect the Hopis, the Navajos are now occupying and using those Hopi lands. These would not be returned under the Bill as it passed the House, so you can see that we are not being unreasonable in our demands to have some line of defense in this day and age.

About the year 1935 and long prior thereto, Hopis were farming in the Red Lake area and their livestock was using the grazing available in that vicinity. Navajo herds now have forced them out of the area, both as to their farming operations and their grazing and have pushed the Hopis over into the Coal Mine Mesa. Now the Coal Mine Mesa is being threatened by the same relentless aggressors. This same story that we repeat year after year has not ended. Today the Navajos still penetrate our areas, grazing their livestock in our farms and committing other depredations that make the sitution more and more intolerable. We ask you not to expose us to another long and expensive amount of litigation to protect what rights we may have. We know that all during the time of litigation the Navajos never stopped the same tactics they have employed all through the years. We lose every day while the Navajos use legal tactics to delay a final decision. We now ask the Congress to draw the line and direct the Department of Interior to help us protect the line. If the description drawn by the Interior Committee of the House last year is all that we can reasonably expect at your hands, please make it the law and for a very refreshing change, give some direction to the Department of Interior to protect the integrity of that line of demarcation.

The United States government has regarded me as a citizen when it was necessary to defend this country. I served in the Armed Forces of the United States and have had five tours of active duty in Vietnam. Other Hopis have served in a similar capacity. Why then are we not entitled to equal protection under the Constitution of this Country? If your homes are robbed, you call the police and

someone responds; but when we cry for help, no one hears the alarm. How many times can this great government turn its head and pretend that it just does not see? Historically our people are known for their peace-loving ways, but you have taught me how to fight. I still have one arm that I can use to fight in defending the rights of my people. Frankly, *we have had enough.* But we still want to think that this Country will respond to the cause of justice and right without violence.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., July 1, 1966.

To: Commissioner of Indian Affairs. Attn: E. R. Fryer, Assistant Commissioner.
From: Associate Solicitor, Indian Affairs.
Subject: Interest of Hopi Indians in area defined by Act of June 14, 1934, 48 Stat. 960.

By memorandum dated June 16, 1966, you referred to this office a letter dated June 11, 1966, to the Commissioner from Mr. John S. Boyden, Hopi Tribal Attorney. Your memorandum asks whether the Hopi Indians have an interest in the area defined by the Act of June 14, 1934, 48 Stat. 960, and, if so, the nature and extent of that interest.

The Act of June 14, 1934, in part provides:

"That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby defined as follows:

* * * * * * *

All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882."

It is beyond question that Hopi Indians resided in the area defined by the Act at the time of its passage. The history of the Act discloses beyond quibble that Congress recognized this fact and included the "other Indians" provision for the express purpose of protecting Hopi rights.

While it is clear that the Hopi have an interest in the area described in the 1934 Act, it is not possible for us to define the nature or extent of that interest.

Although we were not supplied with copies of Mr. Boyden's earlier letters to the Commissioner which are referred to in his letter of June 11, 1966, it appears that they expressed Hopi protests to recognition by this Department of certain grants of rights in lands in the area, particularly in the vicinity of Moencopi, made unilaterally by the Navajos. Apparently the Hopis have also protested certain encroachments by the Navajos on lands in the area traditionally used or occupied by the Hopis.

We are mindful of the serious problems faced by the Bureau in attempting to administer lands in which more than one group of Indians have real but undefined interests and wish we could be more helpful in delineating the respective rights of the tribes. It may well be that only the Congress has the power to definitively deal with the issue. But, pending authoritative resolution of the respective interests of the two tribes, it would seem essential that the area be administered in a way which takes account of the Hopi interest.

RICHMOND F. ALLAN,
Associate Solicitor Indian Affairs.

Senator ABOUREZK. Your next witness, Chairman Hamilton?

Mr. HAMILTON. The next witness is Mr. Donald Antone, chairman of the Intertribal Council of Arizona.

STATEMENT OF DONALD R. ANTONE, CHAIRMAN, INTERTRIBAL COUNCIL OF ARIZONA

Mr. ANTONE. Thank you, Senators, I will be real brief. I want to make this a point of record. I asked Chairman Hamilton if I couldn't be placed on the earlier part to state my case, because I was afraid

of exactly the same thing as happening now, will happen that you are going to limit the time.

I am somewhat disappointed with the hearings, that you are limiting both tribes to state their statements, because this situation is very dear to both tribes and I wish there were some way that you would give all tribes the opportunity to state, even though it may sound repetitious and may sound, maybe to you—to you it might sound that it was repeating some of the cases. But, to them, it is very dear.

Senator ABOUREZK. Let me, before you proceed, Mr. Antone, let me say I am very sorry about your disappointment. We did not want to do that to anybody. We wanted to make sure that both sides were fairly heard. Aside from offering equal time to each side, I do not know, really, what else we can do.

Because all of us here have demands on our time other than the hearings here today. I know how important the hearings are to each side to this dispute. I know each side wants to be heard, but I can assure you that the hearing record will contain every statement that is submitted to us today.

There will be thousands of copies printed and distributed. It will go to each member of the committee and each Member of Congress at the time, and whatever legislation it is that we propose will be debated on the floor.

And, the legislative assistants to each Senator no doubt will carefully go through the hearing record as they do in all major pieces of legislation, and they will advise their Senators exactly what the position is of both sides and I hope—we try to understand your position, and I hope you will try to understand our position, that we have a great deal of work to do, and as you might suspect, I am involved very deeply in the controversy up at Wounded Knee, and I have that to worry about myself—as a matter of fact, I want to state now that I intend to come back to Arizona on my own.

I know Senator Fannin is very familiar with the territory in Arizona and he has represented this State very ably for a very long time.

I intend to come back on my own and take a further look at the territory, the disputed area, before too long a time, and I want to wait until the weather gets better, so that I can do so.

But, I want to assure you of my concern about settling this dispute and hope that you understand that we have to put some kind of time limit on it, and we cannot stay here indefinitely to hear everybody, although we will make sure that everybody's statement is printed as submitted.

Mr. ANTONE. I don't envy your problem at Wounded Knee.

As is stated, my name is Donald Antone, chairman of the Intertribal Council of Arizona, representing 16 tribes of the State of Arizona, except for the Navajo nation.

The Intertribal Council of Arizona does not wish to, nor is it in a position to take sides between two tribes of Arizona Indians.

It seems to me, however, truly unfortunate, that this problem has been allowed to develop over the past 100-plus years without the leadership of our Government having sufficient strength to exercise its proper role as its trustee to these lands.

This problem could have been solved years ago, when it could have been treated with minor surgery.

Now the cancer is allowed to grow by the inaction and it appears it will require major surgery to correct the dispute.

The fact that this situation has not received the proper attention by the Federal Government is pointed out by the fact that a judgment handed down by a U.S. district court, and confirmed by the Supreme Court of the United States, has been ignored for 10 years, while both parties have continued to suffer the consequences.

Just over a year ago, the Intertribal Council of Arizona took the situation under study and unanimously passed a resolution expressing its feelings about it. Unfortunately, the situation has worsened, not improved, since the resolution was passed by the council.

I have a copy of the resolution and I do not want to read it at this point.

I am sure that Senator Fannin and all our Arizona congressional delegates have copies of that resolution and was passed and presented to the congressional delegates a year ago, and, however, if this committee wishes I could send a copy addressed to you, Mr. Chairman.

Senator ABOUREZK. We would like to have a copy of it and insert it in the record and have it printed.

Mr. ANTONE. I have a copy here, but it is not the original and not signed.

I have the original in my office and I could send that.

Senator ABOUREZK. You can submit the copy.

Mr. ANTONE. Fine, real good.

My only reason for being here, Mr. Chairman, is to say to the committee that the bill that Mr. Steiger had written and has pointed out some of the ways that it could be settled, we are, the intertribal council, eager and willing to help in anyway that we can to help settle this long dispute between the two tribes.

It was already stated by several of the people here that testified, I think, our efforts and their efforts could be geared toward other things, other than the dispute they have been having, in order to uplift their own economy so that their livelihood could be better and useful to themselves.

Thank you, Mr. Chairman.

Senator ABOUREZK. Thank you, Mr. Antone.

[The resolution referred to follows:]

RESOLUTION ADOPTED BY INTER-TRIBAL COUNCIL OF ARIZONA RELATIVE TO HOPI-NAVAJO LAND DISPUTE

Whereas There has been a long-standing, unresolved and bitter land dispute between the Navajo Indian Tribe and the Hopi Indian Tribe and

Whereas in 1962 a special three-man Federal Court legally settled portions of this dispute by stating that Land Management District Six belonged exclusively to the Hopi Tribe and that the remainder of the Executive Order Reservation of 1882 should be shared on an equal basis by the Hopi and the Navajo Tribes and

Whereas to this time the Hopi people through negotiation, and court efforts have been unable to remove any Navajo from the District Six area and have been unable to share in any of the balance of the 1882 Executive Order Reservation and

Whereas The United States Ninth Circuit Court of Appeals has directed the United States District Court to take the necessary steps to grant the Hopi their petition for an order of compliance or writ of assistance to enforce its rights as co-tenant and

Whereas we feel that it is inconceivable that the Hopi and the Navajo people could live peaceably side by side in an undivided section of "joint-use" land and

Whereas United States Representative Sam Steiger of Arizona has a bill H.R. 11128, which would divide and partition the "joint use" area between the two Tribes and make reasonable arrangements for the displaced Indians from both Tribes;

The members of the Inter-Tribal Council of Arizona Petition the congressional delegation of Arizona to give prompt support to responsible legislation that will quickly and fairly partition the lands in question, settle the peoples who are to be displaced into other areas among members of their own Tribe, and thus settle once and for all this long and bitter dispute.

s/_____
DONALD R. ANTONE, *Chairman.*

_____
WEST ANDERSON, *First Vice Chariman.*

_____
ADRIAN FISHER, *Second Vice Chairman.*

Your next witness, Chairman Hamilton?

Mr. HAMILTON. Our next witness is Ted Vaughn.

STATEMENT OF THEODORE M. VAUGHN, ENROLLED MEMBER OF THE YAVAPAI TRIBE

Mr. VAUGHN. Senator Abourezk, Senator Fannin, and members of the committee.

My name is Theodore M. Vaughn. I am an enrolled member of the Yavapai Tribe and an employee of the Bureau of Indian Affairs. I serve as an airplane pilot at the Hopi Indian Agency, Keams Canyon, Ariz., and have been employed in this capacity since June 28, 1972.

Part of my job requires that I make daily airplane reconnaissance flights along the perimeter of district 6 to observe and report to courtesy patrol any trespass activities of Navajo livestock. The courtesy patrols in turn warn trespass violators to withdraw their livestock from the area.

I think it is important that you hear about what is happening today with regard to Navajo treatment of their Hopi neighbors. The Navajos have said that all is well between them and the Hopis. This is not true. There is trouble even today and I see this every time I make a flight.

The Navajos have said that the trespass violations are merely accidental. This is also not true. Let me tell you what I see as I perform my job.

As I fly near the Navajo stockmen, I frequently see unfriendly gestures. On two occasions I have had firearms aimed at me. I don't know whether I have ever been fired upon but, of course, pointing a weapon at an aircraft is a Federal offense. And, it is not surprising that the Navajo trespassers are unhappy about our patrol because it definitely has had the effect of reducing their ability to trespass upon the Hopi land.

Their trespassing is intentional. During my early morning flights I see Navajos attempting to sneak their horses back across the district 6 line into the joint use area. On some occasions, when we double back at evening time, we find animals have been brought back into district 6.

About 10 days ago we caught a Navajo rustling a heifer out of

district 6. We kept him under surveillance, the Navajo left the heifer and headed back into the joint use area. I also noticed that when the Senate hearings were held last september, the frequency of trespass violations dropped significantly. This has also been true when VIP's have toured the area.

This leads me to believe even stronger that this trespass is intentional and that Navajo stockmen have been advised by someone. I commonly observed Navajo livestock one-half mile inside of district 6 and frequently much further. This means that along the entire perimeter of district 6 at least 72 square miles have been used by the Navajos unlawfully. That area totals nearly two full townships which the Navajos have grazed over.

On last Monday, March 5, 1973, I observed 50 head of cattle, 300 head of sheep, and 32 head of horses unlawfully grazing in district 6. This was not an unusual day as my log indicates.

When you fly over the area during the summer months, you can see that the joint use area is badly overgrazed. The Navajo livestock have left the area in very poor condition. They have made it nearly impossible for the Hopis to raise any livestock out there at this time.

In contrast, I have observed that the Hopi area inside district 6 is in much better condition. This is due to Hopi conservation practices. My observations are from the air, of course, and I do not have to personally endure the problems which the Hopi face. But, from what I have seen, it is clear to me that something should be done to contain the Navajo trespass. Mingling of Hopi and Navajo livestock is obviously unworkable. I hope my testimony has been helpful. I have mentioned only a few of my reports. The remainder of my reports are contained in this collection which I also submit for the record.

[The Hopi Indian Agency Air Patrol reports referred to were retained in the committee files.]

Senator ABOUREZK. All right, we will accept those reports.

How thick are they?

We will accept them and put them in the record.

Mr. VAUGHN. They date back to June.

Senator ABOUREZK. I am trying to find out how many pages it is.

Mr. VAUGHN. I don't know.

Senator ABOUREZK. Is that what you have in your hand?

Is that the extent of it?

Without objection, that will be accepted for the record.

[The material referred to was retained in the Committee files.]

Senator ABOUREZK. Your next witness?

Mr. HAMILTON. Viets Lomahaftewa, member of the Hopi Tribe, read in Hopi and translated by Emory Sekaquaptewa.

STATEMENT OF VIETS LOMAHAFTEWA, MEMBER OF THE HOPI TRIBE

My name is Viets Lomahaftewa. I am from the village of Shongopavi on the Hopi reservation. I speak words of truth on behalf of all people of good heart and who are known as a people of good intent.

I held the high priest's position in my priesthood society for 24 years. I still hold the one one high priest's position in Tewa Village. It is with this authority that I speak to you today.

I feel compelled to give this statement to you today for personal and traditional reasons.

My personal reason involves my grandfather Honanie, who is now dead. When I was younger, my grandfather told me this story: When he was a young boy, some Navajos kidnapped him, carrying him away to their hogans. Another Hopi boy, who later became chieftain at First Mesa was also carried away by the Navajos at that time.

The fathers of my grandfather went to these Navajos to ransom him. As a ransom, my grandfather's family gave up two cows with calves and one steer. In addition, his aunts prepared piki bread and gave up valuable buckskins and beads with jaclo.

When my grandfather told me this story he said that some day I should use this as evidence against the Navajos. Apparently, he knew from our traditions that one day it would come to this. I now submit this evidence to you.

Now, may I explain the traditional basis for my statement to you. To do this, I must refer to our traditional account of the emergence into this world.

It begins many, many years ago when all people lived together in the underworld. The people decided to seek sanctuary from the underworld because of the wickedness and evil existing there. When the people finally escaped, one who was wicked also escaped with them. The Indian people after seeing this person demonstrate certain powers permitted the evil one to stay with them. But the white brother who escaped with them opposed this idea. He wanted to force the evil one to go back to the underworld. But the evil one remained and the white brother separated from his brothers and went to the East. Before he left, he made a solemn and sacred convenant with the Hopi people that if this evil which was permitted to come among the people, ever caused throuble again, that the white brother would return from the direction of the rising sun to purify the people once again and remove the evil from the presence of the Hopi people.

Then the people remaining made preparation to begin their migrations and settlement of this land. Before they started out, they were given an opportunity to select the way of life they and their children would lead. A number of ears of corn were placed before them—each ear was of a different length. The longest ear represented a lifestyle that would give them the worldly pleasures of life.

This ear was chosen by the forebearers of the Navajos, who thus became heirs to the evil that was present among the people. It gave to them a destiny of roaming about as nomads with the benefits of the pleasures of the flesh, stealing, and in all ways to have material benefits in this world.

With this destiny, however, there was no promise for the hereafter. In accepting this long ear, the Navajos also accepted the destiny that one day they would pay the price of their lifestyle and be the instrument through which the removal of evil will begin. The long ear of corn has a good countenance but it does not possess qualities for long life.

The shortest ear was chosen by the Hopi. It gave to us a harder life, in accord with law and peace, and with a promise for life hereafter. We still use the short ear in our initiation ceremonies as a symbol of the heart of our being.

The time is now here when this ancient prophecy is to be fulfilled. It is now your solemn obligation as duly elected Senators to fulfill the covenant made by the white brother so long ago. It is now your sacred duty to restore us to our lands, over which we hold stewardship as a result of our choice of the lifestyle of the shortest ear. It is now time to remove this lawless influence from our lands and to purify our life once again.

This land is ours and has always been ours. We cannot abandon or forget this land. To do so would be to abandon our religions, faith and heritage and remove ourselves from our sacred shrines which make up our traditional boundary. When our Kachinas dance at the various times of the year, they tell us about our lands, our sacred mountains, springs, and other sacred places of their residence far beyond the boundaries now established by the white man.

From the pine ridge of the sacred mountain to the west, we bring Douglas fir boughs for ceremonial use. There also are eagles' nests where we gather young eagles at the proper religious seasons. We hunt large game for our sustenance, obtain medicinal herbs for our use, and gather stones for our kivas and minerals for ritual use. Today, as before, we also use this land to raise our livestock and to plant our fields and orchards. Now, the white man has established a boundary limiting the size of our lands. And, the Navajo seek to limit this area even more.

We are hopeful that you will now settle this problem and remove these Navajo from our lands. The land is our mother and we are her children, suckling at her breast. We have been pulled from our mother and we cry out for her—much as my grandfather cried out for his people so long ago. What ransom must we now pay?

Our elders have taught us as a part of our tradition that even when the evil ways of the Navajos are brought to light, they will continue to follow the lifestyle of the longest ear of corn. They will continue their depredations against the Hopi people. Even when he is down and on his back he will continue to resist and create problems for us. This is the destiny he has chosen.

For these reasons we believe that joint use of our lands and co-existence with the Navajos is not possible and is totally contrary to our age-old traditions. I call upon you to perform your sacred duty and restore to us what is ours. Settle this problem so that we may live in peace and enjoy all of our lands once again.

I want to take the pleasure in expressing my appreciation for your presence here, Mr. Chairman, and Senator Fannin. I will say briefly about the origin of our people.

At the emergence of our people from the undergrowth, the first encounter in making preparations to live on this land was to choose a way of life.

This choice was made by corn which was displayed before them. The Navajos chose the longest ear of corn, and it is our belief that this longer ear of corn demonstrates a lifestyle which would lust after the worldly pleasures, and it is this lifestyle which continues to be manifested in his present day affairs.

I have here a picture of my grandfather who was taken captive by the Navajo when he was very young.

He had to be ransomed in order to return back to his people. This

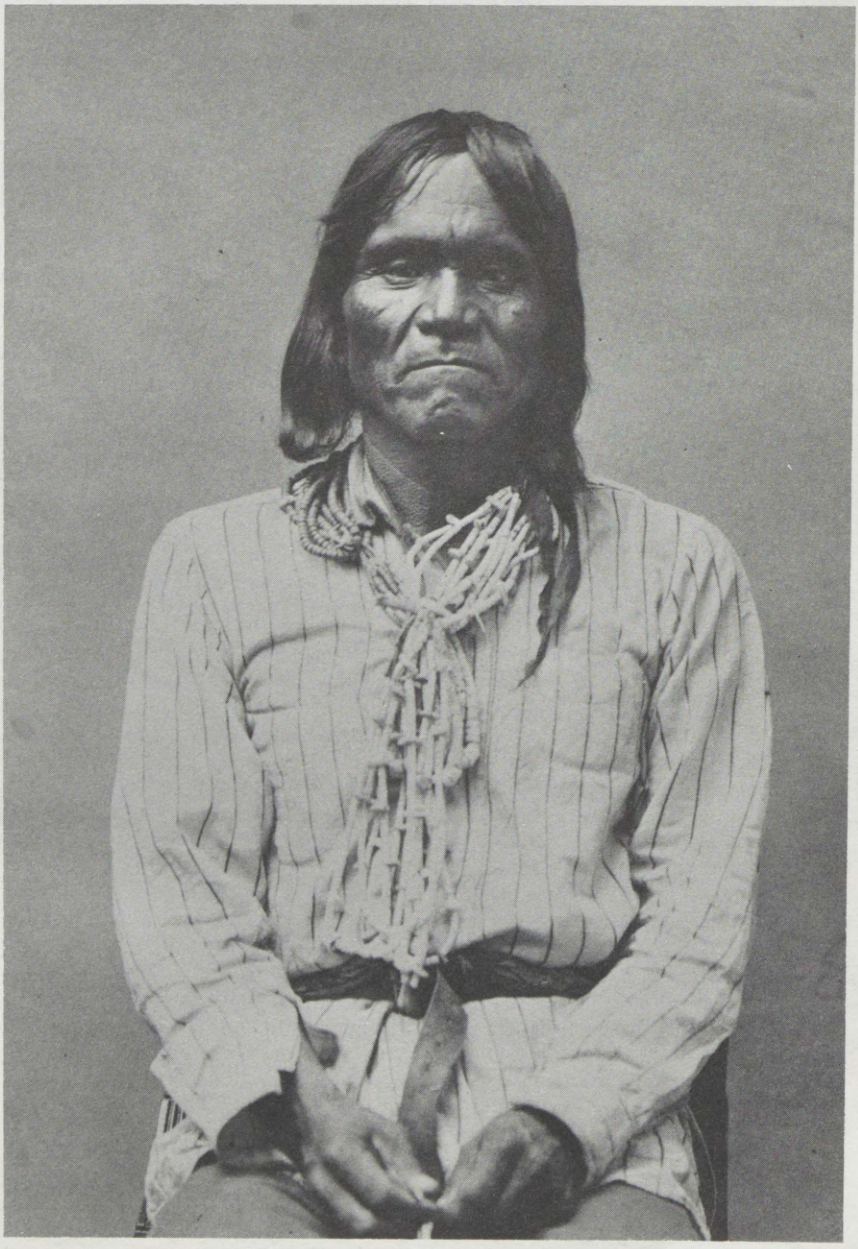
is a picture of another man. I would like also to submit these pictures for the record at this hearing.

Senator ABOUREZK. Thank you.

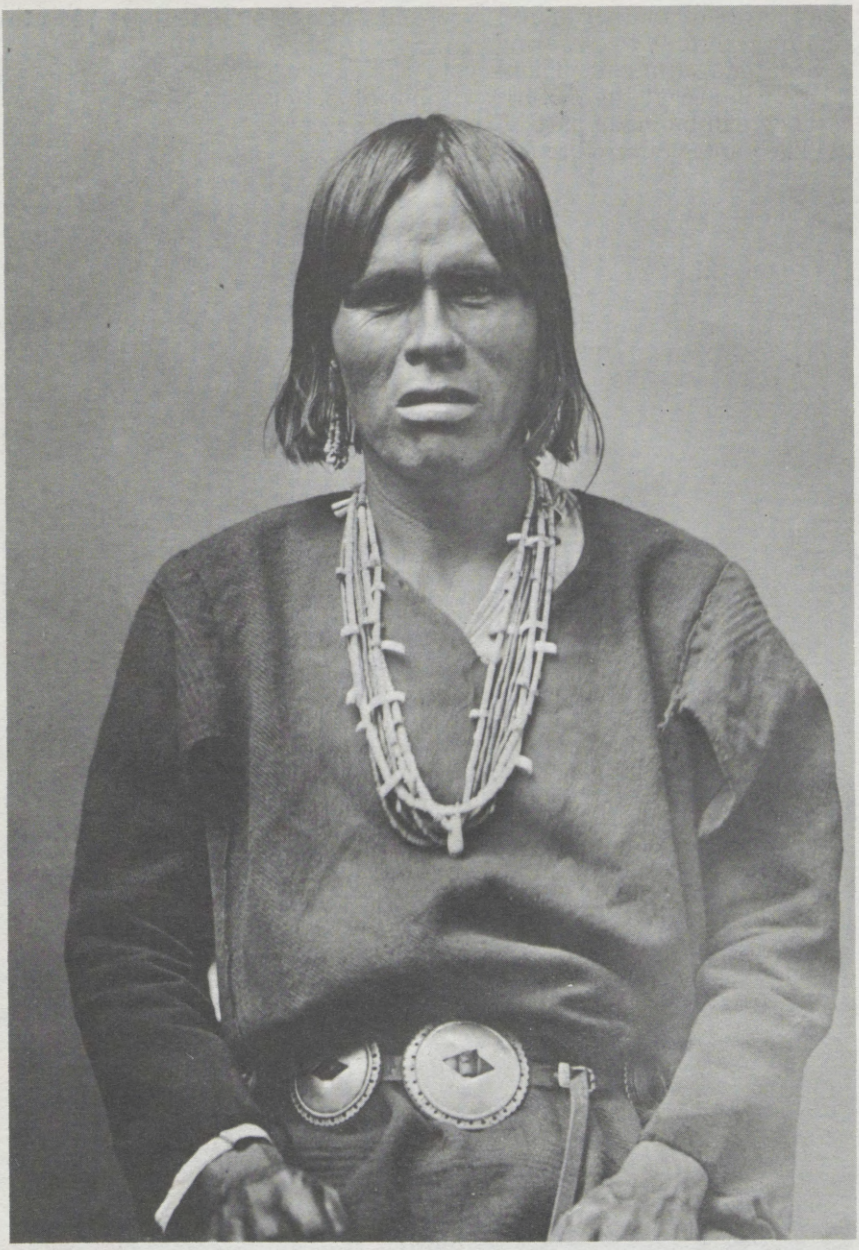
We will accept the pictures without objection.

They will be made part of the hearing record.

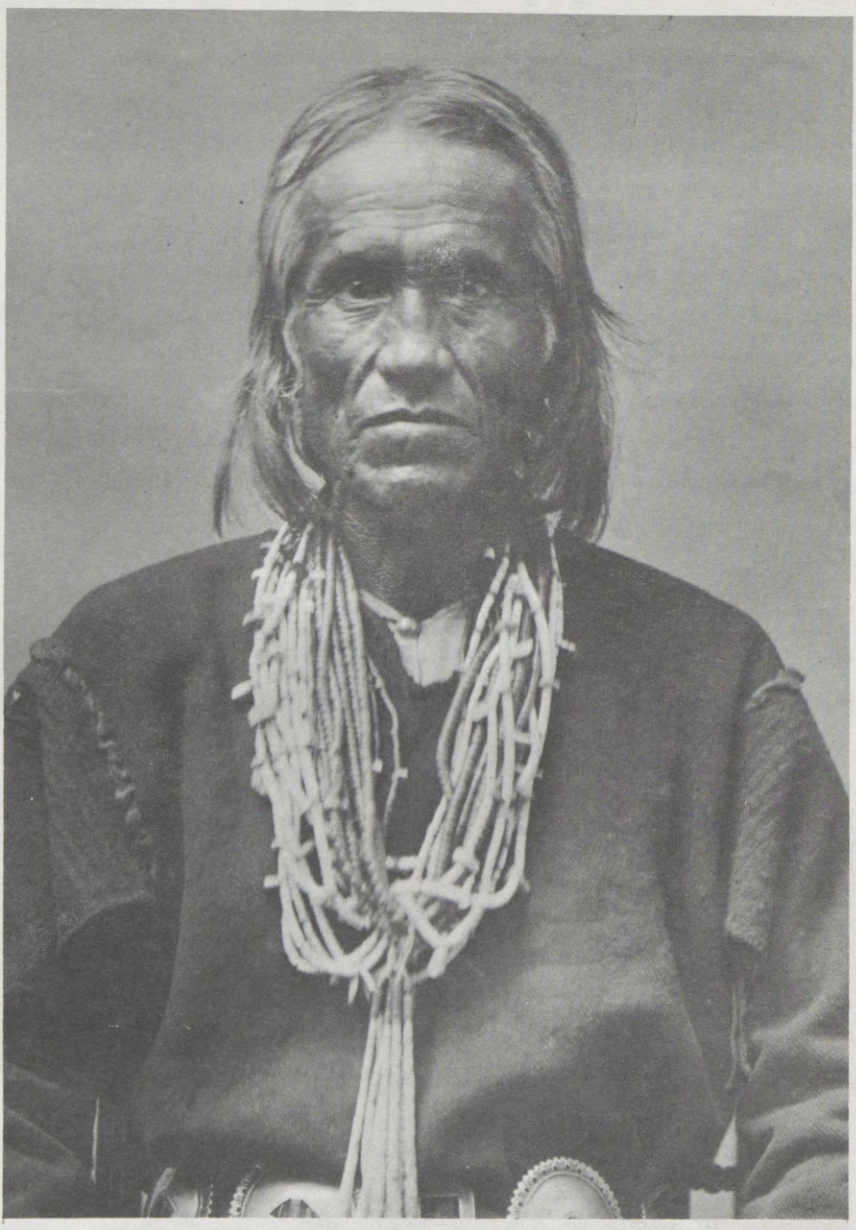
[The photos referred to follow:]



LOLOLOMA
of Oraibi, Arizona



HONANIE
A Hopi Indian from Shongopovi, grandfather.



SIMO
A Hopi delegate to

Senator ABOUREZK. Is that the end of your statement?

Chairman Hamilton, the two and a half hour time period for the Hopi side of the dispute has now expired.

Would you like to submit the other statements now at this time?

Mr. HAMILTON. Yes, I would.

Senator ABOUREZK. We will accept those without objection.

[The statements referred to follow:]

STATEMENT OF KIRKLAND POLACCA
BEFORE THE SENATE SUB-COMMITTEE ON
INDIAN AFFAIRS, WINSLOW, ARIZONA
MARCH 7-8, 1973

My name is Kirkland Polacca. I am a Tewa-Hopi Indian, Age 55 years old. Polacca, First Mesa was named for my grandfather. My father's name is Clyde Polacca who died in 1941, and was buried in the joint-use area. He established a home for us on upper Polacca valley approximately 4 or 5 miles south of Pinon on the highway 10 miles inside the joint-use area.

This building was put up in 1926. We the family lived there at that time. There weren't many navajos living in that area, infact, only three navajo families were living there. Leafty Long, another Preston and Tinnizzni ji si. These are the only three navajo families living there at that time. We used to have our sheep herd with their flock of sheep.

We would go to Polacca for a ceremonial or a dance upon our return we'd always miss something or our door and windows will be opened. Thins like food and farm tools would be missing. On one occassion we missed 40 chickens right in our back yard when we came out to Polacca for a night dance. The following day the chickens were gone.

When Paul Jones was the chairman of the navajo tribe, he came to the house one time when we were cultivating and had our horses hubbled there. He told me not to have my horse hubbled there cause he said that that was the navajo land and I told him that it was the land of our fathers and I could do what I pleased with my horses. When he threatened to bring the police over to the house, but he never did showed up after that. The navajos tore down all the barb wire fence around our field and pulled our fence posts up. When we did raise any crops they'd drive their sheep into ourt field and stole our crops. When I went to the Army in 1941, and my father died, 40 head of cattle were stolen and the navajos took over. We were never able to move back.

This is to the best of my knowledge and the facts that I can tell you.

STATEMENT OF
WALTER ALBERT, MOENCOPI, ARIZONA
BEFORE THE SENATE SUB-COMMITTEE ON
INDIAN AFFAIRS, WINSLOW, ARIZONA
MARCH 7 - 8, 1973

My name is Walter Albert. I am a Hopi Indian and I live in Moencopi, Arizona.

When I started to build my ranch house in the Dinnebito Area, which is across the wash from District 5 and 6, I had no idea that trouble with the Navajo people would start for me.

I started the foundation of my house and it was then that the Navajos around that area would come and encircle me. I, in the middle, while they threatened to whip me with their horsewhips in order to move me out of this area and also that they would round up my stock and move them. I tried to be calm and understanding but this kept on until my house was well on the way.

I wanted to settle with my cattle in this area because my great grandfather had his sheep where I am now. Since this is Hopi land I feared no one.

After I settled in this area and moved my cattle, the Navajos started to steal my cattle. One day I missed one and when I looked for the steer, I found the meat in seamless sacks hidden in a wash. Another steer was killed by the Navajos and the insides were buried in the ground and the bull dug it up so I also found that one. I tried to find out from the Navajos in that area if they knew who was killing off my cattle but the only answer I ever got from them was "Who-la", (I don't know). These Navajos seem to protect each other from their evildoings. They will stick together whether it is right or wrong.

My horse was stolen and I found out that a Navajo man had taken my horse from Dinnebito Area to south of Gray Mountain. I went after it and I gave the Navajo man time to deliver the horse or I would swear out a complaint. The horse was returned.

The Navajo boys would use my steers to practice bulldogging before the Flagstaff Pow Wow until I found out about it and threatened to haul them into court and that stopped them.

Last summer the Navajos who live north of my ranch house were chasing my horses and cattle with their pickup just to tire them out so they can drop dead. I approached the Navajos at their camp about this and these Navajos told me to go back to the Hopi side. They said where I am belonged to the Navajos. One of these boys was raised by a Hopi.

Also, I lost a heifer last summer and I kept looking for it almost a year. Then one day I came upon the heifer with a Navajo brand. The Navajo couple had stolen my brands and made the brands to be like theirs. Just day before yesterday, I came face to face with the Navajo woman who had helped with the branding of the heifer. She said she had no cattle and that the heifer was branded by mistake and she wanted me to take the heifer back. She said they had buried my brands at a corral. I had looked there before and dug around but didn't find any brands. So now she doesn't know where my brands are.

At one time I had found uranium in the area below my house. My wife and I went to Window Rock to get a prospector's permit because we were told that was the White Man's way.

In Window Rock we stayed all day and by 5 P.M. the Council was ready to adjourn, so one of the Navajo councilmen asked if they were going to hear us but they said, No, because we were Hopis. Then one man said, "Why don't we hear them? They are people like us." So we were heard, but they did not give us our permit because they said we were on the Navajo Reservation. Instead, they gave the uranium findings to a Navajo man named Hosteen Nez, now deceased. He and his boys made a wagon road to the bottom and hauled up the uranium ore. From what some Navajos told us, Mr. Nez and Mr. Ramon Hubbell, who was still alive at that time, did away with the ore.

Now it seems I am being attacked through my ranch house. A Navajo threw a huge rock at my door and I had to put in a new door. Some years before, my house was broken into and shoes, groceries and my brother's chaps were taken. We found the Navajo man who took these things, but he said he did not have the chaps then to give back to my brother.

How much more abuse should I take from these Navajos, who now claim to be my friends and yet perform such unfriendly acts toward me by trying to destroy what I have worked hard for all these years?

Then comes my farming land. This land I farm for my wife was made by my wife's father and uncle, and it was all brush land but when it was cleared it became fertile and produced a crop every year. For many years it was farmed by the father and uncle until it was turned over to my wife and mother-in-law. I farmed this land until up to about 10 years ago. Every year the Navajos living across from our farm would dig up our posts and use it for firewood. They would steal our crops. It might just as well

have been a Navajo field the way they helped themselves to our crops. When one approached them about stealing our crops, they would say this is "Navajo land" and then leave with a big victorious smile.

So I finally gave up the land across the wash. Now, the one on the west side of the wash. This farm belonged to my wife's family and since I was farming it for them, the Government put it in my name until one of my wife's younger brothers took it over. He farmed it for 3 years and then the Goldtooths moved in saying it belonged to them through a Navajo relative. But if this were so, the Navajo would have made the land, cleared it and made it suitable for farming, as it was my wife's father and uncle who had worked hard to make this land into farming land so it was not a Navajo who had made this farm. Now these Goldtooths have taken out all the posts, torn down the fence, and chopped all the fruit trees down. Where they put the posts and fence no one knows. They claim this is Navajo land so they take everything they want.

When the Navajo Civic Center in Tuba was being built, a Navajo man, Blackhair, ~~stole my~~ sold me one and three-forths cord of rocks at Cameron. ~~He had sold it to my before but he stole it and sold it to a Harry Smith. In turn, this man sold it to~~ Then Harry Smith, another Navajo stole the rocks and sold them to a Navajo who in turn to me a Jensen, ~~and he~~ sold it to the Civic Center so my rocks are part of the Tuba City Civic Center.

Three years ago a Navajo mechanic wanted to repair my International truck for the transmission I had so I let him take my truck to Tuba to his hogan. It was fixed up but he said the transmission was no good so he told me to get my truck home. In the meantime, he left for California to work and locked my truck key in his hogan, so I could not get the truck going. The truck also had no battery. While my truck was standing there the

Navajos stripped it completely so my truck is no longer workable. I asked the neighbors who stripped the truck and everyone says "Who-la".

I have a piece of land at Hotevilla bridge and ever since I have been farming there with my father-in-law, the Navajos who live across from the highway behind the hill, have been putting their sheep and cattle into my field when my corn is ready to be eaten. They do this every year and now they have decided they can break the lock on the door of our house and take whatever it is they want.

It is getting so I cannot own what I work hard for without a Navajo having to steal from me.

It is with great regret that I have come to the conclusion that the Hopi way and the Navajo way are so different that it would be unbearable for the Navajo and Hopi to live on this Hopi land together. As you can see, there is no way that a Navajo can correct his way of life; the stealing, raiding, lying and cheating, not only on the Hopis but other people as well.

The Government made a mistake by ignoring the encroachment of the Navajo on the Hopi land, now the Navajo has abused and destroyed our Hopi land. The land which the Creator gave to us "The Hopi". Now the Government must make their wrong right by removing the Navajos from the Hopi land and back to where ever they came from. We have suffered enough and the Government must make amends now to the Hopi people. This sacred land is the Hopi Land.

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STATEMENT OF HENRY TEWANEMA
BEFORE THE SENATE SUB-COMMITTEE ON
INDIAN AFFAIRS, WINSLOW, ARIZONA
MARCH 7 - 8, 1973

My name is Henry Tewanema. I am 67 years old and live at Hotevilla on the Hopi Reservation. I am a cattle owner and graze them both on the exclusive Hopi land and on the joint-use land.

I began in the livestock business about 1930 when I first owned sheep. Shortly thereafter, I moved with my sister and her family to the vicinity of No Trail Mesa where we now have a permanent place.

I have experienced problems of various kinds with Navajos since the thirties, as did my father, my brother and others. In those days, Navajos would come in the night and take sheep from the pens regularly. When we settled at No Trail Mesa, we also established a farm there and frequently Navajos would steal our crops. For example, one day while herding near the farm, I left the sheep to graze and went to check my field. Upon arriving there, I saw that someone had just taken some corn and dragged it away in a sack. I followed the tracks and soon caught up with a Navajo woman who was just pushing the sack of corn under the barbed wire fence encircling our farm. We had also constructed a tent using a regular tarpaulin just outside this fence about this time, to camp out in while tending the field. One day in our absence, the tent was taken down by Navajos and the tarp taken. Our farm is located a little more than a mile from the District 3 boundary. Several times we lost young colts to them, which were taken by them and eaten.

In the early forties, my brother-in-law traded me one cow and I began in the cow business. My brother-in-law helped me to look after my small herd until they reached about fourteen and then I began attending to them myself. Again, from my personal knowledge, we experienced problems with Navajos. One year we lost ten head before we brought them back from District 3 range into District 6. Navajos

would rope our calves and mutilate their earmarks, making it difficult to identify them at branding time.

When our herd increased, I have had not only range problems, but problems over rights to livestock watering places in District 3 in recent years. In 1969, during the critical summer shortage of stock water, we were driving our cattle to a charco located below the southern tip of Howell Mesa in District 3. Before we got there, a Navajo man by the name of Bahozhoni Begay intercepted us and attempted to prevent us from proceeding to the watering place. He told us there was no water, that we had no range rights in District 3, that it was Navajo range and that we had rights in only District 6 and should stay there. I have been confronted by this same man almost every year for the past several years, always being told by him to remove my cattle to District 6. He was chapter president of the Coal Mine Mesa Chapter in 1969 when we received work that our cattle had been impounded for "trespass" in District 3. (We later found out that they had corralled our cattle, counted them and then released them.) We met with the Coal Mine Mesa Chapter on September 18, 1969, at which time we were again told that we had no rights outside District 6. At that meeting, the chapter members voted to fence the District 3 and 6 common boundary and confine us to District 6. The chapter members were instructed by their tribal officials from Winsow Rock at that meeting to give us a few days to remove our cattle from joint-use land, and if we did not comply, to impound our cattle and sell them. Subsequently in 1971, the chapter members did construct the fence.

I have never driven Navajo cattle around on joint-use land, but Navajos persist in driving my cattle away from joint-use land where I have as much rights as Navajos. I instruct my young men to leave Navajo cattle alone, never to disturb them, or Navajo hogans. Yet one day two young Navajos on horseback attempted to turn my cattle and drive them back when I was taking them to water.

Joint use is possible only if people respect each others property. But the Navajos do not respect any law or the property of others. In my experience over forty years, they have not changed their character; therefore, I believe that true joint-use is not possible. The fact of the matter is, they are not on their land, but rather, are disturbing and denying the right of the Hopi to the free use and enjoyment of his own property, property which has belonged to the Hopi people since before your Magna Carta was signed. I have said these same things to Bureau of Indian Affairs personnel because they are prone to give in to Navajo pressure and have told me in official correspondence to "cooperate" by removing my cattle from joint-use land to District 6.

This land is our land, and I will not give it up, and will continue to walk on the face of it. Since the Navajo has not changed his character and will not change his ways, partition of the land is the only answer.

Senator ABOUREZK. At this time, before adjournment of the hearing, we have additional witnesses who do not wish to associate themselves with the Hopi Council structure and who wish to testify.

Those people will please come forward.

Is Major Johnson here to interpret?

Mr. BOYDEN. As counsel for the Hopi Indians, I believe this is entirely unfair unless we are given an opportunity to answer these people.

To have them come in and just present this sort of thing is just like giving the Navajos another turn.

It has a definite answer and they have a right to do it.

If they want to hear us out, I think we have a right to answer it.

Senator ABOUREZK. We would like to have order in the hearing room.

After a little bit of consultation with the other committee members and the staff, the committee will hear these people who are at the table and then we will adjourn the hearings.

We have duly noted, Mr. Boyden, your objection.

The ruling of the Chair is at this time we will hear these people and there will be no rejoinder.

Major Johnson, would you proceed?

STATEMENT OF MAJ. CALEB JOHNSON, CHAPLAIN, U.S. ARMY, OFFICIAL INTERPRETER OF HOPI TRADITIONAL CHIEFS

Major JOHNSON. Thank you very much.

This statement is being presented on behalf of the following Hopi sovereign, autonomous villages, Old Oraibi, Shungopovi, and Mushongnovi and it is our belief that it also reflects the position of all the Hopi traditional villages and people. The old Oraibi Village chief, Mrs. Mina Lanza and the official representatives of the other two village chiefs are here to answer any questions that you may have.

My name is Maj. Caleb H. Johnson, chaplain, U.S. Army, and I am one of the official interpreters of these Hopi traditional chiefs.

[The transcript of a hearing held at Old Oaribi village, Ariz. on March 8, 1973 is in the appendix.]

The Steiger bill has created a great deal of concern among the traditional Hopi people. We are therefore most grateful that you, the honorable Senators, hvae taken this time out from your busy schedule to come to our country and listen to the voice of the Hopi traditional people.

We certainly appreciate this and our respect for your widsom has increased because of this action on the part of the Senate, whom you represent.

The Steiger bill with its provisions for dividing the joint use area within the Executive order reservation of 1882 is not a just nor a workable solution to the land needs of the Hopi and the Navajo people.

The Hopi traditional land area is clearly delineated by sacred, established shrines. The Steiger bill will divide a small portion of this Hopi land area and it is our religious belief that we will not approve any reduction of land within the Hopi traditional land area.

Therefore, we will not accept any solution which will reduce our

Hopi land area in any form or manner. The Steiger bill intends to do just that.

Thus, this Steiger bill and its provisions are not acceptable to us, the traditional Hopi people.

As far as the Navajo people are concerned, it is our position that they be allowed to remain within the Hopi traditional land area as long as they do not disturb the tranquility of the Hopi people. If in the future, should the Navajo people disturb the tranquility of the Hopi people, then it is our position that the Federal Government remove them to their traditional land areas.

The Steiger bill is a very unfortunate piece of legislation because it will, if enacted, have drastic and unfortunate consequences. It will create a grave injustice to those Navajo people who have Hopi blood in them and who presently live within the area which the Steiger bill intends to divide.

The Navajo and the Hopi people have lived side by side for generations and our roots are deep within the land on which we live.

It seems to us that a better solution would be for the Congress to exercise its combined wisdom and refrain from interfering into the domestic relationship of the Navajo and Hopi people.

The day is long past, it seems to us, that the white man should try to impose its own solutions to our domestic so-called problems.

The Hopi traditional people do not see this as a problem. It is the Hopi Council who have created this so-called problem among the Navajo and the Hopi people. It is they and their servants who have been impounding the sheep of the Navajo people. It is they who have painted such distorted pictures of the Navajo people in the press. It is they who are trying to divide the traditional Hopi land area and reduce it for their own reasons.

We the Hopi traditional people do not support these unfortunate measures of the council and we wish to make it absolutely clear that we will not bear any responsibility for any consequences which may result from such ruthless behavior.

In fact, we want to suggest to the council that they cease forthwith from their irresponsible behavior toward our Navajo neighbors. For, that is not the way to make friends nor to influence people.

In conclusion, we wish, to once again, express our combined appreciation to you, the Senators of the United States, who have come from such a distant place to visit and listen to our words today.

We pray that what you have heard from us may influence you to a just and a honorable decision.

Thank you.

Senator ABOUREZK. Thank you.

I have one question, Major.

Major JOHNSON. Yes, sir.

Senator ABOUREZK. Would you ask the two witnesses how many people support their position by percentage?

What percent of the Hopi people support their position?

Major JOHNSON. The two religious chiefs feel that very few of the Hopi tribe support the traditional position.

Senator ABOUREZK. My question then is, why have they not been able to decide that within the tribal government structure if they have that much support?

It seems to me they would be able to control the tribal government if they have that much support.

Major JOHNSON. Sir, let me explain it this way.

The traditional Hopi people are reluctant, because they do not know the ways of the democratic process of government, to participate in this form of government.

Therefore, they express their opinions and their decisions by not participating.

And, of course, the American democratic process maintains that if you do not participate, then you have approved of the particular position.

But this is not the Hopi traditional way.

Senator ABOUREZK. Do these traditionalists approve what the Congress is coming here to do, by coming here and participating?

Major JOHNSON. They have great respect for the Congress of the United States.

So, they have come here to present their particular viewpoint and then they will of course abide by whatever decision the Congress of United States makes.

Because as you know, we are decent, honorable citizens of this land that we have.

Senator ABOUREZK. Thank you.

Senator Fannin?

Senator FANNIN. No questions.

Senator ABOUREZK. Thank you very much for your testimony.

The hearings are adjourned.

(Whereupon, at 5:05 p.m., the hearing was concluded.)

[The statements by witnesses who were unable to testify due to the time limitation follow:]

STATEMENT OF LAWRENCE LOMATSKA
BEFORE THE SENATE SUB-COMMITTEE ON
INDIAN AFFAIRS, WINSLOW, ARIZONA
MARCH 7-8, 1973

My name is Lawrence Lomatska. I live at Hotevilla on the Hopi Reservation and I am user of the joint-use land. I began working sheep long before I owned my own flock. In 1935, my father turned his flock over to me and I came into my own. Before that, one year we had gone to Sand Springs to dip sheep which we had done for a number of years. This was about 1932. Sand Springs is located in what is now called joint-use land. On this particular occasion, I discovered after our arrival there that one of our sheep had been taken and put in one of the holding pens with Navajo sheep, so I caught the animal and put it back with our own flock. I was challenged by a Navajo and we struggled over the sheep, then a fight broke out when other Navajos came to his assistance and my brother-in-law and nephews came to my aid. This incident is only one illustration of many others whereby Navajos have taken issue with Hopis over property actually belonging to Hopis and not Navajos.

In following years, I personally experienced other problems. After the livestock reduction program was completed in the early forties, I sold my sheep and took another job to make a living. About that time, I first acquired some cattle. One day I penned some Navajo horses that had gotten into our field when I was working there. Several days later, I was accosted by a Navajo while I was out on horseback looking for cattle. This man apparently owned the horses I had penned up, and had trailed me for some distance before overtaking me. He came up abreast of me and grabbed my bridle reins, obviously to assault me. I immediately dismounted and started around my horse and reached for his leg when he wheeled and took off.

Another time, while herding sheep, I went to gather our horses which I had earlier observed grazing on open range. When I arrived at the place where I had seen the horses, I found one missing and after tracking, I found that it had been driven away. I followed the tracks on horseback later that day and found my horse tied outside a Navajo hogan with saddle on. It had been taken by them.

For the past several years now, my cattle have been driven from joint-owned lands back into District 6 several times by Navajos. My brother and my nephews have caught them several times in the act but the Navajos have continued to do so, saying that we have no rights on joint-owned land.

Just last summer, when I was in an area south of Howell Mesa in joint-use land rounding up cattle, I encountered a Navajo who was looking for his stray cattle. During my encounter with him he told me that they would have to kill us in order to stop us from using joint-owned land, saying that it would be easy since there were a lot of them and there were few Hopis. He was just trying to intimidate me, I know. However he was serious when he told me that we were using "their" water and should go back where we belong and use our own water.

I don't intend to pull back because as I told this man, we have rights out there. They accuse the Hopis of wanting land that they (the Hopis) are not using. How are Hopis going to use the land when everytime they attempt to use it, they are pushed back by overwhelming numbers of Navajos who deny them the use of the land, many times by force and coercion. The Hopi must have land that he can call his own.

STATEMENT OF HARRY PIESTEWA
BEFORE THE SENATE SUB-COMMITTEE
ON INDIAN AFFAIRS, Winslow, Arizona
MARCH 7 - 8, 1973

My name is Harry Piestewa. I am a member of the Hopi Tribe and live in the village of Moencopi near Tuba City, Arizona.

My testimony before you here today will be about the small settlement of Mao-Yavi, or Monave as it is called today. Monave is located about eight miles west of Tuba City, Arizona in the 1934 Reservation.

This was a Hopi settlement with Hopi rock houses, garden plots, and fruit orchards and as a young boy I helped my uncle, Earl Numkena transplant fruit trees in his orchard located there.

The Navajos literally took away this homestead from my uncle some years ago with the backing of the Tuba City BIA Superintendent Runke. Navajos now use the Hopi homes, use the garden plots, and keep the harvests from these same fruit trees which I helped to plant. My uncle was made to take some c cattle against his will as payment. About a fortnight later, the cattle were rustled by the Navajos.

This is only one of the many injustices done to the Hopi by the Navajo, and the federal government only sits back and will not protect our interests.

These injustices will continue if this land is not partitioned between the two tribes. Partition is the only solution and only the Congress of the United States can do it. If this is not done now, ten years from now the Hopi will not have any lands to call his own. Help us, we ask of you.

STATEMENT OF JUSTIN SANDERSON
BEFORE THE SENATE SUB-COMMITTEE
ON INDIAN AFFAIRS - Winslow, Az
MARCH 7 - 8, 1973

My name is Justin Sanderson, I am a Pima Indian married to a member of the Hopi Tribe.

In 1935, I moved eighty seven head of cattle into the joint use area in the vicinity of the Holbrook-Window Rock junction on Arizona State Highway 264 and lived in a tent until 1936 when I built a Hopi rock house.

I maintained this home and my herd in this area until after the "Reduction Program". I could not make a living with the cattle that remained after the "Reduction" so I left my livestock in the care of a Navajo and moved into Flagstaff, Arizona to work.

Navajos began to steal my livestock and on numerous occasions broke into my house. Many times, I came back to the reservation to repair my house. Finally, everything was hauled away by the Navajos and I had to sell my livestock.

Justin Sanderson

STATEMENT OF TITUS LAMSON
BEFORE THE SENATE SUB-COMMITTEE
ON INDIAN AFFAIRS-WINSLOW ARIZONA
MARCH 7-8, 1973

My name is Titus Lamson, I am 74 years old and a member of the Hopi Tribe from the village of Hotevilla, Arizona. I also maintain a home one-quarter mile from the 1882 joint use area on the north western perimeter of District Six one mile west of the Dennebito bridge.

My traditional and cultural teachings by my elders has taught me to honor our supreme creator and to live in harmony with my environment. This I have practiced throughout my humble life.

I am a farmer by trade, and before I retired from my various occupations I purchased the necessary tools and machinery to carry on my farming activities in preparation for the day I would return to my homeland in District 6 and the joint use area.

In 1960, I cleared and planted fields in the 1882 joint use area one quarter mile north of Arizona State Highway 264, one mile north west of my farm house.

Each planting season since 1960 I planted corn, beans, watermelon and other crops in my fields and each year Navajos living in the area herded their flocks of sheep and goats intentionally into my fields to destroy my crops. I submit photographs to support my testimony for the record.

Just last July, my Navajo neighbors, Grover Williams and his wife, threatened me with bodily harm if I did not leave my fields in the joint use area.

My Navajo neighbors have torn down my fences and fence posts, taken the new barbed wire, took my railroad ties which I planned to use as fence posts. My culvert pipe was taken, and farm machinery was stolen from my fields.

In December 1972, a house trailer was moved by the Navajos to within 200 yards of my northern most field where I planted sweet corn. I cannot any longer plant my crops in this field for fear of bodily harm. This field was fenced, but today, the western perimeter fence has been torn down to be used as fire wood by the Navajos living in the trailer house.

To make matters even worse, last summer, when I was returning from my fields in the joint use area to District Six a government vehicle sideswiped me. When I was forced to stop I saw four Navajo men in the vehicle. Two of these men jumped out of the panel truck and grabbed me by both shoulders threatening me to stay out of Navajo country (Joint-Use Area).

After pushing me around, the Navajos proceeded westward on Highway 264 toward Tuba City. This incident happened after the trespass program was initiated by the Hopi Tribe and I believe these men to be members of the Navajo Courtesy or Livestock Patrols.
I come before you today to ask that you protect our interests, and to ask you to restore to the Hopi what lands are rightfully theirs.

Titus Lamson
Member, Hopi Tribe

STATEMENT OF THORTON MAHO,
HOPI TRIBAL MEMBER
BEFORE THE SENATE SUB-COMMITTEE ON
INDIAN AFFAIRS, WINSLOW, ARIZONA
MARCH 7 - 8, 1973

My name is Thorton Maho. I am 67 years old. I live in the village of Polocca which is within District 6.

All my life I have been a rancher. I run my cows in both District 6 and also in the Joint'Use Area north of Keams Canyon. My father and my grandfather before me also raised livestock in this same area.

I have come to testify about the one thing I know best about this dispute -- violence. The Navajos have said that we have made up this violence, that it does not exist. I know the Navajos are not telling the truth. I know this firsthand because I have seen and experienced Navajo violence.

Before I was 20 years old, we had little trouble raising our livestock in what is now the Joint-Use Area. But about 1925 our troubles began. In that year four Navajo men, two of which were at one time Council members for the Navajo Tribe, told me that Hopis could no longer raise livestock in what is now the Joint-Use Area. Rather than face a fight, we tried to cooperate with these Navajos.

As long as we kept our livestock inside District 6, we had no serious troubles until about 20 years ago. At that time our dwelling was burned by the Navajos.

Some years after that, Navajos stole a calf from my little herd and killed it.

In 1964, the Navajos crippled my registered bull. In 1967 the Navajos shot and killed another registered bull.

In 1970 the Navajos roped one of my cows and broke its leg. I was forced to butcher it.

In 1971 there were more cases of roping and dragging of my cattle.

Last year, the Navajos burned my ranch house. They burned my corral and stole wood from me. They shot holes in my water tank during the bad drought. They destroyed my old house trailer. They stole six calves from me and they took my only riding horse.

You can see that this situation gets worse and worse each year. It seems that the more the Navajos get away with, the more they take.

These Navajo people doing these things are supposed to be my neighbors. We have never done anything to hurt them. All we have done is to try to use our part of the Joint-Use Area.

The last time I testified before the Senate Committee, I brought pictures of the damage caused by these Navajos. I now want to personally invite you to visit my old ranch house. I want you to see for yourself what the Navajos have done to me.

I want you to see the burned ranch house. I want you to put your fingers through the holes in my water tank. Then you will know that something must be done to stop this violence.

We Hopi people have lived on this land longer than anyone has lived anywhere in this country. We love this land. It has been in our blood for 25 generations or more. We cannot live side-by-side with this lawlessness. It is not our way to fight and steal as the Navajos do.

My brother's family and I need the land in the Joint-Use Area to raise our cattle to provide for our families. Apart from Social Security which I have been receiving for two years, we have no other way to earn our living.

I want to return to my ranch land and rebuild my house. I would like to do this without the fear of more violence and destruction.

If this partition bill passes, I will be able to live there once again as we did in those happy years of yesterday. If this bill passes, the Navajos will no longer be able to ruin our beautiful grassland by having too many sheep come into the District 6 and eat the food growing there.

We will be able to restore this land to the way it used to be.

I hope for this day to come. I hope it comes before my eyes grow dim. I hope it comes before my legs grow too weak so that again I will be able to walk through the tall green grass as I did when I was a boy. I hope it comes now while I can enjoy it with the little Hopi children, who now only hear stories about the past.

We ask you, Senators, to return to us what is ours. Stop this violence and help us to live in peace and happiness once more.

When you see the ruins of my home, you will know this must be done.


BRANCH OF LAND OPERATIONS-BIA
610-72-101


BRANCH OF LAND OPERATIONS-BIA
610-72-102


BRANCH OF LAND OPERATIONS
610 TT 106


BRANCH OF LAND OPERATIONS
610 TT 105











APPENDIX

(Under authority previously granted, the following statements and communications were ordered printed:)

NAVAJO GOSPEL MISSION, INC.,
Oraibi, Ariz., *March 6, 1973.*

Senator PAUL FANNIN AND
MEMBERS OF THE CONGRESSIONAL COMMITTEE
Winslow, Ariz.

DEAR SIRS: We of the Navajo Gospel Mission have worked with the Navajo people of this vast area for the past 42 years. We are located 15 miles north of Oraibi, right in the heart of the "joint use" area. We are very much concerned about this whole land matter, for it affects all of the people that we have ministered to for these many years.

I have read and heard it stated that the "joint use" land only affects a few hundred Navajos. I trust that the committee has come to grips with the fact that it affects many more than that. Estimates are that some 6,500 to 10,000 will be affected. This we feel is fact, for we know the numbers that we have ministered to and work with. There are families in our area who have lived in this same area for four generations. This would put them here when this land was arbitrarily given to the Hopis back in 1882. The one who granted the land paid no attention to who was then living here. Now it seems strange that these have to be pushed from their homeland by a people who will not use it for residency. When you make the tour of the area, I trust this will be made clear to you.

Most of our people have made great improvements. Houses have sprung up, all over the area. Even in the inaccessible back areas nice homes exist. The people are still sheepherding people not, generally speaking, farmers. If they are uprooted and flocks taken from them, what will be their future lot? They will probably have to go on welfare. Will the State of Arizona have to take on this responsibility? Also, how will the funds be provided to move this 6,500 to 10,000 people, and to reimburse them for their improvements?

We are the only Protestant Mission in this vast area. We have a day and boarding school facility for the Navajos, a clinic, a shop, and supply them with water, as well as a church center. We have just recently installed a $23,000 sewer lagoon at the request of the U.S. Public Health Service. We had plans for a new school facility, but have not proceeded due to the land dispute.

There have been virtually no public improvements in this total area. No one will act to give the people lights, water, roads, etc. We have no public schools in the area. All are tabled waiting for the settlement of the land dispute.

I wonder if people realize what might happen if a bill goes through that will drive folks from their homes and force them to give up their livelihood. It has been stated by many Navajos that they will not leave their homes. They will fight before that will happen. Bloodshed will possibly result if there is not an agreeable solution to the problem sought and found.

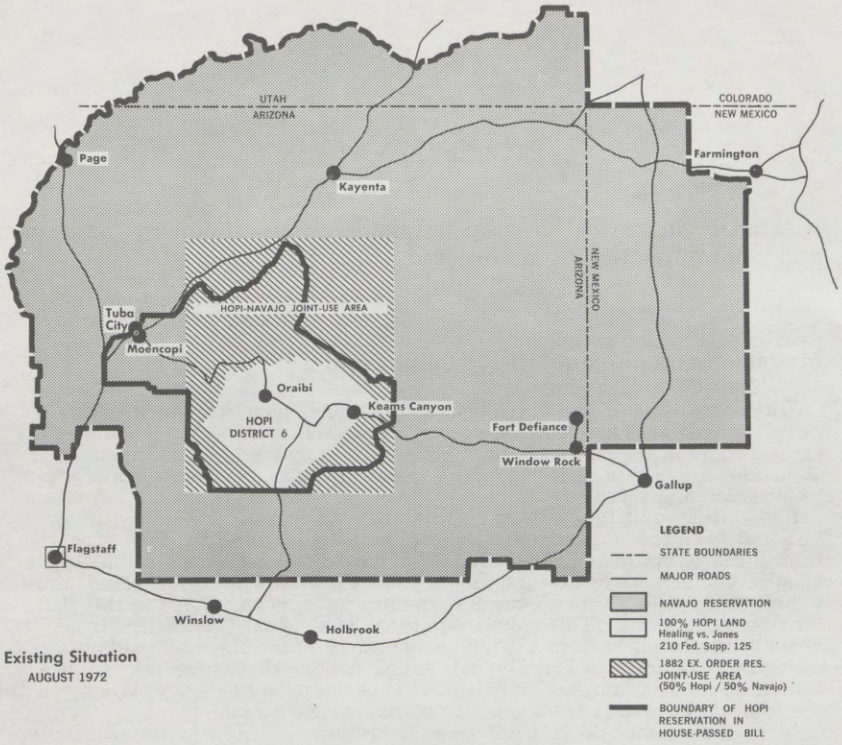
We know personally some of the people who live along the present boundary. Some of the harassment that has been going on has not been pleasant, nor has the news media given it a true picture. The tactics used by range riders, etc., have not been the best. Some of these folks could say lots if given the chance.

I personally have lived here and worked with the Navajo people for 19 years, as well as being raised as a boy among them some 80 miles to the east. I have many Hopi friends as well as Navajo. I do not feel that the majority of the Hopis go along with the present pressures nor conflicts.

May you seek under the sight of God a just solution to the problem with the honest interest of all involved.

Sincerely yours,

CARLTON J. LUCAS,
Field Director.



Existing Situation
AUGUST 1972

Official transcription and translation from a tape taken at Old Oraibi village, Oraibi, Arizona on 8 March 1973 when Senator Fannin visited Chief Mina Lansa as a part of the field hearings of the special Senate Subcommittee .

Translator is Chaplain(MAJ) Caleb H. Johnson.

Senator Fannin:
You say that you were speaking for her yesterday at the hearings in Winslow, that covers your feelings as I understand them, but if you have anything that you would like to add to his testimony, we will be very pleased to hear about them.

Chief Mina Lansa:
It is correct that I have heard about the possibility of the Navajos and the Hopis coming together to discuss this land. At least, that is what the Council has been talking about.

Senator Fannin:
How many people does she feel that she represents?

Chief Mina Lansa:
I speak mainly for my people in this village and generally, for all the traditional people, but each traditional village has its own chief. My colleagues, these other village chiefs, should be here shortly and they then will be able to speak for their people in their villages.

Senator Fannin:
How many people are involved?

Chief Mina Lansa:
I would not know precisely how many are in my village.

Mr. John Lansa:
Our records indicate 142 residences but, of course, not all of them remain here. Some of them are at work in other areas.

Senator Fannin:
It is my understanding that she has been elected by these 142 involved?

Chief Mina Lansa:
We, the traditional people, do not determine our form of government in the White Man's way. Within our practice, it is our Clan membership which determines who shall suceed to the position of a chief of a village. Our father was a member of the Bear Clan and it is the Bear Clan which is the Chieftain Clan in this village.

Senator Fannin:
That is what I am trying to determine. In what way does she govern the village. Does she have control of the village: Does she maintain law and order: What are her functions?

Chief Mina Lansa:
Yes, the Chief has all these prerogatives, to include people and land. All these, she holds in her hands.

Senator Fannin:
What I am trying to determine is how does she enters into the education program?

Chief Mina Lansa:
In the past, when the Federal Government first determined that we should attend school, it was our parents who gave their consent and then we went to school. This then was a matter to be decided by our parents. After all, we were their children and if they wanted us to attend school, it was they who put us into a Government school. This was thus up to either our father or mother.

Senator Fannin:
As far as the economic situation, what is her position?

Chief Mina Lansa:
My people farm on land which is their clan land. This is normal traditional Hopi practice.

Senator Fannin:
Would she have information regarding how many of her people are on welfare?

Chief Mina Lansa:
It is my understanding that just about all of my people are on welfare. I am aware of only a few individuals who are not receiving welfare. It was our father's recommendation that we do not participate in the welfare program.

Senator Fannin:
Is there anything further that she wants to add to her statement?

Chief Mina Lansa:
Yes there is. When I was in Washington last year to testify against the Steiger bill, I was asked by the Subcommittee if we, traditional chiefs, wanted to get the Navajos out of our land. I said, no. I told them that I am not going to be doing that.

We, the traditional chiefs, do not have this as a part of our desire, nor is it a part of our traditions. We, the Hopi traditional chiefs, embrace all of life which includes all people of the land and all living creatures who walk the land. We are the protectors of all living things. All the animals, all the living creatures are our friends and pets. We have this sacred responsibility and obligation because, we, the Hopi people, were the first to set our foot on this continent. No other people have set their foot print before our foot print. We are the first people on this continent and therefore we have this sacred responsibility and obligation. We embrace all within our arms.

Staff Member of the Senate Subcommittee:
How far back does this village date?

Chief Mina Lansa:
It would be impossible for me to know that.

Rev. Fred A. Johnson:
Let me answer that. Nobody will know exactly how old this old village is. This is the oldest inhabited village in the United States. According to our traditional elders, this village has been rebuilt three times. The first one is gone. The second one is gone and now this is the third one that is going down. So nobody will be able to tell exactly how long the traditional chiefs have been ruling this Hopi Nations.

Senator Fannin:
To your knowledge, how long back do they feel or do they estimate.

Rev. Fred A. Johnson:
According to some of the traditional leaders, this village has been established way before the time of Jesus Christ's birth in Bethlehem.

Staff Member of the Senate Subcommittee:
Chaplain Johnson, would you ask her to comment on what all the Hopis are saying about the problems they are having with the Navajos and what she thinks about that? We do have a lot of Hopis who are saying that they do have a problem. What does she know about the problem and what does she suggest should be done to prevent them?

Chief Mina Lansa:
According to my traditions, it is not we, the Hopis, who are to solve this problem. It is our understanding that the Washington Government has this basic responsibility, that is, to look after us and our Hopi interests. It is our understanding that it is also the Government's responsibility to look after the Navajos so that they will not invade our land, but this, the Government did not do. Our traditions also tell us that the White Man came to us so that he will protect us but again, this he has not done.

Staff Member to the Senate Subcommitte:
So she says that she wants us to solve the problem but she does not want us to remove them from the land. Is that it?

Senator Fannin:
As I understand it, she is not aware of the problems that exist because they do not exist in this area. Is that correct?

Chief Mina Lansa:
No, that is not correct. I am deeply aware of the problems. Even historically, this was a problem. Today, the Navajos are all over our land but only a few Hopis are in conflict with them. These are mainly those Hopis who have cattle.

Staff Member to the Senate Subcommittee:
Does she leave the village?

Senator Fannin:
How much time does she spends away from the village, if any?

Chief Mina Lansa:
I generally leave the village when I am asked to go somewhere and then, of course, we visit with one another.

Question from a Hopi:
Senator, I would like to ask you a question. What do you mean by leaving?

Senator Fannin:
Well, I wonder if she did travel around the reservation; if she is aware of what is happening in other areas of the reservation?

Translation to Chief Mina Lansa:
The Senator has asked: have you gone to the areas of conflict and have you inspected them in person, that is, the conflicts that some Hopis say they are having with the Navajos?

Chief Mina Lansa:
No.

Senator Fannin:
Well, thank you very much. We appreciate having this opportunity to visit with you.

I bear witness to the fact that this is a true transcription and translation from a tape which I took at Old Oraibi, Arizona on 8 March 1973.
Signed, 12 March 1973, Ft. Bliss, El Paso, TX.

Caleb H. Johnson
Chaplain(MAJ)USA

Subscribed and sworn to before me this 12 day of mar 1973
Mildred J. Parker
Notary Public, El Paso County, Tx

MILDRED J. PARKER, Notary Public
in and for the County of El Paso, Texas
My Commission Expires June 1, 1973

THE NAVAJO TRIBE,
WINDOW ROCK, NAVAJO NATION, ARIZ.,
March 7, 1973.

Hon. JAMES ABOUREZK,
Hon. PAUL FANNIN,
Subcommittee on Indian Affairs,
U.S. Senate,
Washington, D.C.

DEAR SENATORS ABOUREZK AND FANNIN: I am writing you this letter as a Councilman representing the Cameron Area and, more importantly, as a Navajo on behalf of all the Navajo people. These thoughts are those which are shared by all of us.

Our rights and responsibilities as taught by our elders have been relayed from generation to generation among the Navajo people for centuries in the past until the present.

We call the Earth our mother (Mother Earth). Since the earth is mother to the Indian, the color of our skin is the color of the earth.

Our Indian people lived with the wilderness in the past long before any other people came to America.

Our people survived all difficulties and continue to endure the problems, drought, human misery, disease, troubled minds, violence, damage, poor condition of the land, because there are many sacred places in the area within the four sacred mountains where our people could go and pray for cures and betterment for the future ahead of them.

Because our elders, whose words guide us from the past, are not here today to inform you of our ways and beliefs, it is up to us, their children to relay their message to you all. They have said that you cannot evict people from their land and homes, nor can you exchange their land for any other land. Neither is it possible to sell land upon which people walk and live.

The people who sailed from across the sea to our land have a white skin; they cannot survive in the natural wilderness areas where the climate is dry and living conditions are difficult. So the white men must damage the land with drills and blasting and other destructive measures in order to survive.

At this time we must protect all our Indian brothers and friends, Navajo and Hopi alike, before they become drastically injured, not by the Navajo People, but by the white man and white leaders who are alone responsible for this Bill, and who are always attempting to direct, control and change Indian lives, and alter our relationships to Mother Earth.

If there is a need for more land or space for the Hopi People adjacent to the Hopi Reservation, then in exchange for Navajo lands thus granted the Hopis, there should be made available to the Navajo People land adjacent to our land, even the land upon which are situated the communities of Flagstaff, Winslow, Holbrook, or Gallup. Historically and traditionally, all of this land is Indian land. If the U.S. Government feels that relocation of people is necessary, then it should be the white man and other non-Indians who are moved from Indian lands, not the Indian people.

I respectfully submit this statement for your consideration and thank you for your consideration of it.

Very truly yours,

SEYMOUR TSO, SR.,
Councilman, Cameron Chapter.

STATEMENT OF JOHN LOGAN, SCHOOL ADMINISTRATOR

Effects of non-settlement of the joint-use area dispute between the Navajo and Hopi tribes on the residents of the Rocky Ridge-Dinnebito School district are multitudinous and disasterous from many standpoints.

About 1900 people live in the district—all in the disputed area. About 700 of these residents are school age children, with over 500 of the school age children required to attend school from 50 to over 1000 miles from home, with consequent multitudinous problems of non, poor, or erratic attendance due to the inability of families to participate in the education of their children because of distances

involved. Reason for lack of school facilities in the district—administrative bureaucratic decision to ignore the wishes and recommendations of the local parents, school board, and school staff concerning construction of school facilities to accommodate all the children of the district—life long residents, as are their parents and grand parents—under the guise of construction not being possible until the dispute is settled.

The next greatest lack seems to be in the field of roads construction. So called long range planning (P.P.B. & E.) had paving programed for FY 1971 from Arizona 264 to the existing school, but possible funds for this were diverted to tourist oriented highway from 164 to Page, Arizona. In spite of the great need all over the reservation to serve the Indian people with many short and medium length roads, the only construction that seems to be undertaken is roads primarily serving tourist oriented towns peripheral to the reservation. Construction of the above mentioned road and an extension to Black Mesa would have made it possible for residents of this district to commute to work at the Peabody Development, instead of all the development being based at Kayenta, Arizona.

"Freezes" on school construction and roads development because of the "dispute" have had very serious economic consequences for the local residents. Exporting the children away to obtain an education also exports all the jobs associated with the education process. Officialsof schools receiving these schools have grandiose plans for construction, based upon these imported students and are reluctant to see the dispute settled. More distant and densely populated areas (Kayenta & other nearby places) now furnishing the labor to see the people closest to Black Mesa (our district) remain out of the labor market.

Rocky Ridge B.I.A. School has 1 radio telephone, Dinnebito Trading Post has 1 radio telephone, Navajo Gospel Mission has 1 regular telephone and that is the extent of telephone service for over 1900 people with their children scattered all over the western U.S. in schools and medical and other services unavailable within 50 miles. Additional telephones, included badly needed toll phones will not be installed by the telephone company until the dispute is settled. Again—this affects job opportunities, school attendance, and the whole gamut of human social relationships.

A half million volt electrical transmission line carries power across the reservation, but there is none available for local use. How this line, carrying power generated in New Mexico to California for use, could be authorized, and power lines carrying power for local use denied is difficult to understand. The only families in the district who can have electrical power are those wealthy enough to own their own generating plant, or those lucky enough to live in the government or mission station. This lack of power also precludes the availability of running water, appliances, and some news and entertainment media such as T.V. The only newspapers available are those mailed in.

Establishment of a post office possibly should be a community goal but can't seem to arouse any interest in postal circles—again—we are told to settle the dispute.

Many possible sources of conflict would seem to make it imperative that a settlement to be arranged. The former commissioner's moratorium on housing construction is certainly widely ignored. "Hard feelings" over "arrest" of animals and humans seemingly will eventually lead to violence. It should be readily apparent to an outsider that Navajo Tribal Officials stall, delay, and vacillate on any settlement now pending, while the so called Hopi Tribal leaders favor settlement. Since the Navajo Tribe is multitudinous in numbers when compared with the Hopi Tribe and since the Navajo families have occupied the land for three or more generations, with negligible Hopi occupancy, any settlement at all would appear harmful to the Navajo and advantageous to the Hopi.

Before some of the cost of settlement involves human blood, the body which caused the problem, the U.S. Congress, should settle the dispute. It would seem that settlement could be reached which would allow the Navajos to remain at their ancestral home while at the same time the Hopi Tribe should be indemnified for what ever it gave up—if anything. It should be noted that the Hopi Tribal members are far from unanimous in demanding a settlement or in pressing a claim.

NAVAJO BIBLE ACADEMY,
NAVAJO GOSPEL MISSION, INC.,
Oraibi, Ariz., March 6, 1973.

To Senator PAUL FANNIN:

As one who has respected and voted for you I wish to express myself concerning the Navajo-Hopi Land Dispute.

Since 1943 I have had the privilege of teaching in this mission school fourteen miles north of Oraibi. It has been a thrilling experience to watch the progress of these proud, simple, scattered shephard people.

How eager were the bashful little children walking in to attend school. Gradually as we could add dormitories the school grew. The wagons bringing some from farther away were replaced by pickups. Fine two door houses have been constructed next to their hogans. Beds and other furniture appeared in place of only sheepskins.

At Christmas we often minister to 2500 Navajos who come in to our Protestant services here at Gadiahi and in our outstations at Sand Springs, Pinon and as far north at Coal Mine.

Please do what you can to work out a just settlement for these people so dear to my heart.

Thank you.

Sincerely yours,

Miss RUTH L. CHAPMAN, *Principal.*

HISTORIC USE AND OCCUPANCY OF THE TUBA CITY - MOENCOPI AREA

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April 1972

One area of long-standing land disputes in the Navajo Country has been that around Moecopi and Tuba City. The history of use and occupancy of lands in that area reveals that diverse peoples have settled in the vicinity or used lands at different times.

The following brief summary of land use there is a simple chronicle, without any attempt to account for the dynamics of population shifts in the earlier periods, explanations that might be advanced for these being all of a theoretical nature.

The earliest peoples known in the immediate area were the Kayenta Branch Anasazi who are generally thought to have been ancestral to the Hopis, at least in part. Colton believed the modern Hopi Tribe originated from a fusion of the Kayenta, Tusayan and Winslow Branches, with perhaps some others.[1/] The archaeological sequence at Moencopi is not well known and a detailed record of the occupation there has never been published. Our best data at present are from the historic record.

In the latter part of the 17th century, there seems to be little doubt that the occupants were Yuman speakers. Peñalosa, Governor of New Mexico in the 1660's claimed:

> He reduced to peace two heathen nations, the Cruzados and The Coninas, and made them settle by assembling them in two large Pueblos in the province of Moqui; there were certificates from Father Fray de Espeleta among the defendant's papers, of those who had already been baptized, who he thinks, numbered thirty-eight or twenty-eight. 2/

The Cruzados were the Uavapais and the Coninas the Havasupais. That a mission was established west of Oraibi and that it served Havasupais is confirmed further by the record of the Chapter election held by the Franciscan missionaries of New Mexico in 1672. Listed toward the end is the following:

> And, that the recently taught and catechized souls of the unbelievers may have Fathers to feed them with the Bread (of life) and to impart to them as little children the Divine Law in true apostolic spirit, we designate and constitute Apostolic Emissaries with papal authority: In the Missionary District named (Coconinos) Father friar Jose de Espeleta and Father friar Jose de Trujillo. 3/

By 1686, the "Coninas" or Havasupais were reported to have been defeated by the Apaches, these latter being indentified as Navajos by Bandelier.[4/]

The recise location of the mission station is not now determinable, at least on the basis of the limited known documentation and the lack of an intensive archaeological survey of the area. In 1692, Don Diego de Vargas reported that the Coninas lived only ten leagues -- about 25 miles -- west of the Hopis,[5/] suggesting that Havasupai settlement extended as far east as the lower end of Blue Canyon at that time.

There follows a long gap in the historical record. The Spaniards failed to retake the Hopi Pueblos in the reconquest and knowledge of events in the west was limited to vague reports concerning the Coninas that give no good indications of their geographic spread until the 1770's. In 1775, Fray Silvestre Velez de Escalante, then missionary at Zuni, visited the Hopi and met a "Cosnina" who said that the first ranchitos of his people were about three days travel west of Oraibi.[6/]

In June 1776, Francisco Garces, a priest from Sonora passed through

Havasupai country on his way to visit the Hopis. He reported the Havasupais to be at war with the Napao, doubtless a reference to the Navajos. He referred to the Havasupais variously as Jabesua or Yabipai. He recorded in his journal for the last day of June, and July 1, when near present Tuba City:

> I arrived at a rancheria of Yabipais that should have as it were 30 souls; I was received with many civilities, for here was the Indian who, as said above, had sung the hymn. The captain of this rancheria, who wore the beard very long, was brother of the Jabesúa Indian that accompanied me....July 1. I went one league and half eastsoutheast, and found a river that seemed to me to be the Río San Pedro Jaquesíla, /actually Moencopi Wash/, and on a mesa contiguous thereto a half-ruined pueblo. I asked what that was, and they answered me that it had been a pueblo of the Moqui, and that some crops which were near to a spring of water were theirs, they coming to cultivate them from the same Moqui pueblo /Oraibe/ that is today so large. The river runs little, and it is yellowish; having crossed it and ascended some hills, I entered upon some very wide plains, without one tree, though there is some small grass; and having gone six leagues /about 15 miles/ in the same direction I arrived at some pastures where the Moquis keep their horseherd. These pastures are of difficult entrance and worse exit; there are found some scanty aguages. 7/

Garcés was not hospitably received at Oraibi and soon returned by the same trail. He wrote of his stop at the Tuba City rancheria on his return:

> July 5. I arrived at the rancheria of Yabipais, having gone a league and a half westnorthwest. The bearded captain and his people were much grieved that the Moquis had given me nothing to eat, and themselves did even more than at the going. They had killed beef, and (it was) one of those head of cattle which run wild, on the whole of which did they feast me....8/

Garcés journal makes it clear that in 1776, the Hopis used land as far west as Moencopi and the Havasupais used land as far east as Tuba City. The year was a very productive one for records, however. In November, another expedition, with Escalante as chronicler, came from the north and

added to our knowledge of the Tribes of the area. Escalante's journal entry for November 14th contains most of the pertinent information:

> We continued southeast, and having gone three-fourths of a league, we entered a canyon in which four springs of good water rise. We traveled along it half a league to the southeast and arrived at a small farm and some ranchos of the Cosninas, which were very beautiful and well arranged. This farm is irrigated by the four springs mentioned and two other large ones that rise near it. This year the Cosninas planted maize, beans, calabashes, water melons and cantaloupes on it. When we arrived they had already gathered their harvest, and judging from the refuse or remains which we saw of everything, it was abundant, especially the beans, for if we had stopped here we could have gathered half a fanega of them. The farm was surrounded by peach trees, and, besides several huts made of branches, there was a little house very well made of stone and mud. In it were the baskets, jars and other utensils of these Indians. Judging from the tracks, they had been absent for several days, perhaps to seek piñon nuts in the high sierra close by toward the south-southwest. From the rancho, roads lead out in different directions, and we did not know which we ought to take to go to Moqui,...We took a road which runs to the southeast and traveled two leagues over a very level terrain, passing some springs of good water, and crossed a small river which flows from northeast to southwest and carries as much water as a fair-sized ditch. It has its small grove and medium-sized meadows but very bad pasturage where we crossed it. After leaving the river we climbed a mesa on which there was a small lake, and several pools of rain water which served as drinking places and watering holes for the cattle of Moqui, which we now began to see in large herds. We traveled along the mesa two and one half-leagues to the east-southeast, ascended a high hill, and because night was coming on and there was good pasturage for the animals, we stopped, naming the campsite Cuesta de los Llanos, because from this place wide plains and fields begin without mesas, trees, or sierras, but with very good pasturage, that extend to the southeast beyond Moqui. -- Today six and one quarter leagues. 9/

It is not certain that Escalante visited the same ranchería as Garcés,

and his failure to note the Hopi fields reported by Garces suggests that the two followed somewhat different trails.

Again, there is a long gap in the documentary record, this one lasting nearly half a century. In 1823, Jose' Antonio Vizcarra in his journal of his campaign agaisnt the Navajos, wrote that he set out to the westward from Oraibi for Los Algodones, the name meaning "The Cotton Plants". This is a translation of the old Navajo name for Moencopi and even though Vizcarra never reached his intended destination,[10] the implications that Hopis were raising cotton at Moencopi and that Navajos were likely to be found at or near the same place are strong.

If the Havasupais had withdrawn and the Navajos advanced into the Moencopi area between 1776 and 1823, as the data suggest, the time of entry of the Navajos was most probably in the 1780's or 1790's a period for which a very high proportion of tree-ring dates have been obtained from the remains of Navajo hogans and other structures in the Gray Mountain-Coconino Basin area.[11]

As early as 1776, Garce's had reported hostilities between the Navajos and Havasupais.[12] In 1801 a war by the Navajos against the Hopis and Havasupais was reported.[13] Navajo success in the war is indicated by the sale of a Havasupai captive at Jemez in December of the same year.[14]

No people other than the Havasupais themselves seem to have any tradition of Havasupai occupancy in the Tuba City area and it may be presumed that Havasupai occupancy ended quite early. Navajo traditions suggest that Navajos from Black Mesa first crossed the region while en route to Gray Mountain some distance to the Southwest.

In the meantime still another tribe, the San Juan Paiute, was in the

region just to the north. Escalante reported Paiutes in the Navajo Canyon country in 1776.[15] In 1823, Vizcarra's troops encountered Paiutes on White Mesa and in Paiute Canyon.[16] Today, Paiutes claim to have been the first occupants of the Tuba City area and some Navajo tradition is in agreement.

Both the Hopis and the Paiutes assert that the Navajos did not occupy the Tuba City area until the time of the Carson Campaign and Fort Sumner Period of the early 1860's. Navajos claim to have been there considerably earlier.

Specific documentation to support the Navajos' claim is sparse, but Indian tradition recorded at an early date indicates the Navajo to be correct in this regard. Havasupai tradition recorded about 1918-21 quotes a Navajo as saying about 1863:

> A long time ago some of them /Havasupai/ came to a place a little east of the present Tuba, where I had some horses. They killed all of my family, my wife and children and some other women. I was not home then. They killed them and stole all my horses. That is why I want to fight. [17]

Regarding Navajo occupancy at Tuba City prior to the Fort Sumner exile, in a sworn affidavit taken in 1898, the Navajo headman Et-zit-tee (Atsidi) stated:

> ... that before the Navajos were taken as prisoners to Fort Sumner (Bosque Redondo) about thirty years ago, he, Et-zit-tee, used to visit an uncle of his named Hosteen Tso, who lived near where Tuba City now is; that his said uncle and a number of other Navajos were then farming there, and there were no Mormons in that section of the country at that time; that a Navajo Indian named Bi-lin-dal-chin-ni farmed at the spring where Tuba City now stands when he used to visit his said uncle over thirty years ago...[18]

Records of Navajos born at or near Tuba City and west of the 1882 Executive Order Reservation prior to the establishment of that reserve are numerous. These are tabulated in an Appendix to this report.[19] Of 496 Hopi births -- 1805-1868 -- recorded during research on the Navajo Land Claim (Docket 229 before the Indian Claims Commission), records were located for only four who were born beyond the vicinity of the present mesa villages: three Hopis were born at Moencopi, and one at Keams Canyon, Arizona.[20]

The period of the Carson Campaign and the Fort Sumner Exile lasted from 1863 to 1868. Data available indicate that prior to this there was use of the area by Navajos, Hopis and Paiutes, but no really detailed description of the use made by these peoples is possible. Vizcarra's account suggests that the San Juan Paiutes had begun to acculturate to Navajo ways by 1823, and it seems probable that limited Hopi farming, particularly of cotton, continued at Moencopi throughout the period. Navajos also farmed in the area. There is little doubt that the government's campaigns did drive more Navajos to the west, beginning about 1860, although the question of how many of these became permanent settlers in the west would not appear to be a major problem, despite the Hopi and Pauite assertions that these were the first Navajos to enter the region.

Carson did lead his troops westward from the Hopi villages. His description of his movements is so vague that is it not possible to trace the exact route followed, but a general determination of locations is of value. He arrived at Oraibi about the 23rd of November 1863. Having heard that the Oraibis were in alliance with the Navajos he had their governor and one other leader bound and taken with them. From Oraibi, the troops

marched 65 miles to a running stream, a tributary of the Little Colorado. This was almost certainly Moencopi Wash, the only running stream anywhere in the region flowing into the Little Colorado, and it is probable that Carson exaggerated the distance traveled unless, as is not unilkely, the distance included excursions from a direct route in search of Navajos. On the 24th, which was apparently spent in camp on the Moencopi, a scouting party captured one boy and seven horses, destroyed a camp and encountered a Navajo presumed to be Manuelito who tried to parley, failure to communicate being due to the lack of an interpreter. On the 25th, the troops captured a woman and child, about 500 sheep and goats and 70 horses, destroying another camp. Five other Indians in the group escaped across a deep portion of the canyon of the Little Colorado. This suggests that the campaigners first struck the Little Colorado west of present-day Cameron. Carson reported that he camped that night "on the table lands of the river," obviously meaning the Little Colorado, but did not say which side of the river. He was west of the Little Colorado on the 26th, however, and camped that night about 25 miles northwest of the San Francisco Peaks, probably westerly from Mesa Butte on the upper drainage of Tappan Wash. His scouting parties found abundant signs of Navajos, but could not overtake them. A captive informed him that it was a three day trip without water to the destination of the Navajos and he turned back. He took a different route on his return to the Hopi village, probably striking more easterly toward the Dinnebito below Oraibi. 21/

If the Navajos fleeing before Carson's troops were Manuelito's band, they did not long remain in this far western area, for later reports of Manuelito's movements show him ranging between Black Mesa and Zuni until he finally surrendered. It therefore seems unlikely that the Carson

Campaign had any great lasting effect upon the composition of the Navajo population in the area west of Hopi, although a few of the refugees may well have remained among the local Navajos.

As a conclusion regarding this early period, it would appear that the traditions of none of the tribes in the area can be relied upon for accurate information as to the time of settlement by their neighbors and that reliance should be given to the information obtained from an informant only with regard to the history of his own tribe.

During the Fort Sumner period a few expeditions of citizens undertook raids to the west of Hopi. In the spring of 1864, a party of citizens attacked Navajos two days' travel beyond Hopi, presumably to the west, taking stock and captives. They were then surrounded by 200 mounted Navajos and had to fight their way out, losing part of the stock and captives[22/] In July, the following year, another band of privateers attacked the Navajos west of Hopi:

> ...a citizen named Juan Vigil reported to me this inst. that he in company with fifty one other citizens left Abique N. M. on the 19th day of last month on a scout against the Navajoe Indians, that after having passed over a great portion of the Navajoe country finally upon the 8th inst. they encountered at or near the San Francisco Mts. about two hundred warriors, Navajoes & Apaches combined, with whom they had two fights. The 1st fight lasted about three hours, the 2nd, one and a half hours. They killed nine Indians, and recaptured a Mexican boy of some ten years of age, and captured eighty five Ind. horses and about one thousand head of sheep. In these fights two of the citizens were pretty severely wounded. On the third day after the 2d fight when the party was divided the Indians surprised the herders (twenty two in number) and retook all their stock excepting some fifty or sixty sheep which had been killed for the subsistence of the party.
>
> After having lost their captured stock, the party finding their provisions growing short, and deeming it useless to campaign without a party sufficiently large to protect any property they might capture, they concluded to return home....

> The distance from this post /Fort Wingate/ to where the Abiquie party found the Indians is about 230 or 250 miles, being west of the Mo ie Villages; ... 23/

A thir pedition in November and December of 1865, passed through the area, bu saw few Indians 24/

It is significant that none of these expeditions reported any sort of Hopi settlement beyond Oraibi. Traditional accounts of the first Hopi settlement at Moencopi variously ascribe it to the period of the Fort Sumner exile or the time of the arrival of the first Mormons. The Temporal discrepency is not so great as to be a cause for concern. The date of the initial Mormon settlement is also somewhat uncertain.

Accourding to Gregory a large group of Mormons crossed from Utah in 1873, but

> ...disastrous experiences in the Painted Desert forced them to return, only one family remaining at Moenkopi. 25/

This was apparently the party encountered by John D. Lee on his flight southward from federal troops in June of that year. In his journal entry for June 26th, he wrote:

> Reached the Navajo springs about 2 PM where I found a co. of 22 wagons of the Brethern returning from the A. Z. Mission. Related the news and gave them the mail containing news from their friends at home. Refreshed myself and animal and in co. with Bro. Becksted and Wood about sunset started on for the Main Camp at the Mowencroppa... 26/

The next day Lee encountered Jacob Hamblin who advised him to settle at "The Mowcroppa" with an old man named Winburn. 27/ Winburn had crops planted at a place Lee Consistently called "Moencropa" in his journal. There was a Main Camp at some distance where Lee purchased supplies until that group left. Lee was staying not at Moencopi proper however and his

description of the country suggests that he was at Moenave:

> We strike the first springs affording water enough' to Eregate about 40 arce of land, a few cottonwoods and willows. Here we turn East over rocks and sand 6 /M/ to the 3rd springs; consider /able/ land and grass, a few cotton woods, abundance of willow. Good water and soil enough to eregate about 50 acres. At this spring, J. Hamblin has commenced a little farm. 1 mile East is an other spring and some small springs that would eregate about 25 acres. Land not so good- not so good in quality (El) the soil. 8 m. further E.- is the Main body of spring or water, the place where Tuba resides. Their farm is situated in a low vally ½ mile W. Rich soil probably 20 miles in length with m/ore/ smal springs braking out on the North side but too small to amount to Much for Eregating... 28/

As with his failure to note any information about the company of Mormons except that which concerned him directly, Lee is very vague in the information he gives about the Indians in the vicinity. His first mention of them after his arrival is on June 29, 1873, when some of the wagon train stock got into the crops of the "Natives." He mentioned that Tuba was "the principle of the settlement." He later referred to Tuba as a "Walipie Chief." As Tuba was Hopi rather than Wallapai, he probably meant Walpi and this suggests that Tuba was originally from First Mesa. In his entry for July 3rd, Lee mentions that a "Piede" or Paiute Indian helped him erect a shade. On July 4th, he identified more Hopis, who visited his camp:

> One of the principle men and his Lady of the oriva Tribe named Tow-wow-we-win and his Squaw She-ma...29/

On July 6th, 1873, a Navajo named "Ash-Ha-as-neh" with two companions stopped at the camp on their way to trade in Utah. Finally, on July 7th, he identifies a Paiute as named "Shew" who helped him irrigate. Not until July 7th,

did he intimate that Shew had crops of his own at the same place.[30]

On the 9th, Lee made an entry of particular interest:

> ...To day Shew, one of the Natives, info/rmed/ Me that the whites at the agency did not wa/nt/ the Mormons to Setle at the Moencrop/a/; that they had written to government t/o/prevent it, & that Jacob would not be ab/le/ to tend the land at the Moencropa another year without Paying Horses, cat/tle/, clothing &c. &c.; that th/e/y were putting the oribas & Navajoes up to objec/t/to our Setling amoung them &c. [31]

On the 10th, he noted rain "in the direction of the Navajo & oriva country." This has led some researchers to conclude that no Navajos were near Moencopi at the time Lee stayed there. On the 12th, he recorded that Shew and his family moved to "upper Moencropa," apparently meaning Willow Springs. On the 16th, he did not irrigate, noting that "To day the Indians had the water to eregate their crops." Just who these Indians were besides Shew and his family is not stated, but it seems likely that there were more people farming at Movenave than those Lee indentifies by name. That Lee's farm was at Moenave is made quite certain by a mention on that same day that it was eight miles to Tuba's place. He visited Moencopi the following day and his description of

> ...the farm of the Native, including oraves, Navajoes and Piutes...

clearly shows that Navajos were farming there at that time.[32]

Lee's day by day account continues, generally adding little as to the exact location of the Indians of various tribes. He recorded the name of Tuba's wife, Tellas aski, on hte 18th of July.[33] On the 28th, he mentioned a Navajo chief, "Ash-Kaash-na, known as John".[34] On August 16th, Lee visited Moencopi and mentioned the name of another Hopi there, Taltee. On the 19th of the month, he made mention of another Paiute, a different man than Shew, who came from "Upper Moencroppa" and used the water at Moen-

ave to irrigate crops.[35] Beginning on August 21st, Lee no longer referred to his place as "Moencroppa," but wrote a name that more resembles Moenave, spelling it variously, Moweeyabby, Moweeyawba, Mowe Yauba, Moweabba, etc.[36]

On August 23rd, 1873, W. S. Defrees, the Hopi Agent, visited Lee and informed him of a plan to establish the Hopi Agency at Moencopi. On August 30th, he mentions the visit of a Paiute named "Pocky." On September 2nd, he hired somebody named "Cuckelbur" to irrigate. This was Shew but this identification is not given until later on. On September 4th, he noted that Taltee was Tuba's brother-in-law.[37]

On September 6th, Taltee came to inform Lee that all the Hopis at Moencopi had returned to Oraibi except he, his son, Tuba and "Telaskle", the last being another spelling for Tuba's wife's name. They wanted Lee to move with his family to Moencopi so that they could unite to prevent any trouble with the Navajos. This Lee did not want to do as he had not yet harvested all his crops at Moenave.[38]

On September 26th, a Navajo came from "5 Lakes" to trade.[39] An earlier reference to 5 Lakes[40] suggests that this was Lee's name for Pasture Canyon.

In September and October, Lee was engaged in putting up a store house at Moenave that measured 34' x 17'.[41] It might yet be possible, on the basis on these dimensions, to identify this structure and thus locate Lee's farm.

Directions written by another hand in Lee's journal following the entry for December 24th mentions a Navajo camp 18 miles from "Tuba's camp," apparently meaning Moencopi. This was apparently the place referred to occassionally as the "Navajo Villages."[42]

In January 1874, an event in Utah was to alter Defrees' plans to establish the Hopi Agency at Moencopi and to have a profound effect upon events in the Moencopi area. A rancher named McCarty, a non-Mormon, with some cowboys, attacked four young Navajo traders, killing three and severely wounding the fouth, who made his way back to his own people. Two of the men killed were sons of Ketcheene, a Navajo leader in the west, and the Navajos blamed the Mormons.[43] Word of the threatened trouble was sent by a Navajo chief through Tuba to warn the people at Lee's settlement. Lee learned of the trouble on January 15th and set out that night to bring help from Utah. On the 29th, he returned with Jacob Hamblin hearing a message from Brigham Young. Tuba had visited Moenave with two chiefs, Tutsnay and Comiase, apparently both Navajos, in his absence. Both of the Navajo chiefs were against any hasty action.[44] Hamblin went to see the Navajos, accompanied by J. E. Smith and Edward Smith. The trouble had caused all the Hopis except one woman to leave Moencopi. Hamblin first went in search of Mush-ah (or Musher), a Navajo who had a camp about 12 miles east of Moencopi. Musher was not at home, but they met there a Navajo messenger bound for Moenave. The Navajo directed the Whites to a high mesa visible from that point where a number of Navajos were camped.[45] The location has been variously indentified as a camp of Ketchene[46] or "Peokon;"[47] perhaps both men lived there. It is probable that "Peokon" is a poor spelling of the name Bii'aghaani, "Backbone", a Navajo known to have lived in the area. The place was said to be about a 50-mile ride from Moenave[48] and was probably on Big Mountain. Hamblin and the Smith brothers engaged in a long discussion with the Navajos, feeling trapped

when given the places of honor at the rear of a forked-pole hogan with some 24 Navajos between themselves and the entry. The talks lasted from about noon until midnight. Hamblin stoutly maintained that the Mormons had no part in the killings and refused to commit them to any payment of reparations. It was finally agreed that the matter would be settled by another chief, Hastele on a date set 25 days after the meeting. Hamblin reported that the next meeting was to be held at Moenave[49] Ketchene was reported to have gone to Fort Defiance.[50]

On February 6th, Ketchene, father of two of the men killed in Utah, came to Moenave with a party of Navajos and a Paiute interpreter. According to Lee:

> ...After a long talk they decided not to shed blood but asked 400 head of horses and 400 head of cattle and settle and be friends and wished to write it to Brigham Young and for Jacob to take it to Brigham and consult the matter and bring word within 25 days &c. We smoked and I fed them and they embraced Jacob and I then returned....[51]

Early in February 1874, immigrants to the San Juan passed Lee's place at Moenave on their way to the Aneth area. Hamblin did not keep his appointment with the Navajos, leaving Moenave for Oraibi two days before the date set. Ketchene felt greatly offended by this. On March 12th, Ketchene did catch Hamblin at Moenave, but little came of the encounter beyond the setting of a date for another meeting and a disagreement between Lee and Hamblin.[52]

The trouble caused the return of a Mormon colonizing expedition, but a few of the Mormons remained at Moencopi.[53] According to McClintock, only Hamblin, Hatch and Tenney remained. Hamblin's failure to keep his appointments led to another meeting in which Ira Hatch and John L. Blythe represented the Mormons. The meeting ended in a Navajo threat to destroy

the Mormon settlement and the Mormons retreated to the other side of the Colorado River.[54] The threat of war also disrupted Agent Defrees' plan to locate his agency at Moencopi.[55]

In the fall of 1875, another Mormon party stopped at Moencopi and built a stone house there for the winter quarters. From Moencopi, they explored the country and returned to report to church authorities. This led to establishment of a settlement at Moencopi in December.[56] At about the same time the new Hopi agent, W. B. Truax, was encouraging Hopis to farm at Moencopi.[57] Mormon immigrants were also settling in considerable numbers on the Little Colorado,[58] and Truax wanted a reservation established to protect the Hopis.[59]

In June 1876, it was reported that both Navajos and Hopis were frequent visitors to the Moencopi settlement. In 1877, the settlement had a population of 25, and in 1878, the population was 27.[60] The settlers had plans for expansion, however, and in the same year laid out a townsite at "Musha Springs" which became Tuba City.[61]

The Hopis at Oraibi that year were claiming that their resistance to government programs was upon the advice of the Mormons. One prominent Hopi, Hum min sha, was said to spend most of his time at "the Mormon camp at Moen Kappi."[62]

By the spring of 1879, land disputes between the Mormon and the Hopis had already begun. Agent Mateer reported from Keams Canyon:

> Tu-bee, formerly a chief of the Oraibe Village is here and complains that the Mormons are intruding upon their farming lands at Moen-Kappi and interfering with their planting. He states that his father planted there when he was a boy, as well as many other Oraibis, and that it is their ground. At Moen-av-ee, eight miles above, in the same canyon they had another place of planting where they lived during the summer. A few years ago Jacob Hamlin (sic), one of the Mormon Apostles, came in there and asked permission to plant that season and water his stock which was granted. In the spring

> when the Indians returned to plant, as usual, they found other Mormons in possession and when they attempted to go to work, the Mormons said, oh no! we have bought this place from Mr. Hamlin and you can't plant here. John W. Young, the favorite son of Brigham Young deceased, resides at Moen Kappi and has a large store there. I inclose a copy of a letter which I send to him at Tu-bee's request.
>
> I would respectfully inquire whether there is not some law by which the Indians can be protected in their rights to lands which they have cultivated for a century or more? 63/

Young was undertaking a new enterprise at Moencopi that year. He had a woolen mill under construction by May 6th and a party of Mormons who passed through on their way to settle on the San Juan stayed briefly to help quarry rock for him. The same party found Bii'aghaanii farming in the valley just east of Middle Mesa that spring. 64/

By November, Young had his woolen mill ready for operation and by spring of the following year it was manufacturing yarn. 65/ In 1879, the Moencopi Mormon population had increased to 110. In 1880, the population was split between Moencopi and Tuba City and varied from 111 to 116. 66/ It is uncertain whether there was a permanent Hopi population in residence at Moencopi in addition to the Mormons at this time. It would seem likely that there was, but perhaps still limited to Tuba and his family. There was an interesting development at this time. As the land conflict between the Mormons and the Hopis seemed to be increasing, the Mormons began doing more missionary work among the Navajos. Seven Navajos were baptized in May 1880. 67/

In March 1882, then agent, J.H. Fleming reported that Tuba had "been dragged into the Mormon band," apparently meaning that he had joined that church. 68/

In July, Inspector C.H. Howard reported that at least 8,000 Navajos

were living beyond the reservation boundaries in Arizona and recommended that extension of the reservation under a new agency to look after both the Hopis and the western Navajos.[69]

In August there is a record of "Musha", a Navajo residing at "Moenkopie," and a mention of his nephew, John Navajo.[70]

The Mormon population at Moencopi continued to grow. By February 1883 it stood at 127.[71] Mormons continued to maintain close relations with the Navajos. In February a party of Mormons held a meeting with some Navajos near Comar Spring. In March, Christensen preached to the Navajos and in June a Navajo boy was baptized. In September Christensen with three others, including the local bishop, visited a Navajo dance and re-assured the Navajos who were concerned that they were to be driven onto the reservation. Christensen also helped Musher to market his wool.[72]

By May 1884, the Mormon population had increased to 174.[73] During the year the Mormons continued to proselytize among the Navajos. On April 26, Navajos were baptized and in May there were more Navajos baptisms. A mission at Palchin Alanney's place was even proposed[74] but it is not known what came of the plan.

In October, Navajo Agent John Bowman visited Tuba City and settled some land disputes there between the settlers and the Indians. He also reported that "Mussor" was a wealthy Navajo living about 20 miles north of Tuba City and freed a Paiute slave held by him.[75] The Indians involved in the land dispute were Navajos.[76]

In 1885, the Mormon population around Tuba City reached 230.[77] They continued to have disputes with the local Indian population, over irrigation water with the Hopis, and with the Navajos over livestock.

Musher was living at Tokesjei, the mouth of Cow Spring Wash at Blue Canyon in 1886. His wife, a sister of Goma'a Yazhi, died that year. Christensen had a good deal of contact with the Navajos that year.[78]

In June 1888, H. S. Welton, Special Indian Agent, visited Moencopi to investigate reported trouble between the Hopis and the Mormons. His report is quite lengthy, and only the more important portions are reproduced here:

> At a small Oraibi Village on a sanstone bluff, at the junction of Resevoir Canon with the Moen Copie Wash, (Shown on the map of 1887) as "Moencopie") there is now 16 Oraibi Indians Viz. 4 men 6 women 5 boys and 1 girl. Several others formerly came from the Oraibi Pueblo (40 miles east) and planted here in summer. But since the Mormons have taken nearly all the land and Water, they come no more.
>
> While the Indians are still permitted to retain a small piece of land they are deprived of water sufficient to irrigate it. Hence I found the men at work for one Smith who had taken their land from them. He had also told them that he had bought the land their village stands on and last spring ordered them off, but finally did not insist upon it, though he took some doors from their Adobe Houses.
>
> These Indians tell me they have been here 8 years before the Mormon (Jno. C. Young) (Son of Brigham) came here and built the now dismantled woolen mill (that was in 1876) and their ancestors had planted here long before that,...
>
> The Mormons, having improved the water supply now claim it all....
>
> In 1875, John D. Young came to this point bringing several Mormon families with him, built a woolen Mill to buy wool from the Indians. But being overbearing and tyranical one Mormon found a smaller spring where Tuba City now is, and moved his family there, others followed, and soon, Mr. Young found himself alone with his mill, which he dismantled and left the country, leaving the Oraibi's in the peaceful possession of their Homes.
>
> They so remained until 1885 when Edgar D. Stone (the Complainant) put a stock of goods into the Old Mormon Fort

> much to the gratification of the Indians....until January, 87 during which time one Lot Smith a wealthy and agressive Mormon had joined this colony and...demanded and took immediate and foreceable possession....Stone finally compromised for $800 gave a quit claim and left with his goods in Aug....
>
> This quit claim from Stone obtained under the above circumstances in all the title under which Smith claims to own and hold all the lands and buildings in Moen Copie. He ownes a house lives and has a wife and family in Tuba City. He also has a wife and family living in the Moen Copie Fort....
>
> The Tuba City settlers have built three large Resevoirs on Resevoirs Canon two miles East of Tuba City. They have also enclosed with wire many hundreds of acres of splendid land in Moen Copie Bottoms some 3 or 4 miles below the Oraibi Village, which land they now irrigate from these Resevoirs carrying the water down passed the Oraibi Village and lands....
>
> To be better understood I have roughly sketched a plat of the location in controversy (inclosed herewith) showing four 160 acre tracts with descriptive boundaries thereto attached, which if alloted to the Indians now these will effectively cover all the lands claimed by the Oraibis....

Welton went on to recommend that these four tracts be allotted to four Oraibi Hopi named Ia-toak - see, Quach-a-yua, Ah-cau-cha and Och-she.[79/]

Welton also found Navajos in the area and wrote a separate short report on them that is worth quoting at some length:

> On my recent visit to the Oraibi Moen Copie Settlement, I found Oraibis Pi-Utes and Navajoes in about equal numbers. But while the two former inclined to settle down and work the lands, the Navajoes had sheep, goats and horses, and were roveing in search of feed therefore. Except some 20 or 30 who are settled in the Moen Copie wash some 12 miles above Moen Copie. They dam the wash and irrigate therefrom.
>
> I met with these Navajoes telling them they must return to their Reserve or take lands in severalty. I

> talked long with them through their headman "Musher".
>
> They do not want to return to the Reserve neither do they incline to take lands in severalty but claim all the land west to the San Francisco Mountains. But will accept the Little Colorado as their western boundary. I saw large bands of fine Navajo horses in the Little Colorado bottoms, where the stock Me /n/ told me, the Indians had often driven the stock mens cattle to the west side of the river. They also seem to practically take full possession of the Moquies Reserve the same as their own, and often (in the absence of the Moquis.) break into their houses eat steal and carry away the food raised and stored by these Pueblos. Both Whites and Pueblos tell me this. I asked the Navajos in Council about this. In reply they say, 'We go to the Moquis houses and get something to eat,' and in return also feed the Moqui when he comes to their Hogan. Being also charged with stealing his horses they say, "the Moqui works all the time in the ground to raise food. He rides to his crop and turns his horse loose and then digs several days in his crop, while his horse wanders away, and then the Moqui says 'The Navajo stole it".
>
> Having now been on the East South and West sides, I think fully half of the Navajos are off of their Reservation. And doubt the ability of their chiefs to get them back....80/

It was about this time that Charley Atsidi purchased the land that was later allotted to him and his relatives. The seller was a Mormon named John Adams.[81] In the summer of 1891, Atsidi was involved in a land dispute with Lott Smith,[82] although no details are known.

Troubles at Tuba City continued into the next year. John S. Mayhugh, who had been sent to allot land to the Hopis on the Executive Order of 1882 reported that Lott Smith had plowed up the crop of one Hopi family and recommended that if Tuba City were found to be off the Reservation that the Indians there be allowed to homestead.[83] On July 1st, word reached Fort Defiance that Lott Smith had been shot in self-defense by a Navajo during a dispute over livestock.[84] Lieutenant R. E. L. Michie led a detachment of the 2nd Cavalry from Fort Wingate to investigate the trouble. He con-

cluded that the killing had indeed been done in self-defense and advised that the Navajo, Chachos, whom he did not meet personally, go to Fort Defiance.[85]

Michie's report included observations on conditions at Tuba City that merit quotation:

> I understand the Mormons have been there some fifteen years and now number from twenty to thirty families in all. The Indians, Navajos, Piutes, Oraibis and a few Utes have been using that section as far as the Little Colorado River, especially during the spring and summer months, the Navajos in large numbers bringing in their ponies and sheep for water and grazing purposes; also doing a little farming, in the way of a few patches of corn at different points here and there. The Piutes probably number a hundred, and the Oraibis from fifty to a hundred during the summer months. The settlements have a good water supply, the land is productive and the Mormons seem very well to do....I found the Indians, Navajos especially, greatly excited, thinking that I came to enforce the arrest of the Indian Chachos, who in a quarrel had killed Lott Smith, about the most prominent Mormon resident there, a short while before; also thinking that all the Indians were to be punished for this trouble. The circumstances of the killing of Smith were from all the evidence I could collect about as follows:
>
> > Smith finding some sheep belonging to a party of Indians encamped several hundred yards distant, in a pasture claimed by him and enclosed with a wire fence, went to his house, secured a pistol, returned and commenced shooting sheep, the accounts varying, the white testimony being to the effect that Smith fired five shots and killed a least two sheep, whilst the Indians claim he killed seven on the spot, and twenty-three more died from wounds received, and in addition Smith shot at a woman who with two children had been sent to drive out sheep, on his approach being noticed by them....
> >
> > The Indians retaliated by shooting six head of cattle (belonging to Smith) that were in the vicinity, five of which died. Whilst there is no White testimony to the effect, I think Smith must then have fired at the Indian Chachos returned the fire twice, one shot mortally wounding Smith.

> Smith rode to his house about one half mile distant and among the last things said by him was, that he ought to have quit when they commenced killing his cows but he thought the Indian wouldn't shoot, the Indians claim that Smith fired at Chachos three times before the latter fired at him (Smith) at all. Smith's last statement leads me to believe that he at least fired at Chachos first. I understand that a deputy sheriff came from Flagstaff to arrest Chachos but the Indians refused to give him up....
>
> They (The Indians) cited certain petty grievances against the whites; as cattle on the ranges getting in their corn, and one of the Oraibis present claimed that Smith the morning he was shot had gone down and dug up his watermelon vines and that a son of Smith had frequently passed near his place firing his gun in the air simply to frighten him. That once he had plenty of land there to farm and the Mormons had taken it away little by little and that now he had hardly enough to put his house on. The Whites cited to me a number of grievances viz: That the Navajos had in April last driven off twelve head of cattle belonging to them and they had not been recovered; that about the same time a fence belonging to one J.L. Foutz had been torn down and a cow killed about seven miles from Tuba City, and that an Indian drew a revolver on one Henry Brown, a Mormon who witnessed it (the man is about one half simple); in addition to this the Indians would bring their sheep so close to their settlement that they would get in their gardens, pasutes, &c. That they had no way of enforcing the law among them. Two cases of insults to females were reported....86/

It is sufficient to conclude this early history of the Tuba City area with a brief summary of later events, the dismissal of charges against Chachos, the allotment of lands to both Navajos and Hopis, the buying out of the Mormon interests and establishment of a school and superintendency at Tuba City and the gradual development of boundary disputes between the Navajos and Hopis in the area. A detailed consideration of these events is not possible at the present time.

The critical point in this early history is that many different peoples have lived in the Tuba City area at various times. No Tribe can make a really good case for "exclusive use and occupancy" for any extended period of time.

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APPENDIX

NAVAJOS BORN WEST OF THE 1882 EXECUTIVE ORDER RESERVATION 1882 OR EARLIER FROM VITAL STATISTICS RECORDS, CLINICAL RECORDS, INDIAN SCOUT RECORDS, THE TRANSCRIPT IN DOCKET 229 BEFORE THE INDIAN CLAIMS COMMISSION, DEPOSITIONS AND STATEMENTS OF AGED NAVAJO INDIANS

Summary

Place	No. of Births	Place	No. of Births
Black Point	3	Kendrick Peak	1
Bodaway	10	Moenave	1
Cameron	1	Pasture Canyon	1
Coconino Basin	1	San Francisco Mountains	5
Coconino County	3	Shadow Mountain	2
Flagstaff	2	Tanner's Wash (Well)	4
Gap	8	Tuba City	28
Grand Canyon	1	Upper Coconino Rim	1
Grand Falls	7	Western Navajo Reservation (Tuba City Agency)	91
Gray Mountain	54	Wildcat Butte	2
Kaibito	17	Willow Springs	7
		TOTAL	250

Navajo Births West of the 1882 Executive Order Reservation

1829	Black Point	Asdzaan Łigai	#117 Ethel Robbins
Ca.1845	"	Baa'	#101 Clyde Beesh Łigai
1882	"	Clyde Beesh Łigai	#101 Subject
By 1810	Bodoway	Atsidi Nez	Tr. 5329-30
By 1810	"	Asdzaa Naahaznii	Tr. 5329-30
By 1832	"	Naadlibaa'	Tr. 5349-51, 5362, 5367
1848	"	Alsi "Tall Syphillis"	#326 Tony Onesalt
By 1858	"	Asdzaa Łibahi	#35 Hn. Whooshni
BFS	"	Soomaasi	#19 Silas Talker
1871	"	Hn. Neinii	#44 Joe Attakai
1874	"	Emily Scott	#328 Maggie Holgate
1878	"	Hastiin Doyaaztii	#340 Hastiin Tsoh
1871	"	Joe Attakai	#44 Subject
1868	Cameron	Susie Huskon	Nav. Ex. 1519
Ca.1855	Coconino Basin	Asdzaa Bitsii Łigahi	Tr.5213
1850	Coconino County	Hn. Etsety or Blind Man	Nav. Ex. 1749
By 1850	"	Fa (unnamed)	Nav. Ex. 1750
By 1850	"	Mo (unnamed)	Nav. Ex. 1750

Birth-date	Place	Name	Source Tr. p. ref.; Nav. Ex. No., Doc. 229; or Nav. Dep. and No.
By 1858	Flagstaff	Mo (unnamed)	Nav. Ex. 1500
By 1858	"	Fa (unnamed)	Nav. Ex. 1500
By 1828	Gap, Ariz.	Asdzaa Bininali	Tr. 5282
Ca.1848	"	Dineh Diil Be'asdzaa	Tr. 5387, 5389-90, 3068-69, 3071, 3079, 3107, 3931-32, 3934-35, 3943-44
Ca.1848	"	Dinet Hastiin Diil	Tr. 5394, 3067-68
By 1848	"	Asdzaa Ba'aɣchini ɣani	Tr. 5303
By 1848	"	Hastiin Ba'aɣchini ɣani	Tr. 5303
By 1865	"	Fa (unnamed)	Nav. Exs. 1556, 1556A
By 1865	"	Mo (unnamed)	Nav. Exs. 1556, 1556A
1876	"	Mrs. Dan Tauchin	#20 Subject
Ca.1820	Grand Canyon	MoMo (unnamed)	Tr. 3267-68, 3281-83, 3291-93, 3318, 3325
By 1850	"	Asdzaa Ts'oosi	Tr. 3271-72
Ca.1850	Grand Falls	Asdzaa Ts'oosi	Tr. 5102-03, 5122-23
1853	"	Asdzaan Ajoon Aɣiziɣi	#118 Lillian Jones
By 1857	"	Asdzaa Aataahiliin	#105 Jack Slowtalker
1858	"	Hastiin Aɣtsihi	Tr. 5132-33
BFS	"	Hastiin Biwoo Adini	#9 Talabah Cody
1870	"	Millie Luther	#56 Subject
1879	"	Asdzaa Yazhi or Talabah Cody	#9 Subject
1803	Gray Mountain	Asdzaa Yazhi	#133 Mandy Clark
By 1819	"	Asdzaa Kehi	Tr. 4976
By 1821	"	Asdzaa Ts'oosi	Tr. 4967
1825	"	Naaɣiin (Tɣiin) Yazhi	#108 Hastiin Mark
1829	"	'Aaz jaa kai	#353 May Nakai
By 1830	"	Yahnahbah	Nav. Ex. 666
By 1830	"	FaMo (unnamed)	Tr. 3323-24
By 1830	"	FaFa (unnamed)	Tr. 3323-24
1836	"	Bass'ishii Bah	#101 Clyde Beeshɣigai
By 1836	"	Asdzaa Nizoon	#35 Hn. Whooshni
Ca.1837	"	Asdzaa Gaani	Julia McClellan (May 8, 1971)
Ca.1839	"	Baa'	#119 Elva Lee
By 1839	"	Asdzaa Tsehi	Tr.4975
Ca.1850	"	MoMo Sister	Tr. 3299
1840	"	Woh La Chii ji hatath'li Be8asdzaa	#203 George Nells
By 1841	"	FaFa (unnamed)	Tr. 4965-66
By 1844	"	Fa (unnamed)	Nav. Ex. 1501
By 1844	"	Mo (unnamed)	Nav. Ex. 1501
Ca.1845	"	Jaad Cho'i	Tr. 5231-32
Ca.1845	"	Naadlii Yazhi	Tr. 5231-32
1845	"	Hosh ɣis Niitso	#422 Glin Ha Ni Bah
1845	"	Aachiihaas Baa'	#108 Hastiin Mark

Birth-date	Place	Name	Source: Tr. p. ref.; Nav. Ex. No., Doc. 229; or Nav. Dep. and No.
By 1845	Gray Mountain	Baa'	#17 Dine Łigai Bitsili
1845	"	Asdzaa Tsizi	#353 May Nakai
1847	"	Asdzaan Zhinnie	#352 Tom Nakai
1848	"	Haashke Ndiicho	#309 Jim Ashley
By 1848	"	Asdzaa Yashi	#10 Hastiin Naat'aani
Ca.1850	"	Asdzaa Ashiihi	#146 Slim Salt
Ca.1850	"	Tsii'adeni	Tr. 5103-05
Ca.1851	"	Peshlakai Atsidi	#101 Clyde Peshlakai
Ca.1851	"	Asdzaan BitŁiziłani	#243 Wm. P. Goodluck
Ca.1854	"	Asdzaa Neez	#107 Naalnishi
1854	"	Bah	Nav. Ex. 1502
By 1858	"	Ason Tso	Nav. Ex. 1503
By 1859	"	Goma'a Yashi Bitsi	#14 Mrs. Billy Sawyer
Ca.1859	"	Mo (unnamed)	Tr. 38, 44-45
1859	"	Binaa'astaani	Tr. 4974-75
1861	"	Nakaidine'e	Tr. 4964-65; #352 Tom Nakai
1862	"	Hosteen Todacheene	Nav. Ex. 1504
BFS	"	Hastiin Ashiihi	#19 Silas Talker
BFS	"	'Achoo'ii, "Testicles"	#266 Hn.Keshkoli Biye' Adika'i
BFS	"	Asdzaan Ashiihi	#146 Slim Salt
BFS	"	Naa T'aahe bicho'	#19 Silas Talker
BFS	"	Hastiin Yazhi	#108 Hastiin Mark
BFS	"	Asdzaan Tsosie	#352 Tom Nakai
BFS	"	Hastiin Tsi Yit	#108 Hastiin Mark
BFS	"	Hastiin Bagodi	#117 Ethel Robbins
1863	"	Zilahnie Sonnie	Nav. Exs. 1505, 1505A
1864	"	Bkinde Chisi	Nav. Ex. 1501
By 1868	"	Hastiin Tsoh Biye'	Tr. 3011
1870	"	Asdzaan Łikai	#117 Ethel Robbins
1874	"	Silas Talker	#19 Subject
1879	"	Elva Lee	#119 Subject
1881	"	Charley Begay	#27 Subject
1821	Kaibito, Ariz.	Asdzaa Bitsii Łigaii	#129 Tom Lefty
By 1829	"	Asdzaa BitŁ'izi	Tr. 5298-5301
Ca.1830	"	TŁ'ee Soozii	Tr. 5472
Ca.1830	"	Daaghaa' Sikaad	Tr. 5327-28; 5340-41
1845	"	Atcitty Nez Begi	#327 Robert Longsalt
By 1848	"	Hajiibaa'	Tr. 5374, 5376, 5383
Ca.1849	"	Asdzaa Bagaane	Tr. 5296
1853	"	Asdzaa Łitsoi	#129 Paul Tallman
By 1853	"	Bah	Nav. Ex. 1582
1858	"	Cha'an Teel Be'asdzaan	#328 Robert Sombrero
1861	"	Old Man Small Canyon	Nav. Ex. 1583
By 1865	"	Traisonnie Bitsi	Nav. Exs. 1584, 1584A
1867	"	Laura Delaney	Nav. Ex. 1585
1869	"	Asdzaan YiitŁoi	#419 Everett Mann
1873	"	Paul Tallman	#128 Subject
1875	"	Tse'yitni Yazhi Biye'	#123 Subject
1877	"	Bakad Sani Begay	#331 Isabel Onesalt

Birth-date	Place	Name	Source: Tr. p. ref.; Nav. Ex. No., Doc. 229; or Nav. Dep. and No.
By 1843	Kendrick Peak	Asdzaa Yazhi	Tr. 3371, 3377-78, 3384
1855	Moenave	Denneth Tsinnijinnie	Nav. Ex. 1561
Ca.1848	Pasture Canyon	Chishi Neez	Tr. 24-26 (1954)
1875	Preston Mesa	Asdzaan Ayo Łanesnezi	#335 John Redshirt
By 1823	San Francisco Mtns.	Daaghaa'i Yazhi	Tr. 2507, 2509, 2511
By 1823	"	Daaghaa'i Yazhi Be' Asdzaa	Tr. 2508-09
By 1839	"	Gomaa'a or Gomaa' Yazhi	#14 Mrs. Billy Sawyer
Ca.1848	"	Ba'ałchini Łani	Tr. 4939
Ca.1848	"	Nadze Tsoh	Tr. 3021
By 1830	Shadow Mountain	"Red Ant Singer's Wife"	Tr. 5258
1885	"	Tall Whiskers	#60 Subject
Ca.1840	Tanner's Wash (Well)	Asdzaa Bitsii' Łibahi	#345 Sally Naakaiidine'e
1840	"	Thin Silversmith	#345 Sally Naakaiidine'e
Ca.1864	"	Asdzaa Yazhi	#345 Sally Naakaiidine'e
1879	"	Sally Naakaiidine'e	#345 Subject
By 1828	Tuba City	MoFa (unnamed)	Tr. 5381
1832	"	Ustzon Nez	Nav. Ex. 1562
By 1843	"	Hn. Bii'aghaani	Tr. 3371, 3377-78, 3384
By 1845	"	Hosteen Sheen	Nav. Ex. 1563
By 1845	"	Mo (unnamed)	Nav. Ex. 1563
By 1849	"	Atsitty	Nav. Ex. 1564
By 1849	"	Mo (unnamed)	Nav. Ex. 1564
By 1852	"	Tonezani Nez	Nav. Ex. 1565
1852	"	Mary Owens	Nav. Ex. 1566
1852	"	Paul Shepherd	Nav. Ex. 1567
By 1854	"	Fa (unnamed)	Nav. Ex. 1568
By 1854	"	Mo (unnamed)	Nav. Ex. 1568
1854	"	MoMo (unnamed)	#329 Maggie Holgate
By 1855	"	Hastiin Chaala	#27 Charley Begay
By 1855	"	Hosteen Yazzie	Nav. Ex. 1569
1857	"	Chi Dez Bah	Nav. Ex. 1570
1858	"	Chelly Coffee	Nav. Ex. 1571
1862	"	Carding Woman Begody	Nav. Ex. 1572
By 1862	"	Silversmith	Nav. Ex. 1573
By 1862	"	Mo (unnamed)	Nav. Ex. 1573
By 1864	"	Tall Ute	Nav. Exs. 1574, 1574A
1864	"	Butler's Brother's Mo.	Nav. Ex. 1575
By 1864	"	Ason Ta'neszahnie	Nav. Ex. 1576
1865	"	Aszais Badani	Nav. Ex. 1577
1865	"	Charlie Grayhead	Nav. Exs. 1578, 1563
1865	"	Bernard Tohannie	Nav. Ex. 1579
1868	"	Richard Dix	Nav. Ex. 1580
1868	"	Denetdeal	Nav. Ex. 1581

Birth-date	Place	Name	Source: Tr. p. ref.; Nav. Ex. No., Doc. 229; or Nav. Dep. and No.
By 1847	Upper Coconino Rim	Bowoo'odeni	Tr. 5220, 5222-24
By 1809	Western Navajo Reservation (Tuba City Agency)	Mo (unnamed)	Nav. Ex. 1557
1812	"	Carrie Dickson	Nav. Ex. 1757
By 1825	"	Fa (unnamed)	Nav. Ex. 1758
By 1825	"	Mo (unnamed)	Nav. Ex. 1758
By 1838	"	Fa (unnamed)	Nav. Ex. 1759
By 1838	"	Mo (unnamed)	Nav. Ex. 1759
By 1842	"	Fa (unnamed)	Nav. Ex. 1760
By 1842	"	Mo (unnamed)	Nav. Ex. 1760
By 1843	"	Fa (unnamed)	Nav. Ex. 1761
By 1843	"	Mo (unnamed)	Nav. Ex. 1761
1845	"	John Boone	Nav. Exs. 1758, 1762, 1762A
By 1846	"	Fa (unnamed)	Nav. Ex. 1763
By 1846	"	Mo (unnamed)	Nav. Ex. 1763
By 1848	"	Fa (unnamed)	Nav. Ex. 1764
By 1848	"	Mo (unnamed)	Nav. Ex. 1764
1848	"	Dick Dickens	Nav. Ex. 1765
By 1850	"	Fa (unnamed)	Nav. Ex. 1766
By 1850	"	Gus Bighorse	Nav. Ex. 1767
By 1850	"	Mo (unnamed)	Nav. Ex. 1767
By 1850	"	Fa (unnamed)	Nav. Ex. 1768
By 1850	"	Mo (unnamed)	Nav. Ex. 1768
By 1853	"	Fa (unnamed)	Nav. Ex. 1769
By 1853	"	Mo (unnamed)	Nav. Ex. 1769
By 1854	"	Fa (unnamed)	Nav. Ex. 1770
By 1854	"	Mo (unnamed)	Nav. Ex. 1770
By 1855	"	Fa (unnamed)	Nav. Ex. 1771
By 1855	"	Mo (unnamed)	Nav. Ex. 1771
By 1855	"	Fa (unnamed)	Nav. Ex. 1772
By 1855	"	Mo (unnamed)	Nav. Ex. 1772
By 1855	"	Fa (unnamed)	Nav. Ex. 1773
By 1855	"	Mo (unnamed)	Nav. Ex. 1773
By 1856	"	Fa (unnamed)	Nav. Ex. 1774
By 1856	"	Mo (unnamed)	Nav. Ex. 1774
1856	"	Gladys Boone	Nav. Ex. 1775
By 1856	"	Hosteen	Nav. Ex. 1776
By 1856	"	Bah	Nav. Ex. 1776
By 1857	"	Fa (unnamed)	Nav. Ex. 1777
By 1857	"	Mo (unnamed)	Nav. Ex. 1777
By 1857	"	Denet Gloni Begay	Nav. Ex. 1778
By 1857	"	White Mexican	Nav. Ex. 1778
1857	"	Joseph Johnson	Nav. Ex. 1779
By 1857	"	Fa (unnamed)	Nav. Ex. 1779A
By 1857	"	Mo (unnamed)	Nav. Ex. 1779A
1858	"	Nonnie Teel	Nav. Ex. 1780
By 1858	"	Fa (unnamed)	Nav. Ex. 1781
By 1858	"	Mo (unnamed)	Nav. Ex. 1781
By 1858	"	Fa (unnamed)	Nav. Ex. 1782
1858	"	Bama Tapanyazzie	Nav. Ex. 1783

Birth-date	Place	Name	Source: Tr. p. ref.; Nav. Ex. No., Doc. 229; or Nav. Dep. and No.
1859	Western Navajo Reservation (Tuba City Agency)	Kate Nez	Nav. Ex. 1784
By 1859	"	Fa (unnamed)	Nav. Ex. 1785
By 1859	"	Mo (unnamed)	Nav. Ex. 1785
By 1860	"	Hosteen	Nav. Ex. 1786
By 1860	"	Bahe	Nav. Ex. 1786
1860	"	Lee Scmalle	Nav. Ex. 1787
By 1860	"	Fa (unnamed)	Nav. Ex. 1788
By 1860	"	Mo (unnamed)	Nav. Ex. 1788
By 1861	"	Fa (unnamed)	Nav. Ex. 1789
By 1861	"	Mo (unnamed)	Nav. Ex. 1789
By 1862	"	Fa (unnamed)	Nav. Ex. 1790
By 1862	"	Mo (unnamed)	Nav. Ex. 1790
By 1864	"	Fa (unnamed)	Nav. Ex. 1791
By 1864	"	Mo (unnamed)	Nav. Ex. 1791
By 1864	"	Black	Nav. Ex. 1792
By 1864	"	Mo (unnamed)	Nav. Ex. 1792
1865	"	Harry Blackgoats	Nav. Ex. 1793
By 1865	"	Fa (unnamed)	Nav. Ex. 1794
By 1865	"	Mo (unnamed)	Nav. Ex. 1794
By 1866	"	Fa (unnamed)	Nav. Ex. 1795
By 1866	"	Mo (unnamed)	Nav. Ex. 1795
1866	"	Lilly Scmalle	Nav. Ex. 1796
By 1866	"	Fa (unnamed)	Nav. Ex. 1797
By 1866	"	Fa (unnamed)	Nav. Ex. 1798
By 1866	"	Mo (unnamed)	Nav. Ex. 1798
By 1867	"	Fa (unnamed)	Nav. Ex. 1799
By 1867	"	Mo (unnamed)	Nav. Ex. 1799
By 1867	"	Fa (unnamed)	Nav. Ex. 1800
By 1867	"	Mo (unnamed)	Nav. Ex. 1800
By 1867	"	Fa (unnamed)	Nav. Ex. 1801
By 1867	"	Mo (unnamed)	Nav. Ex. 1801
By 1867	"	Mo (unnamed)	Nav. Ex. 1758
1868	"	Louise Bitahny	Nav. Ex. 1802
1868	"	Bertha Edsity	Nav. Ex. 1803
By 1868	"	Grayhair	Nav. Ex. 1804
By 1868	"	Bah Salt	Nav. Ex. 1804
1868	"	Madge Black	Nav. Ex. 1805
1868	"	Ann Horserider	Nav. Ex. 1806
By 1868	"	Fa (unnamed)	Nav. Ex. 1807
By 1868	"	Mo (unnamed)	Nav. Ex. 1807
1868	"	Lena Talker	Nav. Ex. 1808
By 1868	"	Fa (unnamed)	Nav. Ex. 1809
By 1868	"	Mo (unnamed)	Nav. Ex. 1809
1848	Wildcat Butte	Dine Dii[illegible]	#58 John Sampson
By 1867	"	Asdzaa A[illegible]ts'ozi	#356 Frank Gishe
1828	Willow Springs	Tsi'naajinii Ayo'[illegible]nezi Be'asdzaa	#58 John Sampson
1838	"	Asdzaan Ba'a[illegible]chiini [illegible]ani	#419 Everett Mann
Ca.1848	"	Dineh Diil Be'asdzaa	#58 John Sampson
Ca.1848	"	Dineh Hastiin Diil	#58 John Sampson
Ca.1848	"	Naad [illegible]iindez Bah	#114 John Walker
1853	"	Dagaa [illegible]ani	#419 Everett Mann
1872	"	John Walker	#114 Subject

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

Filed September 28, 1962

OPINION OF THE COURT

APPENDIX TO OPINION—CHRONOLOGICAL ACCOUNT OF HOPI-NAVAJO CONTROVERSY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JUDGMENT

Opinion of the Court 1-106

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Judgment 225-228

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EXECUTIVE ORDER OF DECEMBER 16, 1882

Executive Mansion.
December 16, 1882.

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.

Chester A. Arthur

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

Before: HAMLEY, Circuit Judge, and YANKWICH and WALSH, District Judges

HAMLEY, Circuit Judge:

We have for determination in this action the conflicting claims of the Hopi and Navajo Indians in and to Indian reservation lands situated in northeastern Arizona.

These lands, consisting of some 2,500,000 acres, or 3,900 square miles, were withdrawn from the public domain under an executive order signed by President Chester A. Arthur on December 16, 1882. In that order it was provided that this rectangular

tract, about seventy miles long and fifty-five miles wide, hereinafter referred to as the 1882 reservation, would be ". . . for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon."[1]

The Hopi Indian Tribe has long contended that it has the exclusive beneficial interest in all of the 1882 reservation for the common use and benefit of the Hopi Indians, trust title being conceded to be in the United States. The Navajo Indian Tribe contends that, subject to the trust title of the United States, it has the exclusive interest in approximately four-fifths of the 1882 reservation for the common use and benefit of the Navajo Indians, and concedes that the Hopi Indian Tribe has the exclusive interest in the remainder. The controversy resulting from these conflicting claims presents what has been characterized as "the greatest title problem of the West."

Over a period of many years efforts have been made to resolve the controversy by means of agreement, administrative action, or legislation, all without success. The two tribes and officials of the Department of the Interior finally concluded that resort must be had to the courts. This led to the enactment of the Act of July 22, 1958, 72 Stat. ~~402~~.[2] 406.

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[1]The "Hopi" and the "Moqui" are one and the same Indian people. The "Navajo" and the "Navaho" are one and the same Indian people. The Executive Order of December 16, 1882, reads as follows:

"Executive Mansion,
December 16, 1882.

"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 the place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

"CHESTER A. ARTHUR"

[2]The Act of July 22, 1958, reads as follows:

"Public Law 85-547

"AN ACT

"To determine the rights and interests of the Navaho Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive order of December 16, 1882, and for other purposes.

The 1958 act authorized the chairmen of the tribal councils of the respective tribes, and the Attorney General on behalf of the United States, to commence or defend an action against each other and any other tribe of Indians claiming any interest in or

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"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. The Navaho Indian Tribe and the Hopi Indian Tribe, acting through the chairmen of their respective tribal councils for and on behalf of said tribes, including all villages and clans thereof, and on behalf of any Navaho or Hopi Indians claiming an interest in the area set aside by Executive order dated December 16, 1882, and the Attorney General on behalf of the United States, are each hereby authorized to commence or defend in the United States District Court for the District of Arizona an action against each other and any other tribe of Indians claiming any interest in or to the area described in such Executive order for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity. The action shall be heard and determined by a district court of three judges in accordance with the provisions of title 28 United States Code, section 2284, and any party may appeal directly to the Supreme Court from the final determination by such three judge district court.

"SEC. 2. Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. The Navaho and Hopi Tribes, respectively, are authorized to sell, buy, or exchange any lands within their reservations, with the approval of the Secretary of the Interior, and any such lands acquired by either tribe through purchase or exchange shall become a part of the reservation of such tribe.

"SEC. 3. Nothing in this Act shall be deemed to be a congressional determination of the merits of the conflicting tribal or individual Indian claims to the lands that are subject to adjudication pursuant to this Act, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

"Approved July 22, 1958."

to the 1882 reservation. As indicated in section 1 of the act, the purpose of any such action would be to determine the rights and interests of these parties in and to the lands and to quiet title thereto in the tribes or Indians "establishing such claims pursuant to such Executive order as may be just and fair in law and equity."

With respect to any interest which either tribe or the Indians thereof might be thus found to have in any of the lands, it was provided, in section 2, that the court would determine whether such interest is exclusive or otherwise. Under that section, lands in which either tribe or the Indians thereof are determined to have the exclusive interest shall thereafter, in the case of the Navajos, "be a part of the Navaho Indian Reservation," and, in the case of the Hopis, "be a reservation for the Hopi Indian Tribe."

Under section 1 of the 1958 act, any such action was required to be heard and determined by a district court of three judges convened and functioning in accordance with the provisions of 28 U.S.C. § 2284, with the right in any party to take a direct appeal to the Supreme Court from the final determination by such district court.

Proceeding under this act, Willard Sekiestewa, then the duly authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe, commenced this action on August 1, 1958. He did so for and on behalf of the Hopi Indian Tribe including all villages and clans thereof, and on behalf of any and all Hopi Indians. Sekiestewa has since been succeeded, as chairman of the Hopi Tribal Council by Dewey Healing, and the latter has been substituted as party plaintiff.

Two defendants were named in the complaint. One is Paul Jones, the duly authorized chairman of the Navajo Tribal Council of the Navajo Indian Tribe, including all villages and clans thereof, and on behalf of any and all Navajo Indians claiming any interest in the 1882 reservation.

The other defendant named in the complaint is William P. Rogers, then Attorney General of the United States, on behalf of the United States. Rogers has since been succeeded, as Attorney General, by Robert F. Kennedy. The latter has been automatically substituted for Rogers as a party defendant by operation of Rule 25(d) Federal Rules of Civil Procedure, 28 U.S.C.A.

Upon the filing of the complaint a district court of three judges was duly constituted in accordance with the provisions of § 2284 referred to above. One change was subsequently made in the personnel thereof, as noted in our previous opinion, *Healing v. Jones,* 174 F. Supp. 211, decided May 25, 1959. The court is now comprised of the judges named above.

Defendant Jones filed an answer, counterclaim and cross-claim. The Attorney General filed an answer in which two defenses were asserted.

Under the 1958 act, the parties authorized to institute this litigation were empowered to name, as defendants, in addition to each other, "any other tribe of Indians claiming any interest in or to the area described in such Executive order. . ." The court has been advised by counsel that exhaustive studies and investigations conducted by field workers, historians and anthropologists have failed to reveal that any Indians or Indian tribes other than Hopis and Navajos have or claim any interest in any part of the 1882 reservation. Consequently the parties to this action, named above, did not join, as defendants, any other Indian or Indian tribe. Nor has any other Indian or Indian tribe sought to intervene or otherwise participate in this action, notwithstanding the fact that the pendency of this litigation has been given widespread publicity throughout the affected area.

One of the defenses set out in the answer of the United States is that this court is without jurisdiction because the rights and interests to be determined herein assertedly present a political and not a judicial question. Pursuant to Rule 12(d), Federal Rules of Civil Procedure, 28 U.S.C.A., and upon the motion of plaintiff, a hearing was first had on this defense challenging the jurisdiction of the court.

At this hearing plaintiff and defendant Jones opposed the position of the Government and argued that the court had jurisdiction. We decided that this court had jurisdiction to hear and determine the action. The first defense of the United States was accordingly dismissed. *Healing v. Jones,* 174 F.Supp. 211. At the same hearing certain motions directed to the pleadings were argued and later disposed of as indicated in the opinion just cited.[3]

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[3]Unless otherwise indicated, references hereinafter to "defendant," will mean Paul Jones, Chairman of the Navajo Tribal Council, and

Extensive pretrial proceedings were thereafter had, including pretrial conferences on March 16, 1959 and August 18, 1960. The parties exchanged documents, submitted documents for identification, filed statements of contentions, and entered into stipulations concerning certain facts, issues of fact and law, and exhibits, all in advance of trial. It is provided in pretrial order No. 2, filed March 28, 1960, that pretrial orders Nos. 1 and 2 shall supersede all pleadings and render moot all motions then pending directed against the pleadings.

As set forth in the pretrial orders, and as explained during pretrial hearings, plaintiff claims that all of the lands described in the order of December 16, 1882, are held in trust by the United States exclusively for the Hopi Indians and that neither the Navajo Indian Tribe, and its villages, clans or individual members, nor any other Indian or Indian tribe, village or clan, has any estate, right, title or interest therein or any part thereof. Plaintiff seeks a decree of this court quieting title to all of these lands in the United States in trust exclusively for the Hopi Indians.

Plaintiff further claims that if (but not conceding) some Navajo Indians have been settled on the reservation lands in the manner provided in the order of December 16, 1882, rights and interests thereby acquired, if any, do not inure to the benefit of the Navajo Indian Tribe in general, or to Navajo Indians who have not been settled on the reservation, but only to the group of Navajo Indians actually settled therein and to their descendants, collectively. Plaintiff also claims that such rights and interests, if any, acquired by any such group of Navajo Indians, are not exclusive as to any part of the reservation area, but are co-extensive with those of the Hopi Indians.

As set forth in the pretrial orders and explained during pretrial hearings, defendant concedes that the United States holds in trust for the Hopi Indians a portion of the executive order lands, described with particularity in pretrial order No. 2, and in paragraph 12 of the findings of fact herein. This tract, consisting of about 488,000 acres, is located in the south central part of the executive order reservation and includes the Hopi villages located on three mesas. Defendant claims that the remaining four-

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references to the "parties" will mean Dewey Healing and Paul Jones, representing the Hopi and Navajo Indians and Indian Tribes, respectively.

fifths of the 1882 reservation is held in trust by the United States exclusively for the Navajo Indian Tribe. In the map following this page of the opinion, the boundary lines of the area which defendant concedes to plaintiff, and other boundary lines to be discussed in this opinion are depicted.

Defendant makes no claim on behalf of any member of the Navajo Indian Tribe or any Navajo Indian using or occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in the order of December 16, 1882, except as beneficiary under the Navajo tribal claim. Defendant seeks a decree of this court quieting title to the lands in question in the United States in trust exclusively for the Hopi and Navajo Indian Tribes in accordance with his claims summarized above.

The second defense of the Attorney General is that the United States is a stakeholder with respect to the lands involved in this suit. For this reason, it was alleged, the Attorney General would take no position as between the claims of the other parties and would assert no claim on behalf of any other Indian or Indian tribe. Throughout the proceedings, after denial of its first defense, the Attorney General, represented by the office of the United States Attorney in Phoenix, Arizona has, consistent with its position as stakeholder, assumed the passive role of observer.

The cause came on for trial at Prescott, Arizona, on September 26, 1960, and continued without interruption to its conclusion on October 22, 1960. Proposed findings of fact and opening briefs were filed by both parties followed by objections to the proposed findings of the opposing party, and reply briefs. The case was taken under submission on August 2, 1961, when the last of these briefs were filed.

Concurrently with the filing of this opinion this court has entered its findings of fact, conclusions of law, and judgment herein.

In the judgment it is declared and adjudicated that, subject to the trust title of the United States, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, has the exclusive interest in and to that part of the 1882 reservation lying within the boundaries of land management district 6, as defined on April 24, 1943, which area is described in the judgment and in paragraph 41 of the findings of fact and is depicted

on the map which is a part of this opinion. Accordingly, and pursuant to section 2 of the Act of July 22, 1958, it is declared and adjudicated in the judgment that such area is a reservation for the Hopi Indian Tribe.

In the judgment it is further declared and adjudicated, subject to the trust title of the United States, that the Hopi Indian Tribe,, for the common use and benefit of the Hopi Indians, and the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, have joint, undivided and equal interests in and to all of the 1882 reservation lying outside the boundaries of land management district 6 as defined on April 24, 1943. Accordingly, it is declared and adjudicated in the judgment that such area is a reservation for the joint use of the Hopi and Navajo Indian Tribes.

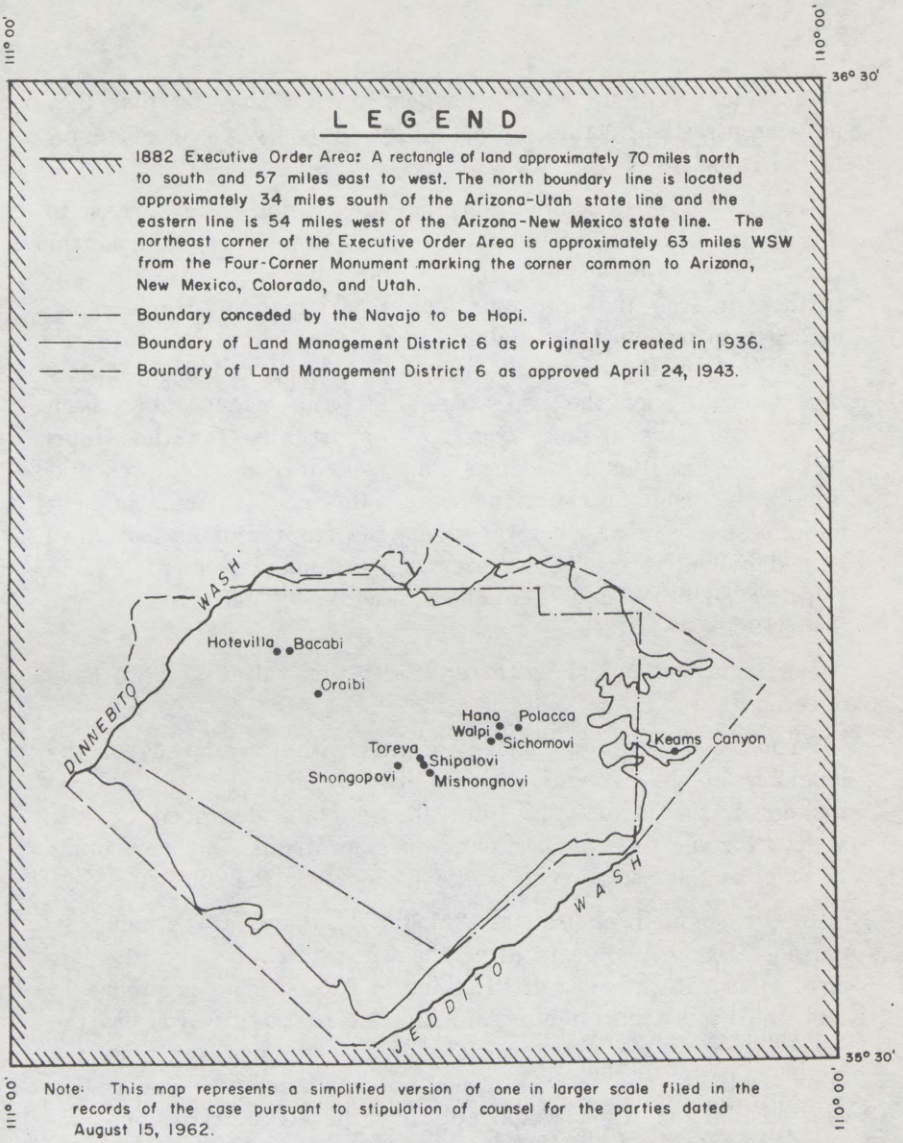
The judgment quiets title in and to the 1882 reservation lands in accordance with the declared rights and interests of the respective tribes.

In this opinion we will discuss the principal questions of fact and law which have been resolved by the findings of fact, conclusions of law, and judgment which we have entered. A chronological account of the Hopi-Navajo controversy, added as an appendix to this opinion, contains marginal references to the record.

The rights and interests in the reservation lands, as declared and adjudicated herein, derive from the Executive Order of December 16, 1882, and from events which thereafter occurred. In this discussion we will first consider what rights and interests, if any, were acquired by the two tribes and their respective members as a result of the December 16, 1882 order standing alone. We will then discuss the extent to which any such rights and interests were enlarged or diminished, and similar rights, if any, were newly created, by reason of events occurring after that date.

Rights and Interests Acquired
by Hopis on December 16, 1882

It has been the consistent position of the Hopis from the outset of this litigation that the rights which they assertedly have in the reservation arise from the 1882 executive order standing



Note: This map represents a simplified version of one in larger scale filed in the records of the case pursuant to stipulation of counsel for the parties dated August 15, 1962.

alone, and are in no sense dependent upon a showing that they have been settled in the reservation by authority of the Secretary of the Interior.

On the tentative assumption that the Hopis were correct in this it was ordered, during the pretrial proceedings, that, at the trial, the Navajos should proceed first with their case. It was further ordered that the question of whether the Hopis must, in order to establish their claim, prove they were settled in the reservation by the Secretary, would be argued and decided during the course of the trial after the basic evidence had been received but while there was still opportunity for the Hopis to produce additional evidence. This procedure was followed and during the trial the court ruled from the bench, after argument and conference, that whatever rights the Hopi Indians may have gained in and to the 1882 reservation are not dependent upon a showing that they had been settled therein by permission of the Secretary.

Defendant has asked us to reconsider this ruling and we have done so.

Such reconsideration logically begins with an analysis of the language of the Executive Order of December 16, 1882. It is recited in that order that the lands therein described are set apart "for the use and occupancy of the Moqui, and such other Indians as the Secretary may see fit to settle thereon."

In the quoted clause the "Moqui" Indians are specifically named, a comma appears after the word "Moqui," and there is no comma after the word "Indians." This specific reference to the Hopis, and the punctuation, indicate that the words "as the Secretary may see fit to settle thereon," do not apply to the Hopi Indians, but only to "such other Indians." Under this construction the Hopis would appear to have acquired immediate rights and interest in and to the 1882 reservation, without the need of any Secretarial action permitting them to "settle" on the reservation.

The language is not ambiguous in this regard and therefore reference to extrinsic aids to construction, such as the factual setting in which the 1882 order was issued, hardly seems necessary. We have nevertheless examined the evidence pertaining thereto and now state the background facts pertaining to the establishment of this reservation.

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No Indians in this country have a longer authenticated history than the Hopis. As far back as the Middle Ages the ancestors of the Hopis occupied the area between Navaho Mountain and the Little Colorado River, and between the San Francisco Mountains and the Luckachukas. In 1541, a detachment of the Spanish conqueror, Coronado, visited this region and found the Hopis living in villages on mesa tops, cultivating adjacent fields, and tending their flocks and herds.[4]

The level summits of these mesas are about six hundred feet above the surrounding sandy valleys and semi-arid range lands. 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 exhausting tribal dances. 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, at which time they numbered about eighteen hundred.

The recorded history of the Navajos does not extend as far back as that of the Hopis. 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. 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 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

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[4]In 1692 another Spanish officer, Don Diego De Vargas, visited the area where he met the Hopis and saw their villages. American trappers first encountered the Hopis in 1834. In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under the jurisdiction of the United States.

an extensive reservation to the east of what was to become the executive order reservation of December 16, 1882. The Navajos were thereupon released from their internment and moved to the newly-created Navajo Indian 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 sixten thousand.

The western boundary of the Navajo Indian Reservation was defined with precision in an executive order issued on October 29, 1878. This line was later to become the eastern boundary of the 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 8,000,000 acres.

Despite the vast size of the Navajo reservation at that time, this semi-arid land 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. It is therefore not surprising that great numbers of the Navajos wandered far beyond the paper boundaries of the Navajo reservation as it existed in 1880. By 1882, Navajos comprising hundreds of bands and amounting to about half of the Navajo population had camps and farms outside the Navajo reservation, some as far away from it as one hundred and fifty miles.

The Navajos were originally of an aggressive nature, although not as warlike as the Apaches. It was because they had become embroiled in a series of fights with white men 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, except for their proclivity to commit depredations against the Hopis, as described below.

Desert life made the Navajos sturdy, virile people, industrious and optimistic. They were also intelligent and thrifty. 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 return to them when it was practicable.

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

Nothing came of Irvine's recommendation. On May 13, 1878, William R. Mateer, then United States Indian Agent for the Hopis, proposed that a reservation extending at least thirty miles along the Colorado River be set apart for the Hopis. This proposal drew no reaction from the Washington office. 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 1882 reservation. His stated reason for making this suggestion was 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.

A year later Commissioner Ezra A. Hoyt asked Mateer to make a further report concerning the latter's reservation suggestion, but Mateer resigned before making such a report. On March 20, 1880, Galen Eastman, Mateer's successor as Hopi Indian Agent, wrote to R. E. Trowbridge, the then Commissioner, recommending that a reservation be set aside for the Hopis. His proposal was for a reservation forty-eight miles east to west and twenty-four miles north to south, embracing the Hopi villages. Eastman expressed the view that the Hopis needed a reservation because the settlement of Mormons in the vicinity was "imminent."

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 Hopi Indian Agent, wrote to the Secretary of the Interior recommending a small reservation for the Hopis.

Such a reservation, he urged, should include the Hopi pueblos, the agency buildings at Keams Canyon, and sufficient lands for agricultural and grazing purposes. Fleming stated that such a reservation was needed to protect the Hopi Indians from the intrusion of other tribes, Mormon settlers, and white intermeddlers.

On July 31, 1882, United States Indian Inspector C. H. 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 within 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.[5]

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 encroaching white settlers and from being "constantly overridden by their more powerful Navajo neighbors."[6]

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 from the Hopi villages as an intermeddler. At the same time he requested authority for soldiers to expel E. S. Merritt, another white intermeddler. Since, however, the Hopis did not have a reservation, forcible removal of intermeddlers could not be ordered, and Fleming was so advised.

On November 11, 1882, Fleming reported that he was having further difficulties with Sullivan, and stated that he would resign if a way could not be found to evict Sullivan and Merritt from

[5]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.

[6]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.

the Hopi villages. On November 27, 1882, Commissioner Hiram Price sent a telegram to Fleming, asking him to describe the 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 boundaries of the proposed reservation, the lines which were later described in the Executive Order of December 16, 1882. The proposed reservation thus described was much smaller than had been suggested in the joint-reservation proposal submitted by Howard.[7] At that time there were about eighteen hundred Hopis and about three hundred Navajos living within the boundaries recommended by Fleming.[8]

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[7]In his letter of December 4, 1882, Fleming said, among other things:

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

* * * * * * *

"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 tribe, they have been too easily imposed upon, & have suffered many losses."

[8]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

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On December 13, 1882, Commissioner Price wrote to H. M. Teller, Secretary of the Interior, transmitting a draft of an executive order in the exact form of the order issued three days later. In his letter of transmittal Price pointed out that the Hopis, then said to comprise "1813 souls" had no reservation, as a result of which it had been found impossible to extend them needful protection from white intermeddlers.

On December 15, 1882, Secretary Teller forwarded the papers to President Arthur, stating that he concurred in the Commissioner's recommendation. The handwritten executive order of President Arthur, setting aside the reservation, was issued on the next day, the boundaries being depicted in the map which is a part of this opinion. 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."[9]

The circumstances which led to the issuance of this executive order, as stated above, demonstrate that the primary purpose was to provide a means of protecting the Hopis from white intermeddlers, Mormon settlers, and encroaching Navajos. It was thus intended that the Hopis would be provided such means of protection immediately upon the issuance of the executive order, no further proceedings by way of Secretarial settlement or otherwise being required. Hence the background facts fully confirm the opinion stated above, based on the language of the order, that the Hopis acquired immediate rights in the 1882 reservation upon issuance of the December 16, 1882 order.

The right and interest thereby gained by the Hopis was the right to use and occupy the reservation, the title to the fee

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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.

[9]This was confirmed by a letter of the same date in which the Commissioner stated, among other things:

> "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."

remaining in the United States. *Spalding v. Chandler,* 160 U.S. 394, 402-403. This included the right to the mineral resource as well as surface use and occupancy.[10] The right was in the Hopi Tribe for the use and benefit of individual members thereof.[11]

The right of use and occupancy then gained by the Hopi Indian Tribe extended to the entire area embraced within the December 16, 1882 reservation, and was not limited to the parts of that reservation then used and occupied by them. As indicated in Commissioner Price's telegram of November 27, 1882, the reservation was intended to "include Moquis villages and agency and large enough to meet all needful purposes and no larger. . ." Future as well as then present needs of the Hopis were thus intended to be met, thereby precluding a construction of the executive order which would confine Hopis to the area which they then actually occupied.

Whether the right thus acquired by the Hopis to use and occupy the entire reservation was lost or impaired by subsequent inaction or abandonment on the part of the Hopi Indian Tribe is a matter to be discussed at a later point in this opinion. Likewise to be discussed below is the extent to which, if any, the right of use and occupancy acquired by the Hopis on December 16, 1882 was thereafter diminished in quantum or altered in character by action, if any, of the Secretary in permitting other Indians to settle on the reservation, or by reason of any other occurrence or course of events.

The right of use and occupancy gained by the Hopi Indian Tribe on December 16, 1882, was not then a vested right. As stated in our earlier opinion, an unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such use and occupancy may be terminated by the unilateral

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[10]Opinion of Acting Solicitor, Department of the Interior, filed June 11, 1946, 59 I.D. 248, dealing specifically with the executive order reservation of December 16, 1882. See, also, *McFadden v. Mountain View M. & M. Co.,* 9 Cir., 97 Fed. 670, 673, reversed on other grounds, 180 U.S. 533; *Gibson v. Anderson,* 9 Cir., 131 Fed. 39; 34 Opinions of the Attorney General, 182, 189; Federal Indian Law, 1958 edition, pages 648-652. The applicable principles are discussed in *United States v. Walker River Irr. District,* 9 Cir., 104 F.2d 334.

[11]*United States v. Shoshone Tribe,* 304 U.S. 111, 116; *Cherokee Nation v. Hitchcock,* 187 U.S. 294, 307.

action of the United States without legal liability for compensation. The Hopis were therefore no more than tenants at the will of the Government at that time. See *Healing v. Jones,* 174 F. Supp. 211, 216, and cases there cited. No vesting of rights in the 1882 reservation occurred until enactment of the Act of July 22, 1958.

Rights and Interests Acquired by Navajos on December 16, 1882

Unlike the Hopis, the Navajos are not named in the Executive Order of December 16, 1882. Therefore if they have any rights of use and occupancy in the reservation such rights must have been acquired under the provision of that order reading: "and such other Indians as the Secretary may see fit to settle thereon."

The words "may see fit" connote a future contingency, to be fulfilled only by an exercise of discretion. Those words thus contemplate the exercise of Secretarial authority which did not come into existence until the executive order was issued.

In the exercise of that authority the Secretary might, sometime after December 16, 1882, permit to be settled in the reservation Navajos who were actually residing there when the executive order was issued. Conceivably the Secretary could, in his discretion, relate those rights back to the day the executive order was issued. But, in any event, rights thereby acquired would be predicated upon the act of the Secretary on some date subsequent to December 16, 1882,, in granting such permission, nunc pro tunc or otherwise, and not upon the force and effect of the executive order independent of such Secretarial action.

Defendant appears to concede that any right or interest the Navajos have in the 1882 reservation must arise from Secretarial action pursuant to the "such other Indians" clause of the executive order.[12]

But it also appears to be defendant's position that the administrative intent in using this "such other Indians" clause was to

[12]In defendant's reply brief, for example, it is stated that "The 'Navajo interest' in the Executive Order area necessarily arises from Secretarial settlement thereon of Navajo Indians, members of the Navajo Tribe." Later in the same brief defendant states: "We are quite certain the court will find that the Navajo Indians are those referred to in the Executive Order as having been 'settled thereon by the Secretary of the Interior pursuant to such Executive Order.'"

grant immediate rights of use and occupancy to Navajos then living in the reservation area. Thus defendant expresses the view, in its objections to plaintiff's proposed findings of fact, that the recommendations of C. H. Howard for the establishment of a joint Western Navajo-Hopi reservation were accepted. Defendant also calls attention to official expressions in later years that it was the intention in creating the reservation to set aside the lands for the use and occupancy of the Hopi Indians and for the use and occupancy of the Navajos then living there, in addition to permitting the continued settlement of Navajos within the discretion of the Secretary.

There seems to be an inconsistency between defendant's concession that any rights the Navajos have in the 1882 reservation result from the "such other Indians" clause of the executive order, and his contention that the purpose in issuing the order was to grant immediate rights to Navajos as well as Hopis. As previously pointed out, the "such other Indians" clause could only be effectuated by subsequent Secretarial action. Its only effect was to provide the Secretary with authority to take future action, in his discretion, permitting Indians other than Hopis to settle on the reservation. Indians whose rights in the reservation are dependent upon future official acts of discretion can hardly be said to have gained immediate rights by virtue of an executive order which authorizes the exercise of such discretion.

But aside from this seeming inconsistency, and apart from the conclusion expressed above that the words of the executive order disclose no such intention, the extrinsic evidence refutes, rather than supports, the argument that it was intended by the executive order to grant Navajos immediate rights in the 1882 reservation.

As stated above, J. H. Fleming had recommended a small reservation for the exclusive use of the Hopis while C. H. Howard had recommended a very much larger reservation for the joint use of the "Arizona Navajos," and the Hopis. Defendant contends that since the Secretary was expressly authorized to settle other Indians in the reservation, Fleming's recommendation for an exclusive Hopi reservation was necessarily rejected. Defendant also calls attention to the fact that in his letter of December 21, 1882, the Secretary advised Fleming that his recommendations "as regards the boundaries" had been accepted,

nothing being said of Fleming's recommendations that the reservation be for the exclusive use of the Hopis. It is argued from these two circumstances that Howard's recommendation for a joint Arizona Navajo-Hopi reservation was accepted.

In our view, the conclusion reached by defendant is not warranted by the circumstances relied upon. The most significant fact in connection with the creation of the 1882 reservation is that the boundaries described in the executive order were those which Fleming supplied in response to the instruction: "for reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger." Had administrative officials intended to create a joint Western Navajo-Hopi reservation they would not have confined it to an area which Fleming thought was no larger than necessary for the Hopis, and rejected the larger area recommended by Howard for a joint reservation.

It is true that Fleming's recommendation for an exclusive Hopi reservation was not completely accepted. It was rejected to the extent that the Secretary was authorized to settle other Indians in the reservation in the future. This explains why Fleming was advised that his recommendations "as regards the boundaries" had been accepted, no like advice being given with respect to his recommendation for an exclusive Hopi reservation. But this falls far short of establishing an intention to accept Howard's recommendation for a joint reservation from the outset. The latter possibility is negated not only by the fact that Fleming's restricted area recommendation was accepted, but by the fact that the Navajos were not named in the executive order.

It is probable that Howard's recommendations had nothing whatever to do with the insertion of the "such other Indians" clause in the executive order. This was a customary provision in executive orders of that period. In 1 Ex. Order 195, I Kappler 916, dated April 9, 1872, a reservation was set aside for named bands of Indians in Washington Territory, "and for such other Indians as the Dept. of Interior may see fit to locate thereon." Between that date and December 16, 1882, as shown by plaintiff's exhibit No. 263, nine additional orders, setting aside reservations for named Indian tribes, contained a similar provision.

On the other hand, when it was decided to give immediate reservation rights to specific Indians then residing in the area,

in addition to the named Indians for whom the reservation was principally created, officials knew how to make this clear in an executive order. Just four days prior to the issuance of the order of December 16, 1882, an executive order was issued establishing the Gila Bend reservation. It was therein recited that the reservation was created for the ". . . Papago *and other Indians now settled there,* and such other Indians as the Secretary of the Interior may see fit to settle thereon." (Emphasis supplied.) The treaty of 1838 with the New York Indians, 7 Stat. 500, provided that the Senecas should have, "For themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians."[13]

There is another circumstance, extrinsic to the 1882 executive order itself, which tends to indicate that it was not the purpose to grant immediate rights to the Navajos by issuance of that order. By the Navajo treaty of 1868, 15 Stat. 667, the Navajos agreed that they would relinquish all right to occupy any territory outside the reservation thereby created, retaining only the right, under limited circumstances, to hunt on contiguous unoccupied lands.

The Navajos were released from this undertaking to the extent that specifically described additions were made to the original Navajo reservation by executive orders issued on October 29, 1878, and January 6, 1880.[14] Had it been the intention of the administration to grant Navajos, by issuance of the 1882 order,

[13]A similar technique has been employed since 1882, when it was intended that Indians other than the primary tribe were to have immediate rights. In II Executive Order 7, IV Kappler 1003, dated July 17, 1917, the Kaibab Indian reservation was established, "For the use of the Kaibab and other Indians now residing thereon, and for such other Indians as the Secretary of the Interior may locate thereon."

[14]The Navajos were similarly released from this treaty obligation on several occasions subsequent to December 16, 1882, but again, in each case, specific reference was made to the Navajo Indians and their then-existing reservation. On May 17, 1884, President Chester A. Arthur withheld from sale and settlement as a reservation for Indian purposes, lands that later were added to the Navajo Indian Reservation. Act of June 14, 1934, 48 Stat. 960. Similar action was taken by President William McKinley on January 8, 1900, and by President Theodore Roosevelt, on November 14, 1901, both of these additions to the Navajo Indian Reservation being effectuated by the Act of June 14, 1934, *supra.* On November 9, 1907, the Navajo Indian Reservation was again enlarged by executive order.

an immediate further release from their treaty obligations, we would expect to find some mention of the Navajos in that order.

We have not lost sight of defendant's reliance upon official expressions of opinion, made at various times, subsequent to 1882, with regard to the administrative intention in creating that reservation. In its briefs defendant relies upon two statements of this kind. One of these was the statement of Superintendent Leo Crane in his report of March 12, 1918. The other was the statement of Acting Solicitor Felix N. Cohen, in his opinion of June 11, 1946, 59 I.D. 248, 252. But there were also many other similar official expressions to the effect that it was the intention, in establishing the 1882 reservation, to give Navajos then living in the described area, rights of use and occupancy co-equal with those granted the Hopis.[15] On the other hand there are a number

[15]The principal statements of this kind were the following: (1) In his 1912 annual report, Leo Crane, then Superintendent of the Hopi Reservation, stated: ". . . These Navajos were permitted to remain on the reservation, having a right of occupancy, when the reserve was created by executive order of December 16, 1882."; (2) in his letter of June 22, 1914, addressed to the Commissioner of Indian Affairs, Superintendent Crane stated: ". . . Those Navajoes who resided on the reserve at that time (December 16, 1882), had a right of occupancy, and it is not understood that this right has diminished."; (3) in his letter of July 7, 1915, addressed to the Commissioner, Superintendent Crane stated: ". . . Owing to the language of the Executive Order creating the reservation in 1882, it would seem there is no authority for the deportation of Navajoes, nor is there any location to which they might be deported. . . ."; (4) in the report made by Inspector H. S. Traylor to the Bureau of Indian Affairs, on June 6, 1916, he stated: ". . . The Navajos were the occupants of at least a part of this territory before the Executive Order was made, and there is no doubt but that they are entitled to a part at this time . . ." (In this report Traylor incorrectly paraphrases the executive order as follows: ". . . it was done for the exclusive use of the Hopis and such other Indians as may be residing there . . ."); (5) in a report dated March 12, 1918, from Superintendent Crane to the Commissioner of Indian Affairs, the Superintendent stated: "The language of the executive order of 1882 practically guarantees to those Navajos or other Indians residing on Moqui at that time equal rights with the Hopi."; (6) on May 18, 1920, during the testimony of Robert E. L. Daniel, Superintendent of the Hopi Reservation, before a subcommittee of the Committee of Indian Affairs of the U. S. House of Representatives, the following colloquy 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,' (an erroneous paraphrase of the order). 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," (this was not a correct statement, as there were about eighteen hundred Hopis and three hundred Navajos in the reservation area in 1882).; (7) under date of July 26, 1924, the chief of the land division of the Department of the Interior, sent a memorandum to the inspection office of that department, in which it was said: ". . . the order of 1882 would seem to include them (the Navajos), or at least those who were there at that time."; (8) in a letter dated September 29, 1924, sent by Charles H. Burke, Commissioner of Indian Affairs, to several Hopi leaders, it was stated: "It is believed this language (of the executive order) was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."; (9) in a report dated May 12, 1928, sent to the Commissioner of Indian Affairs by C. E. Faris, District Superintendent of the Southern Pueblo Agency at Albuquerque, New Mexico, it was said: ". . . with the establishment of the reserve in 1882, the Department and the President, not unmindful of the rights of the Navajos as well as the Hopis, created the reservation for the use and occupancy of the Hopis and 'such other Indians as the Secretary may see fit to settle thereon,' and since the Navajos were there in possession, control, and use of vast range areas, the provision was warranted."; (10) in a letter dated September 24, 1932, sent to Otto Lomavitu, then President of the Hopi Council at Oraibi, C. J. Rhoads, then Commissioner of Indian Affairs, said: "This language 'for the use and occupancy of the Moqui and such other Indians, etc.' was purposely used so as to not only provide a reservation for the Hopi (Moqui) Indians but also 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."; (11) in a memorandum to the Secretary, dated December 20, 1932, Commissioner Rhoads said: ". . . At the time of making the above Executive Order withdrawal it was indicated by the Government field officers in their reports that in addition to the Hopi Indians a considerable number of the Navajo Indians were living within the area withdrawn. Hence, the language used in the Executive Order was designed to take care of the rights of both groups of Indians in their joint use and occupancy of the lands."; (12) in a conference between leaders of the Hopi Indians and officers of the Office of Indian Affairs, held on April 24, 1939, John Collier, Commissioner of Indian Affairs, stated that ". . . the Hopi-Navaho Reservation [was] set aside by the President for the Hopis and other Indians resident there. . . ."; (13) in an opinion rendered to the Secretary on June 11, 1946, Felix S. Cohen then acting solicitor of the department, stated: ". . . it was the intention in creating the reservation to set aside the lands for the use and occupancy of the Hopi Indians and for the use and occupancy of the Navajos then living there, and to permit the continued settlement of Navajos within the area in the discretion of the Secretary . . ."

of official expressions to the contrary effect.[16]

In our view, such comments and expressions of opinions, even though coming from officials of the same agency in the course of their administrative duties, are not competent evidence of what other officials, back in 1882, intended when they framed and obtained issuance of the executive order. Probably none of those commenting officials had access to as complete a record concerning the events and circumstances leading up to issuance of the 1882 order as is now before this court. As indicated by the words which they used in making these comments, several of these officials were apparently unaware of the exact language of that order. We must draw our own conclusions based on our understanding of the facts as they have been presented in this case,

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[16]The principal statements of this kind are: (1) On October 10, 1888, R. V. Belt, then Chief of the Indian Division, advised the Secretary that the reservation "... comprises no lands set apart for the Navajoes ..."; (2) on the same date the Secretary of the Interior, William F. Vilas, wrote to the Secretary of War, giving the identical advice; (3) on December 18, 1890, the Commissioner wrote to the Secretary: "It is very desirable that the Navajos should be forced to retire from the Moqui reservation ..." (4) on February 10, 1912, C. F. Hauke, then Second Assistant Commissioner of Indian Affairs, writing to Leo Crane, then Superintendent of the Hopi Indian School at Keams Canyon, Arizona, said: "In considering the proposition for a division of the reservation, 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."; (5) during hearings before a subcommittee of the Committee on Indian Affairs of the U. S. House of Representatives, held on December 6, 1917, E. B. Merritt, Assistant Commissioner of Indian Affairs, stated: ". . . we have not considered seriously the question of excluding the Navajos from the area set aside primarily for the Moqui Indians."; (6) in a report, dated July 25, 1930, sent by H. H. Fiske, field representative of the Indian Service, to the Commissioner, commenting upon Superintendent Crane's report of March 12, 1918, in which it was stated that the executive order "practically guarantees to those Navajos or other Indians residing on Moqui at that time, equal rights with the Hopis," Fiske said: ". . . 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."

on our analysis of the language of the order, and on our view of the applicable law.[17]

Our conclusion, based on all of the considerations discussed above, is that neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the executive order.

Settlement of Navajos in the 1882 Reservation

It follows from what has just been said that if the Navajos have acquired any right or interest in that reservation it must have been because, subsequent to December 16, 1882, they were settled therein pursuant to the applicable provision of the executive order of that date.[18] The exact language of the provision in question reads as follows: ". . . and such other Indians as the Secretary of the Interior may see fit to settle thereon."

In discussing the meaning of this provision, defendant directs attention to the character of the occupancy which must be shown to exist in order to establish that "other" Indians were settled in the reservation. Indians other than the Hopis are to be regarded as settled in the reservation, he argues, if they use and occupy such lands for residential and incidental purposes, in Indian fashion, and if such use and occupancy is of a continuing and permanent nature as opposed to a transitory or temporary occupancy.

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[17]These post-1882 official comments and opinions may be relevant to the entirely different question of whether Navajos were later settled in the reservation with the permission of the Secretary.

[18]It was theoretically possible for the Navajos to have acquired an interest in the reservation subsequent to December 16, 1882, by some other means, such as by Presidential or Congressional action. However, the Navajos make no claim of that kind, nor would the record support such a claim. Moreover, the Act of July 23, 1958, negates any such claim. In the opening language of that act it is declared that the lands are held in trust for the Hopi Indians "and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order." The statutory trust therefore is not for the benefit of any unnamed Indians who were not "settled" in the reservation pursuant to the "such other Indians" provision of the executive order.

In reaching this conclusion defendant applies, by analogy, the meaning which courts have attached to the terms "settlement" and "settled" as used in the Homestead Law, 43 U.S.C. § 162, 166.[19] He also likens the character of use and occupancy by "other Indians" contemplated by the executive order to that which must be found to exist in order to establish aboriginal Indian title.[20] Defendant thus seems to make the test exclusively one as to the character of the use and occupancy, no mention being made of the role the Secretary must play in order for "other Indians" to obtain rights as settled Indians.

Plaintiff, on the other hand, places the emphasis entirely upon the part the Secretary must play. He argues that however continuing and permanent the use and occupancy of other Indians may be, they cannot acquire rights in the 1882 reservation as "settled" Indians, unless the Secretary has, in the exercise of his discretion, "settled" them in the reservation. Plaintiff contends that neither the meaning attached to the terms "settlement" or "settled," as used in the Homestead law,[21] or the character of use and occupancy associated with aboriginal Indian title, is

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[19]The Supreme Court in *Great Northern Railroad Company v. Reed,* 270 U.S. 539, 545, speaking of the Homestead law, said: "The term 'settlement' is used as comprehending acts done on the land by way of establishing or preparing to establish an actual personal residence—growing thereon and, with reasonable diligence, arranging to occupy it as a home to the exclusion of one elsewhere." See also, *Anna Bowes,* 32 L.D. 331.

[20]In this connection defendant refers to statements concerning the kind of aboriginal use and occupancy which will constitute "Indian title," as set out in *United States v. Santa Fe Pacific Railroad Company,* 314 U.S. 339, 345; *Mitchell v. United States,* 34 U.S. 464, 486; *Alcea Band of Tillamook v. United States,* 103 C.Cls. 494, 558; and *Assiniboine v. United States,* 77 C.Cl. 347, 368. In the *Santa Fe* case, the court said, at page 345:

> "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from the lands wandered over by many tribes), then the Walapais had 'Indian title' which, unless extinguished, survived the railroad grant of 1866."

[21]Plaintiff argues that the Homestead law refers to the act of the individual seeking the benefit of the law, no administrative official being called upon to "settle" anyone.

helpful in construing the words "to settle," as used in the Executive Order of December 16, 1882.[22] Plaintiff concedes that his research has thrown but little light on the question of what act the Secretary must perform to "settle" other Indians on the 1882 reservation, and believes defendant's research has been similarly unproductive.

We are of the opinion that neither the test as to the character of use and occupancy of "other" Indians, as suggested by defendant, nor the test as to whether the Secretary acted to "settle" other Indians, as suggested by plaintiff, is alone sufficient in determining whether "other" Indians have been "settled" on the 1882 reservation. In our view, Indians other than Hopis acquired rights in the 1882 reservation under the executive order provision in question if: (1) such Indians used and occupied the reservation, in Indian fashion, as their continuing and permanent area of residence, and (2) the undertaking of such use and occupancy, or the continuance thereof, if undertaken without advance permission, was authorized by the Secretary, exercising the discretion vested in him by the executive order.

The general principle just stated provides a starting point for our discussion. It does not dispose of all the legal problems to be encountered in determining whether the Secretary in fact settled any Navajos in the 1882 reservation. Nor does it provide any guidance as to what effect Secretarial settlement of Navajos, if any were settled, had on pre-existing Hopi rights in the reservation. These are questions which can best be dealt with as they emerge during the course of the following discussion.

The evidence is overwhelming that Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958, when

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[22]Plaintiff contends that while Indian title as interpreted by the court with respect to Indian reservations has been determined to be the right of occupancy and use, no case has been found which makes the converse true, that such title can be created by merely using and occupying the land. Moreover, he in effect argues, the concept of aboriginal title no more than that of settlement under the Homestead law, involves administrative action, while under the Executive Order of December 16, 1882, such action is a specific requirement.

any rights which any Indians had acquired in the reservation became vested.[23]

The Navajo population in the reservation steadily increased during all of this period. In 1882 there were only about three hundred Navajos living in the area. By 1900 this had increased to 1,826. In 1911 the Navajo population was estimated to be two thousand, and by 1920 this had grown to between twenty-five and twenty-seven hundred. The Navajo population climbed to 3,319 by 1930, and to about four thousand by 1936. About six thousand Navajos were living within the reservation in 1951. By 1958, the Navajo population probably exceeded eighty-eight hundred.

The use and occupancy of the reservation area for residential purposes by a constantly increasing number of Navajos, is therefore definitely established, and we have so found. But the critical question is whether such use and occupancy was by authority of the Secretary, granted in the exercise of the discretion lodged in him by the executive order to "settle" other Indians on the reservation.

None of the twenty-one Secretaries of the Interior who served from December 16, 1882 to July 22, 1958, or any official authorized to so act on behalf of any of these Secretaries, expressly ordered, ruled or announced, orally or in writing, personally or through any other official, that, pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajos in the 1882 reservation, or had authorized any Navajos to begin, or continue, the use and occupancy of the reservation for residential purposes.

In the absence of any order, ruling, or announcement of this kind, defendant produced evidence on the basis of which, he urged, such Secretarial act or acts of discretion should be implied. This evidence relates to such matters as the extent to which administrative officials acquiesced in the known presence of Navajos in the reservation and the reasons therefor; the extent to which Government assistance was rendered to Navajos in the reservation as compared to that rendered to Hopis and the rea-

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[23]In *Healing v. Jones,* 174 F.Supp. 211, 216, we held that from the date of the enactment of the Act of July 22, 1958, 72 Stat. 402, the beneficiaries of the trust thereby created "had a vested interest therein capable of judicial recognition and protection."

sons therefor; and the issuance of official pronouncements concerning the respective rights of the Hopis and Navajos in the reservation and the officially-asserted basis for rights so recognized. Plaintiff produced counter evidence of the same general character.

We turn to a discussion of that evidence.

For a period of nearly six years following issuance of the executive order, the known presence of a relatively small number of Navajos in the 1882 reservation was neither condemned nor sanctioned by administrative officials. These Navajos were not officially labeled as interlopers and no effort was made to eject them from the reservation. On the other hand, they were not publicly recognized as having any rights in the reservation and they were provided with no assistance or supervision of the kind which, on a modest scale, was being supplied to Hopis.[24]

We conclude that nothing occurred during this initial period which would warrant the finding and conclusion that the Secretary had, by implication, settled Navajos in the reservation pursuant to the "such other Indians" provision of the 1882 executive order.

On September 20, 1888, Inspector T. D. Marcum reported to the Office of Indian Affairs that Hopis were complaining of Navajos "on their reservation," with flocks and herds, destroying Hopi crops and ruining their grazing lands. On September 26, 1888, Herbert Welsh, Corresponding Secretary of the Indian Rights Association, wrote to William F. Vilas, Secretary of the Interior. He told the Secretary of complaints he had received from Hopis concerning injuries inflicted upon them as a result of "the continual intrusions and depredations" of the Navajos.

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[24]In August, 1886, S. S. Patterson, then the Navajo Indian Agent, held a general council of Indians at Keams Canyon, within the 1882 reservation. Hopis representing five villages and thirty to forty Navajos living in the vicinity of Keams Canyon, attended this meeting. The Hopi representatives favored the establishment of a school at Keams Canyon, and promised to send sixty to seventy children from the villages. A few Navajos also said they would send their children to this school. Patterson reported this to the Washington office but the record does not indicate whether accommodation of Navajo children at this school was approved and, if so, whether any Navajo children attended during these first years. The school at Keams Canyon was opened in 1887.

Welsh suggested that a military force be sent to the area for the purpose of holding a council with the Navajos to inform them that the depredations must cease.

These two reports were turned over to R. V. Belt, Chief, Indian Division, for consideration. On October 10, 1888, Belt sent a memorandum to the Secretary expressing approval of the recommendation that a military expedition be sent to the area. He concluded this memorandum with these words:

> "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."

On the same day on which this memorandum was written, it was received by Secretary Vilas. Later the same day, he wrote to the Secretary of War requesting that a company of troops be dispatched to the area with instructions "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." In this communication Secretary Vilas also made the identical statement that Belt had made to the effect that no Navajos had been settled in the reservation.

We do not agree with defendant that the Secretary's statement should be discounted because of the expedition with which he acted after receiving the memorandum from Belt. To the extent, however, that this statement represents an expression of opinion by the Secretary as to the meaning of the 1882 order, or as to what some previous Secretary did or did not do in the way of settling Navajos in the reservation, the quoted statement is not competent evidence. Our view as to this is identical with that expressed earlier in this opinion in discussing whether the Navajos gained rights in the reservation on December 16, 1882.

But Vilas had been Secretary of the Interior since January 16, 1888. His statement therefore represents the best possible evidence that between January 16, 1888 and October 10 of that year, when the statement was made, no Navajos were settled in the reservation by Secretarial authorization. We so find and conclude.

The military expedition which Secretary Vilas requested reached the reservation in December, 1888. Due to the fact that winter was coming on, Navajo movement in the area adjacent to the Hopis was at a minimum. Forcible removal of Navajo families at that time of year would also have caused great hardship. For these reasons the officers in charge of this expedition determined not to force an immediate evacuation. Instead, they confined their action to a show of force and a warning that depredations must cease.[25]

Officials in the Office of Indian Affairs were advised of this development and were apparently content to let the military proceed under the new plan. Defendant believes that, in view of this acquiescence, it should be inferred that the Secretary had impliedly settled these resident Navajos in the reservation.

We do not agree. Only a short time before, the Secretary had expressly stated that he had not settled any Navajos in the reservation. There were no official pronouncements during the months which followed indicating a change of position. The decision of the military against forcible ejection of Navajos was not based on any supposed rights the Navajos had acquired in the reservation by settlement or otherwise. This considerate treatment was professedly motivated, as Indian Office officials knew, by a desire to avoid inflicting hardships on Navajo families, where not immediately necessary to protect the Hopis. If there was any other motivation it was probably the desire to avoid antagonizing the aggressive Navajo Indian Tribe at a time when the Government was seeking to maintain peace with the Indians of the West.

In the summer of 1889, there were renewed complaints of Navajo encroachments upon the Hopis, the theoretical twelve-mile limit prescribed by Col. Carr apparently being disregarded by the Navajos. From the beginning to the end of 1890 there were further complaints of this kind. The Hopis living at Oraibi, the largest Hopi village, ceased sending children to the Keams

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[25]It was during this period that Col. E. A. Carr, commanding officer at Fort Wingate, New Mexico, wrote to Navajo Chief Sam Begody. The colonel asked Chief Begody to notify the Navajos in the 1882 reservation that they had no right to move nearer to the Hopi villages, and that they must move back and stay "at least twelve miles away from the Moquis. . . ."

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Canyon school, partly because of the Government's failure to protect the Hopis from the Navajos.

In February, 1890, Commissioner T. J. Morgan instructed Charles E. Vandever, the Navajo Agent at Gallup, New Mexico, to immediately take energetic and proper steps, without endangering the peace, to keep the Indians ". . . within the limits of their reservation, and to return roving Indians to the reservation." The only Indians excepted from this order were those who had settled upon lands outside of their reservation for the purpose of taking homesteads. No Navajos had moved into the 1882 reservation for that purpose, because that area had not been opened for homesteading.

It follows that, under Commissioner Morgan's instructions, all Navajos then in the 1882 reservation were subject to removal. They could not have been removed if they had been settled in the reservation by Secretarial authority. Hence the instructions indicate that from June 10, 1889, when Morgan became Commissioner, to February, 1890, when the instructions were issued, no Navajos had been settled in the 1882 reservation by Secretarial authority.

On December 16, 1890, special agent George W. Parker sent a telegram to the Commissioner stating that a company of soldiers should be sent at once to remove "trespassing" Navajos from among the Hopis, and to arrest rebellious Oraibi Hopis who refused to send their children to the Keams Canyon school. The Commissioner telegraphed General McCook at Los Angeles and, on December 17, 1890, a military expedition was sent on its way.[26] On December 22, 1890, the Commissioner sent instructions to Parker to cooperate with the troops and school superintendent Ralph P. Collins "in such way as may be proper to eject the Navajos from the Moqui country to protect the Moquis from the former. . ."

The troops reached Keams Canyon on Christmas Eve, 1890, and shortly thereafter, with their use, the revolt of the Oraibi Hopis against the Keams Canyon school was broken. Winter being already well advanced, the Navajos were not on the move

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[26]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. . . ."

and Lt. Charles H. Grierson, in charge of the troops, reported 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. Instead, his instructions were to hold interviews with the Navajos and explain to them that they should cease molesting the Hopis.

Again, the Washington office apparently acquiesced in the decision of the military not to forcibly eject Navajos from the 1882 reservation. But, as in the case of the similar attitude adopted by the Commissioner's office in 1888, we do not believe that implied Secretarial settlement of Navajos is to be inferred from such acquiescence.

There were apparently two reasons why it was decided not to use force on this occasion, neither of which was predicated upon the view that the Navajos had rights in the reservation, however acquired. One of these was that, until the 1882 reservation boundary lines were distinctly marked, Navajos could not be blamed for entering that area. The other was that every effort was being made at this time to avoid antagonizing the Navajo Indian Tribe. Thus Lt. Grierson was instructed by Capt. H. K. Bailey, at Los Angeles, that he should 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."[27]

Early in 1891, Parker, Navajo Agent David Shipley, School Superintendent Collins, and Thomas V. Keam, a pioneer of the area, decided that the most feasible way of meeting the immediate problem was to prescribe a circular boundary around the Hopi villages, having a radius of sixteen miles, within which the Navajos were instructed not to enter. They proceeded to do this, marking the circular boundary by mounds and monuments.

The Commissioner was advised of this plan, being told that both the Hopis and Navajos were agreeable thereto. The Commissioner apparently acquiesced in the arrangement, although it was never expressly confirmed by the Washington office. This

[27]That the Washington office shared this reluctance to rile the Navajo Indian Tribe at this particular time is evidenced by the directions Parker received from the Commissioner on December 22, 1890, ". . . to exercise proper care and tact not to inflame the minds of the Navajos and endanger an outbreak with them. . . ."

1891 line is referred to in the record and briefs as the "Parker-Keam" line. In what turned out to be a colossally over-optimistic statement, the Commissioner, on January 30, 1891, reported to the Secretary that the affairs between the Hopis and Navajos in the vicinity of Keams Canyon "have been brought to a satisfactory conclusion."

The significance which defendant draws from establishment of the so-called Parker-Keam line, is predicated on the fact that it operated to assure Navajos residing outside that line but inside the 1882 reservation that they would not be disturbed. We are asked to infer therefrom that, by implication, the Secretary settled Navajos in the 1882 reservation, but outside of the Parker-Keam line.

If this circumstance were considered independently of all the other events of the period, such an inference might be warranted. But immediately prior thereto the Commissioner had ordered the removal of Navajos and had only acceded to less stringent measures out of considerations unrelated to any claim of right in the Navajos. During this same period the Government was rendering substantial assistance to Hopis in the reservation but none at all to resident Navajos unless a few Navajo children were then attending the Keams Canyon school.

Moreover, the significance to be attached to the establishment of the Parker-Keam line must be judged not alone in the setting of circumstances which then existed, but also in the light of subsequent events. There are many instances in the long history of this controversy in which an interpretation of a particular occurrence, perhaps justified by immediately surrounding circumstances, proves unwarranted when considered in a broader context. As we shall shortly see, administrative action in the years immediately following establishment of the Parker-Keam line negates the view that any Navajos had previously gained rights in the reservation by Secretarial settlement or otherwise.

We therefore conclude that practical considerations, unassociated with any official recognition of Navajo rights, dictated acquiescence in the attempt to solve the problem by means of the Parker-Keam line. Up to early 1891, no Secretary of the Interior had settled any Navajos in the 1882 reservation.

Early in 1892, administrative officials put into effect a plan to allot lands to individual Indians in the reservation. While,

under this plan, Navajos in the reservation were not permitted to be uprooted in order to allot lands to Hopis, neither were they permitted to receive allotments themselves. No Indian was allowed an allotment unless his father or mother was a Hopi.[28] This distinction between rights accorded Hopis and Navajos is explainable only on the hypothesis that the Navajos in the reservation were not then settled Indians within the meaning of the 1882 executive order.

Several years were then to pass before there would be other events of significance. In 1899, the superintendent of schools at Keams Canyon complained of Navajo depredations and urged that the Navajos be returned to the Navajo reservation. The Washington office, however, decided that nothing should be done "as the Navajoes have always trespassed upon the Moqui resn. . . ." The following year, rejecting a proposal that traders on the reservation not be permitted to do business with Navajos, the Commissioner said that it was not practical or fair to ask traders to keep the "trespassing" Navajos out by refusing to trade with them.

It would appear that if the Navajos were then "trespassers" in the reservation, as they were authoritatively labelled, they were not settled Indians within the meaning of the 1882 order. The described Government inaction is not necessarily inconsistent with that label. Refusal to eject Navajos at this time may well have been motivated by the same considerations which led to acquiescence in the military decision against ejectment in prior years. Refusal to restrict the traders in the manner proposed was specifically attributed to the hardship this would place upon traders rather than any rights which had been acquired by the Navajos.

Again, several years elapsed before there were other occurrences relevant to the question under discussion. In Part II of the Indian Department Appropriation Act of March 1, 1907, 34 Stat. 1015, under the heading "Arizona" (34 Stat. 1021), the Secretary of the Interior was authorized "to allot lands in severalty to the Indians of the Moqui Reservation in Arizona, in such quantities as may be for their best interests. . ." It was further provided that such allotments would be subject to the provisions

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[28]This first allotment project was discontinued in the fall of 1894, without any allotments having been approved.

of the General Allotment Act of February 8, 1887, 24 Stat. 388-391.

The then acting Commissioner apparently construed the words "Indians of the Moqui Reservation," as used in the 1907 act, to include Navajos then located in the reservation who intended to remain there and who desired to receive allotments. Thus, on February 25, 1909, he instructed field officials to allot lands in the reservation to such Navajos. He further advised, however, that Navajos living in the reservation who declined to accept allotments "can be removed from the reservation." In conveying these instructions, the acting Commissioner made reference to the "such other Indians" provision of the Executive Order of December 16, 1882, stating that this provision provided "ample authority" for the instructions which were given.

The clear intendment of these instructions, given by the authorized representative of the Secretary, is that Navajos then living in the reservation who intended to make it their permanent homes, and who indicated a willingness to accept allotments, were thereby "settled" in the reservation pursuant to the authority vested in the Secretary under the executive order. All other Navajos living in the reservation, however, without regard to length of residence or intention to make the reservation a permanent home, were subject to removal and therefore were not "settled" at that time.

Approximately three hundred Navajos residing on the 1882 reservation indicated a willingness to accept allotments, and received allotments subject to approval. In 1911 this second allotment project was abandoned, and none of the allotments to Navajos or others was approved. These three hundred Navajos must nevertheless be regarded as "settled" Indians, since the only Navajo permanent residents who were denied that status under the acting Commissioner's ruling of February 25, 1909, were those who were unwilling to accept allotments.

It is not ascertainable from this record who these three hundred Navajos were; which, if any, were still living on July 22, 1958, and residing in the reservation; or which of them, if any, had descendants living in the reservation on the latter date and, if so, who were such descendants. It is therefore not possible, on this record, to find that any Navajos residing in the reservation on July 22, 1958, derived rights of use and occupancy by

reason of the fact that, in the years 1909 to 1911, the Secretary had settled three hundred unidentified Navajos in the reservation.

There are several reasons why, as we find and conclude, the Secretarial settlement of three hundred Navajos in the reservation in connection with the 1907-1911 allotment project, did not effectuate a Secretarial settlement of the Navajo Indian Tribe in the 1882 reservation. These reasons are: (1) only three hundred of some two thousand Navajos then living in the reservation were settled in this manner; (2) the only Navajos who may be deemed to have been settled at that time were those who agreed to accept allotments, and the acting Commissioner ruled that Navajos who declined to accept allotments "can be removed from the reservation"; (3) the purpose of the allotment system being to remove lands from communal ownership and place them under individual ownership (see Federal Indian Law, Department of the Interior, page 773), the fact that the Government indicated a willingness to allot lands to Navajos (these allotments were never approved) does not tend to show a purpose to settle the Navajo Indian Tribe; and (4) events subsequent to 1911 show that the Navajos were not administratively treated as a "settled" tribe.

It was during this second allotment period that administrative personnel of the Office of Indian Affairs began to speak of Navajo "rights" in the reservation. Writing to the Commissioner on January 24, 1911, Hopi Superintendent A. L. Lawshe said: "As I understand the matter the two tribes now have substantially equal rights which should be preserved." C. F. Hauke, the Second Assistant Commissioner, making reference to this statement in a letter to an official of the Indian Rights Association, commented: "The Superintendent's report indicates that he appreciates the fact that the Navajos and Moquis have equal rights on the reservation. . . ."

Neither Lawshe nor Hauke indicated what they believed to be the source of the asserted "rights" of the Navajos. There is no indication that they regarded the Navajos as having been "settled" pursuant to the executive order. But if this inference is warranted, it still is not helpful in the absence of an indication that the officials were reporting contemporaneous administrative action, as distinguished from expressing an opinion as to past action. Finally, there is no evidence that these views were then accepted or shared by the Secretary or the Commissioner.

We conclude that these statements of Lawshe and Hauke are without significance on the question of whether Navajos were "settled" in the reservation. Nor were there, with the exception of the allotment instructions referred to above, and action thereunder, any other events during this second allotment period, from 1907 to 1911, from which it may reasonably be inferred that Navajos were "settled."

During the seven-year period from 1911 to the enactment of May 25, 1918,[29] the view first emerged in official circles that, by virtue of the "such other Indians" provision of the Executive Order of December 16, 1882, Navajos then living on the reservation, and their descendants, had acquired rights of use and occupancy. This opinion was first expressed by Leo Crane, then superintendent at Keams Canyon, in his annual report for 1912. It was repeated by him in 1914, 1915 and 1918, and the same view was expressed by Inspector H. S. Traylor in a report dated June 6, 1916.

These expressions of opinion would have significance only if they manifested contemporaneous action by the Secretary, or his authorized representative, settling Navajos in the reservation pursuant to the authority reserved in the executive order. But neither Crane nor Traylor were shown to have authority to act for the Secretary in such matters. It is therefore not necessary for us to determine whether they were purporting to do so, or whether they were merely expressing their personal opinions as to the legal effect of the executive order, or as to past Secretarial acts of settlement.

It was also during this seven-year period, that suggestions for an actual and permanent division of the reservation between Hopis and Navajos, with marked boundary lines, were first advanced. Superintendent Lawshe had, in fact, made such a suggestion on February 14, 1911, just before abandonment of the second allotment project. A similar suggestion was made on November 20, 1911, by Leo Crane. On February 10, 1912, Second Assistant Commissioner Hauke advised Crane that the general

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[29]The Act of May 25, 1918, 40 Stat. 570, 25 U.S.C., § 211, prohibited 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.

problem was under consideration. In his 1912 report, and again in 1915, Crane reviewed this suggestion. A somewhat similar suggestion was made by Inspector Traylor on June 6, 1916.

As a result of suggestions made by then Congressman Hayden at a Congressional committee hearing held in December, 1917, Crane was instructed to investigate the desirability of dividing the 1882 reservation. He reported on March 12, 1918, agreeing with Traylor that the reservation should be divided, the Navajo part, however, to be only for the use of Navajos who resided in the reservation in 1882 and their descendants.

Had the suggestions of Lawshe, Crane and Traylor for a division of the reservation been accepted by the Secretary or Commissioner, the inference would be permissible that the Navajos were recognized by them as having rights of use and occupancy in the reservation. But there is no indication that these recommendations received acceptance above the level of field personnel.

A third development during this period which requires comment has to do with suggestions that Navajos be removed from the reservation. On May 26, 1914, H. F. Robinson, Superintendent of the Land Division of the Department of the Interior, wrote to the Commissioner recommending that the Navajos be moved from the 1882 reservation to available lands to the south. Crane, who was asked to submit his views concerning this proposal, recommended against it.

In his report of June 6, 1916, Inspector Traylor spoke of the territory occupied by Navajos as "rightfully" belonging to the Hopis, and suggested that some Navajos might be persuaded to move to the west and south of the 1882 reservation. He would then set aside the area within the reservation, vacated by the Navajos, for the Hopis for a period of ten years, with the provision that if they did not use and occupy it, the Navajos again be permitted to take it over.

There is nothing in the record to indicate that either Robinson's or Traylor's suggestion for removing Navajos received acceptance in Washington. The fact, however, that Robinson's recommendation resulted in a request for a report from Crane, is some indication that the Commissioner's office did not then regard the proposal as legally precluded. If the Secretary or Commissioner had then held a very firm conviction that Navajos were present on the reservation as of right, it is doubtful if they

would have called upon a field official to report on the proposal to remove the Navajos.

During this seven-year period from 1911 to 1918, the Navajos on the reservation received very little assistance from the Government, while the Hopis, as in the past, received substantial aid. On June 22, 1914, Crane stated, in a report to the Commissioner, that for thirty years the Government "has lavished its help upon the Hopi and has done practically nothing for the Navajo on this reserve. . ." In a report dated March 12, 1918, he stated that thirty years of agency effort had been devoted almost entirely to the Hopis, the Navajos only being given implements. He added: "The Government since 1868 has neither sought to educate or rule them [Navajos]. . . ."

The events of the seven years from 1911 to 1918, reviewed above, provide no factual basis for the inference that, during that period, the Secretary "settled" Navajos on the 1882 reservation. In fact there is no indication that, during this period, the Secretary or Commissioner recognized Navajos as having any rights in the reservation, whether as "settled" Indians or otherwise. That the Navajos were actually regarded by them as without any such rights is indicated not only by the fact that a proposal to remove Navajos was seriously considered, but by the difference in treatment accorded Hopis and Navajos on the reservation with respect to the rendering of Government assistance.

During the nine-year period which followed, ending with the enactment of March 3, 1927,[30] there were further official expressions of opinion concerning the status of Navajos in the 1882 reservation.

At a Congressional Committee hearing held in May, 1920, Hopi Superintendent E. L. Daniel erroneously quoted the "such other Indians" provision of the executive order,[31] and stated that this "usual jigger . . . lets the Navajos in. . . ." Daniel also made the incorrect statement to the committee that, in 1882, "there were practically as many Navajoes on the reservation as Hopis."

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[30]On that date 44 Stat. 1347, 25 U.S.C. § 398d was enacted. Under this statute, changes in the boundaries of reservations created by executive order, proclamation, or otherwise for the use and occupation of Indians were prohibited, except by Act of Congress, with an exception not here applicable.

[31]Daniel quoted the provision as reading: "such other Indians that might belong on the reservation."

On July 26, 1924, Marschalk, Chief of the Land Division, answering an inquiry from the Commissioner as to the status of the Navajos on the reservation, replied:

> "It does not appear that the Navajos 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."

As we said with regard to the somewhat similar expressions of Crane and Traylor, these statements by Daniel and Marschalk would have significance only if they manifested contemporaneous action by the Secretary or his authorized representative, settling Navajos in the reservation. But, as in the case of Crane and Traylor, neither Daniel nor Marschalk were shown to have authority to act for the Secretary in such matters. These latter statements, as in the case of the former, therefore do not aid us in resolving the question under discussion.

On September 29, 1924, an official as high as the Commissioner of Indian Affairs for the first time expressed an official view to the effect that Navajos had rights of use and occupancy in the reservation. This was, in fact, the first of thirteen instances during the twenty-year period from 1924 to 1944, when a Commissioner made an official statement or ruling which expressly, or by necessary implication, recognized Navajos as having rights in the 1882 reservation.

Without doubt the Commissioner of Indian Affairs had authority to exercise the discretion vested in the Secretary of the Interior to "settle" other Indians in that reservation.[32] It therefore becomes necessary to determine whether these statements by the Commissioner, to the effect that Navajos had rights in the reservation, and the administrative action or inaction with which they were associated, considered separately or together as a developing course of conduct, warrant the conclusion that the Secretary had, in the implied exercise of his discretion, and

[32]See 25 U.S.C., § 2, *Rainbow v. Young,* 8 Cir., 161 Fed. 837. In one of these thirteen statements (the one dated February 7, 1931), the Secretary of the Interior joined. In another, dated October 27, 1941, the Assistant Secretary of the Interior joined.

pursuant to his reserved authority under the 1882 executive order, settled Navajos in the reservation.

The statement of September 29, 1924, was made in answer to a protest which Hopi leaders had made against the plan to convert the Keams Canyon facilities into a school for Navajo children residing in the reservation. Referring to the "such other Indians" provision of the executive order, Commissioner Charles H. Burke said: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."

For the reasons previously indicated, this statement is not competent evidence of the meaning of the 1882 executive order, or that a previous Secretary of the Interior had settled Navajos in the reservation. But since the "such other Indians" provision is not self-executing, and since the statement was made in justification of the Commissioner's concurrent act in providing schooling for resident Navajo children at Keams Canyon, the statement and act, considered together may have been intended to manifest implied settlement of Navajos at that time.

It is true that the Commissioner's statement insofar as it undertook to explain the intention of those who issued the executive order, is erroneous. As already stated in this opinion, the "such other Indians" provision was inserted in the order without any particular intent with regard to Navajos. Nor in framing that order was there any intent to limit the Secretary's authority to settle "other Indians," to Navajos who "had," by 1882, "lived on the reservation for many years. . . ," as Burke erroneously stated.

But if Commissioner Burke did thereby exercise the discretionary power to settle other Indians, the fact that he did so in favor of Navajos in the mistaken belief that this was the designed purpose of the "such other Indians" provision, is immaterial. We are not concerned with the motivation for the exercise of such discretion, or whether the result was good or bad.

In one respect, however, there appears to be an inconsistency between what the Commissioner said and what he did. By his statement he seems to have indicated, in effect, that he was settling in the reservation Navajos who had lived therein for many years prior to 1882. But he was apparently, at the same time, making the school facilities at Keams Canyon available

to all resident Navajo children without regard to the number of years their families had lived in the reservation. This is but the first of several instances to be related in which the Commissioner, while verbally seeming to indicate a limited exercise of the discretionary power in favor of Navajos, sanctioned administrative action consistent with a much broader exercise of such power.

It is not necessary to reach a conclusion based on this 1924 incident as to how this seeming inconsistency is to be resolved. Nor is it, for that matter, necessary to reach a firm conclusion based on this one incident, that any Navajos were settled in the reservation pursuant to the "such other Indians" provision of the executive order.

It is sufficient at this point in the opinion to observe that the 1924 statement and the surrounding circumstances have some tendency to indicate that some Navajos were then settled in the reservation pursuant to an implied exercise of authority under the executive order. It must be left to subsequent events, as hereinafter discussed, to reveal whether this initial tendency of the evidence is to be confirmed or undermined, and to accurately appraise the extent to which, if any, the discretionary power was exercised.

On March 31, 1926, Senator Ralph H. Cameron wrote to the Commissioner requesting comment concerning a proposal which had come to him from four Hopi chiefs that 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." Replying under date of April 13, 1926, Commissioner Burke referred to the "such other Indians" provision of the executive order,[33] and stated:

> ". . . 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."

In apparently recognizing resident Navajos as having rights in the reservation the Commissioner thus relied upon the "such other Indians" provision of the executive order. But the infer-

[33]The Commissioner incorrectly quoted this provision, stating that it read: "and such other Indians as the Secretary of the Interior may designate."

ence which might be drawn therefrom that he was thereby reporting contemporaneous administrative action pursuant to that provision is somewhat undermined by the use he made of the word "settled." The executive order contemplates settlement of other Indians only where the Secretary or his representative, in the exercise of discretion, consents thereto. Here, however, the Commissioner uses the term "settled" as if it required only action by the Navajos in taking up residence in the reservation.

The Commissioner's resistance to the proposal that the 1882 reservation be made an exclusive Hopi reservation, manifested in this letter, was borne out by contemporary administrative inaction. Neither the Secretary nor the Commissioner sought Presidential or Congressional authority to make this an exclusive reservation, nor did they take any steps to remove Navajos therefrom. Yet, when appraised in terms of comparative Government assistance rendered to resident Hopis and Navajos, the area was not then administered as if Navajos had equal rights with the Hopis.

During the years from 1918 to 1927, the Navajos in the reservation received slightly more Government assistance than formerly. But it was still insubstantial as compared to the aid received by the Hopis. Some sheep-dipping vats were installed for the joint use of the Hopis and Navajos. But in 1921, 563 out of 648 Hopi children were being served at five Government schools in the reservation, and at non-reservation schools, while only fifty of the six hundred resident Navajo children were being given schooling—all of them off the reservation. In 1926, however, the dilapidated facilities of a former period at Keams Canyon were reconstructed and put to use as a boarding school for Navajo children.

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.

On November 19, 1927, Hopi Superintendent Edgar K. Miller wrote to the Commissioner suggesting that the 1882 reservation be divided between the Hopis and the Navajos. The Commissioner directed Miller to submit a more detailed report concerning this proposal. This further report was filed on January 16, 1928, Miller again recommending that the reservation be divided.

On April 13 of that year, Assistant Commissioner Merritt requested Chester E. Faris, District Superintendent at the Southern Pueblo Agency, Albuquerque, New Mexico, to make a careful investigation and full report concerning the proposal for a division of the reservation. Faris submitted this report on May 12, 1928, recommending against any division of the reservation. The proposal then rested in abeyance until March 14, 1930, when Commissioner Rhoads wrote to Faris, and on April 16 to H. J. Hagerman, special Indian commissioner, requesting them to recommend what action should be taken to resolve the Hopi-Navajo controversy.

While these studies were in progress, Hopi Superintendent Miller wrote to the Commissioner transmitting a petition signed by a number of Hopis, setting out their land claims. Replying to Miller under date of July 17, 1930, the Commissioner quoted the "such other Indians" provision of the 1882 order, and stated:

> ". . . it has always been considered that the Navajos have the right to use part of the reservation."

This reference to the "such other Indians" provision, as support for the view that Navajos have rights of use and occupancy in the reservation, again has some tendency to indicate a contemporaneous exercise of the discretionary power thereby conferred. While there is reference in this statement to what the past view was, it purports also to represent the view of the then Commissioner. Such tendency as this Commissioner's statement has to establish a contemporary settling of Navajos is not diminished by the described setting in which it was made. A division of the reservation between Hopis and Navajos was under active consideration. Concurrently with this statement the Hopi proposal for ejectment of the Navajos was expressly rejected.

On November 20, 1930, Hagerman and Faris submitted the report which had been requested of them in March and April of that year. They recommended that a part of the reservation, consisting of about 438,000 acres and including the Hopi villages and adjacent lands, be set aside and fenced for the exclusive use of the Hopis. It was their proposal that after these fences were built, the Hopis and Navajos should be told that the Hopis must keep inside the fence, and the Navajos outside, as far as grazing or agriculture or other occupancy was concerned. The Hopis,

however, would have the right to drive their cattle "through the Navajo area" to the railroad.[34]

Hagerman and Faris submitted a general description, stated in miles, directions, and natural monuments, for the area which they proposed be set aside for the Hopis within the 1882 reservation. They suggested, however, that if the proposal was accepted in principle, a detailed reconnaissance of the lines as approximately proposed be made with a view of a thorough examination of the terrain so as to find the best location for the fence.[35]

In this report Hagerman and Faris did not indicate why they thought the Navajos residing in the 1882 reservation had such standing that a large part of the area should be set aside for their use.

On February 7, 1931, Commissioner C. J. Rhoads and Secretary of the Interior Ray Lyman Wilbur, joined in a letter to Hagerman, accepting the recommendation that the 1882 reservation be divided. "We are of the opinion," they stated, "that there should be set aside and fenced for the exclusive use of the Hopis a reasonable and fair area of land." These two officials stated that it had for years 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. It was now their reluctant conclusion, however, that real amalgamation was virtually impossible, and that it was therefore desirable to designate separate districts for the use of each group.

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[34]In this connection it was further stated, in the Hagerman report: ". . . At the same time they [Hopis] should be enjoined that they must respect the fenced area and if they do not they will be punished to the full extent of the law. It should be made clear to them that these areas are set aside merely for the use of the Hopis, and that in no way does it mean that the Government's passing upon the areas so set aside as lands to which the Hopis have any specific proprietary right. Nor should it be definitely indicated that there may not in the future be alterations or changes in the districts set aside for the use of the respective tribes."

[35]It was stated in this report that a few Navajos resided within the area proposed to be reserved for Hopis, and that a few Hopis resided outside of those lines. A few other Hopis, while residing within the reserved area, occasionally grazed cattle outside that area. Hagerman and Faris also stated that a good deal of the area adjacent to the proposed fence lines "is actually not even now much used by either the Hopis or Navahos."

The Commissioner and Secretary indicated that they were "disposed to accept" the boundary designations proposed by Hagerman and Faris. But they also directed that field studies be undertaken with a view of being able to designate the lines specifically "when the time comes."

Unlike the statements of previous Commissioners to the effect that resident Navajos had rights of use and occupancy in the 1882 reservation, no statement of this kind was made in the Commissioner's and Secretary's letter of February 7, 1931. That they did recognize resident Navajos as then having such rights is implicit, however, in their acceptance of the proposal to fence the reservation, thus setting aside a large share of the area for the exclusive use of the Navajos.

It remains to be determined whether such recognition of Navajo rights of use and occupancy necessarily establishes that the Secretary then and there, impliedly exercising the discretionary power vested in him under the 1882 executive order, "settled" resident Navajos in the reservation.

It is possible that the Commissioner and Secretary, giving heed to some previous official expressions of opinion, may have erroneously thought that the 1882 executive order, of its own force and effect, operated to confer rights of use and occupancy upon Navajos living in the reservation area in 1882 and their descendants. Or they may have thought that some previous Secretary had settled resident Navajos in the reservation.

But in their letter of February 7, 1931, the Commissioner and Secretary did not limit their implicit recognition of Navajo rights, to Navajos who were residing in the area in 1882, and their descendants, or to Navajos settled by a previous Secretary, and their descendants. They recognized all Navajos then living in the area, whether or not recent immigrants thereto, as having such rights.

In our view, this 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation.

On September 24, 1932, Commissioner Rhoads, replying to an inquiry from the Hopi Tribal Council, stated in effect that the

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1882 reservation was created for the joint use of Hopis and Navajos.[36]

In a memorandum dated December 20, 1932, addressed to the Secretary, Commissioner Rhoads stated that 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 designed 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. . ."

These statements of September 24 and December 20, 1932, were the first instances in which it was officially asserted that the 1882 order had the effect of establishing a joint reservation. For the reasons stated earlier in this opinion, this view was incorrect and, in any event, the Commissioner's opinion as to the meaning of the 1882 order is not competent evidence.

These statements by the Commissioner have no tendency to show that he was then, as the authorized representative of the Secretary, settling Navajos in the reservation. But neither did they operate to undermine the Secretarial act of settlement evidenced by the letter of February 7, 1931.

Administrative action between February 7, 1931 and December 20, 1932, indicates that the department wanted to extend the Navajo rights, so recognized, to Navajos moving into the area after February 7, 1931. Such action further indicates, however, that the department hoped to accomplish this by Congressional enactment, thus avoiding the necessity of exercising Secretarial discretion in settling future Navajo immigrants to the 1882 reservation. The reference here is to the course followed by the

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[36]The Commissioner stated on this occasion, that the "such other Indians" provision of the 1882 order was used

> ". . . 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."

department in drafting the Navajo Indian Reservation Act, as reviewed in the margin.[37]

By the end of 1932, the department gave up the attempt to solve the problem legislatively. It submitted to Congress a new draft of the bill which was to become the Navajo Indian Reservation Act of June 14, 1934, 48 Stat. 960. In this draft all reference to the setting aside of a part of the 1882 reservation for the Hopis was deleted and it was specifically provided that the legislation would not affect the existing status of the 1882 reservation. On March 11, 1933, Commissioner Rhoads advised the Hopis that the new draft fully protected the rights of the Hopi Indians in the executive order area "and also those Navajo Indians who are already living therein."[38]

In our view the events and pronouncements of the period between February 7, 1931 and March 11, 1933, as reviewed above, warrant the inference, which we draw, that all Navajos who entered the 1882 reservation during that period were, by

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[37]In a second report, dated January 1, 1932, Hagerman furnished a more detailed description of the part of the 1882 reservation which it was proposed be set apart for exclusive Hopi use. On February 8, 1932, the department submitted to Congress 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 described in his 1932 report.

This proviso was later changed to eliminate the description of lands set aside exclusively for Hopis, and to provide that ". . . 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."

Under either form of the proviso it was thus contemplated that all Navajos entering the area in the future, as well as those who were settled therein as of February 7, 1931, would be entitled to take up occupancy in that part of the 1882 reservation outside of the proposed area of exclusive Hopi occupancy.

[38]Commissioner Rhoads added: ". . . 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."

implication, settled therein by Secretarial action. Therefore, as matters stood on March 11, 1933, all Navajos then residing in the reservation had rights of use and occupancy in the reservation, such rights arising from implied Secretarial settlement.

On June 18, 1934, Congress enacted the Indian Reorganization Act, 48 Stat. 984. Under § 6 of that act, the Secretary of the Interior was directed to make rules and regulations for the administration of Indian reservations with respect to forestry, livestock, soil erosion and other matters. Pursuant to the authority thus conferred, the Commissioner, with the approval of the Secretary, on November 6, 1935, issued regulations affecting the carrying capacity and management of the Navajo range.

By their terms, these new regulations purported to be limited to the "Navajo Reservation," which, under the Navajo Reservation Act of June 14, 1934, expressly excluded the 1882 reservation. These regulations provided a method of establishing land management districts with the assistance of the Navajo Tribal Council. They also provided a means of establishing, with the advice and consent of the Navajo Tribal Council, methods of range management "in order to protect the interests of the Navajo people."

Early in 1936, boundaries for these land management districts were defined. But notwithstanding the fact that the regulations providing for such districts were expressly limited to the Navajo reservation, and the Navajo Tribal Council was the only Indian group given a say in their determination, these districts embraced not only the Navajo reservation, but also all of the 1882 reservation.[39] Several such districts (Nos. 1, 2, 3, 4, 5 and 7) included parts of the Navajo reservation and part of the 1882 reservation.

District 6, which laid entirely within the 1882 reservation, was specifically designed to encompass the area occupied exclusively by Hopis. The record before us contains no metes and bounds description of district 6, as created in 1936. It is depicted in the map which is a part of this opinion and was probably

[39]In section 4 of Article VII, of the Constitution of the Hopi Indian Tribe, which became effective on December 14, 1936, when approved by the Secretary of the Interior, it is provided that "The administration of this article [relating to land] shall be subject to the provisions of section 6 of the Act of June 18, 1934." This Hopi consent came several months after the plan was put into operation in early 1936.

roughly equivalent to the area of exclusive Hopi occupancy as proposed and described in the second Hagerman report, referred to in footnote 37.

The full implications of this 1936 administrative action were to be revealed by later events. But it was already apparent that the 1882 reservation was thenceforth to be administered as if the Navajos had rights of use and occupancy in at least a large part of it.[40] Whatever opinion may be warranted concerning the way this was accomplished,[41] or as to its desirability, the administrative action itself, which was apparently acceptable to the Washington office, compels the inference that, by implied Secretarial action, all Navajos then residing in the 1882 reservation were settled therein.

From this time to October, 1941, all administrative action and pronouncements pertaining to the 1882 reservation tended to confirm the view just stated. It also indicates that as additional Navajos entered the area for permanent residence between 1936 and 1941, they were, by implication, settled therein by the Secretary pursuant to his reserved authority under the 1882 executive order.

Under the supervision of Allen G. Harper, a comprehensive plan for the administration of the Navajo and 1882 reservations was developed in early 1937. Under this plan, the Navajo Service was given supervision over all of the 1882 reservation except land management district 6, hereinafter referred to as district 6. Even as to that district, the land planning division of the Navajo Service was given supervision over construction and engineering projects and land planning. It was specifically provided that all administrative matters which affected the Hopi and Navajo Indians jointly were to be under the jurisdiction of the Hopi superintendent as to district 6, and under the jurisdiction of the

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[40]These land management districts are referred to in a letter dated May 15, 1936, from Navajo General Superintendent E. R. Fryer to Commissioner John Collier. In this letter Fryer stated that Hopi Superintendent Hutton was in agreement with him that "the entire Hopi and Navaho Reservation" should be considered "as one super land management district."

[41]Failure to forthrightly declare that Navajos were being settled in the reservation; extension of Navajo range regulations to the 1882 reservation without statutory authority; and the failure to consult Hopis in formulating the land management district plan.

Navajo superintendent as to the other land management districts. The Harper plan was put into effect on July 1, 1937.[42]

From then until October, 1941, there was a wide variety of administrative actions and pronouncements confirming this administrative policy of recognizing Navajos as settled Indians.[43] Perhaps the most significant of these was the effort to make final adjustments in the boundaries of district 6 so that the district would contain all lands used or needed by the Hopis, and then to set aside that area as an exclusive Hopi reservation, leaving the remainder of the 1882 reservation for the exclusive use of the Navajos.

This effort got under way on July 13, 1938. On that date Commissioner Collier, meeting with Hopi leaders at Oraibi, Arizona, suggested that the Hopi and Navajo Tribal Councils select committees to negotiate with each other upon boundary matters. The Hopi leaders did not agree to this suggestion, whereupon Collier intimated that an effort to divide the reserva-

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[42]This was accomplished by the promulgation, on June 2, 1937, effective as of July 1, 1937, of comprehensive grazing regulations for the Navajo and "Hopi" reservations. Again, the regulations were approved by the Navajo Tribal Council, but the approval of the Hopis was not obtained and apparently not sought. The regulations provided, however, that

> ". . . 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: . . ."

[43]Among individual incidents of this kind are the following: On January 28, 1938, Navajo Superintendent Fryer, who appeared to have the approval of the Washington office in such matters, wrote to Hopi Superintendent Hutton stating that no Hopis were to move outside of district 6 who had not previously lived outside, and that no new Navajo families would move into district 6. Thereafter a Hopi could not move outside of district 6 without obtaining a permit. In a conference with the Hopi Tribal Council at Oraibi, Arizona, on July 13, 1938, Commissioner John Collier stated that this permit system had nothing to do with the reservation boundary, but was a part of the grazing regulations.

When Hopis found it necessary to travel to other parts of the 1882 reservation to obtain wood, they were required to obtain permits from the Navajo Service, just as were the Navajos residing in that reservation.

In a conference with Hopi leaders on April 24, 1939, Commissioner Collier stated that the 1882 reservation was set aside for the Hopis "and other Indians resident there. . . ."

tion would nevertheless be made. Studies were actually already in progress to determine 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 being made by Gordon B. 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 to consider the district 6 boundary matter was held at Window Rock, Arizona on October 31, 1938. It was there agreed 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 lands by the respective tribes. Page and Quoshena were designated to make this survey with the assistance of range riders. Page submitted his report in December, 1940.[44]

In November, 1939, C. E. Rachford, Associate Forester, U.S. Forest Service, Department of the Interior, was designated to head a commission to conduct a further field investigation. The commission was instructed to make recommendations concerning the boundaries of district 6, and the boundaries of an exclusive Hopi reservation. The Rachford studies got under way on December 4, 1939. On December 14, 1939, a field conference was held at Winslow, Arizona, at which the procedures to be followed in considering these boundary matters were agreed upon.

Rachford made his boundary report on March 1, 1940. He stated that over four thousand Navajos and nearly three thousand Hopis were then living in the 1882 reservation. Rachford expressed the view 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.

Rachford recommended that the Hopis continue to use such agricultural areas then occupied by them outside district 6, stating that "even this is inadequate." He proposed that the boundary line of district 6, extended to include these agricultural lands, be marked and fenced. Under this plan, Navajos would be excluded from the enlarged district 6, and Hopis would be

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[44]He reported that 2,618 Hopis and 160 Navajos were living within the boundaries of district 6 as it then existed.

forbidden to go outside that district, except for ceremonial purposes,[45] and to gather wood and coal.[46]

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[45]Throughout the entire 1882 reservation, and beyond, the Hopis had numerous ceremonial shrines, some of which they had maintained and visited for hundreds of years. 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. 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.

The Navajos as well as the Hopis had sacred places both within and without 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.

[46]Since the earliest times, Hopis had found it necessary to travel to distant places in the 1882 reservation in order to obtain fire wood and building timber. On December 16, 1922, the Hopi and Navajo agencies had entered into a cooperative agreement governing the cutting and gathering of wood and timber. On December 20, 1932, Commissioner Rhoads had recommended that a "proportionate" area within the 1882 reservation be designated for the exclusive use of the Hopis, and that a "fire wood reserve" be set aside for them.

In August, 1933, Commissioner Collier had rejected a request that the Hopis be permitted to cut timber within the San Francisco Mountain area outside of the 1882 reservation. He stated that yellow pine as well as pinon and juniper was available in the Black Mountain country, within the 1882 reservation, "which is much more accessible and will meet their needs." In the report of Range Examiner Joseph E. Howell, Jr., dated April 16, 1934, it was stated that, for the Hopis, "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: "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 committee ". . . prepare the description of . . . any timber and wood privileges that are needed for the Hopis, with a view of negotiating for any needed protection or privilege. . ."

No exclusive wood-cutting area for the use of Hopis was ever set aside. Instead, they were placed under the same permit system as were the Navajos when it was necessary to seek wood in that part of the 1882 district embraced within district 4. Despite this permit system,

The land management district boundary changes recommended by Rachford in this report would result in adding 21,479 acres to district 6, increasing the total acreage for that district from 499,248 to 520,727. While the Navajo and Hopi superintendents asked for clarification of some of Rachford's recommendations, they were, in the main, acceptable to administrative field officials. A draft of order was then prepared which would effectuate the Rachford recommendations.

On October 9, 1940, the Commissioner submitted this draft 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 certain provisos.[47] 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." 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 also stated that the Hopis were not to be disturbed in their use of certain areas within the Navajo jurisdiction for ceremonial purposes, and that, to enable this to

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agency officials continued to assure the Hopis that they had timber "rights" in the 1882 reservation extending beyond district 6. In a conference held in Washington, D.C., on April 24, 1939, Commissioner Collier told a committee of Hopi leaders that his office would "protect your timber right . . . to give access to the forests. . ."

[47]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. . ." 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."

be done, permits would be issued to Hopis by the Navajo superintendent.

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. The draft was disapproved because it would operate to exclude Hopis from the major part of the 1882 reservation without their assent. This would be illegal, the solicitor ruled, for the following reasons: (1) It was contrary to the prohibition 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.[48]

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[48]The Indian Reorganization Act, enacted on June 18, 1934, 48 Stat. 984 (amended in respects not here material by the Act of June 15, 1935, 49 Stat. 378), provided in § 16 thereof a means whereby unorganized Indian tribes could establish a government for themselves. Prior to 1936, the Hopi Indians had never had an integrated tribal organization. In that year Hopi leaders determined to effectuate such an organization, utilizing the procedures set out in § 16 of the Indian Reorganization Act.

After several months of work, and with the assistance of a field representative of the Office of Indian Affairs, a constitution and by-laws were formulated. On October 24, 1936, the constitution and by-laws were adopted by a vote of 651 to 104 out of a total eligible Hopi vote of 1,671. The Secretary of the Interior approved these instruments on December 19, 1936, and they became effective on that day.

In holding that the proposed order dividing the 1882 reservation between Hopis and Navajos was not in conformity with the provisions of the Hopi constitution, the solicitor stated:

> "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 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."

It will be observed that the solicitor's disapproval was not predicated on the view that the Navajos were without rights in the 1882 reservation. Rather it was based on the more limited premise that such rights as the Navajos had therein were not exclusive and could not be made exclusive without the assent of the Hopis.[49]

The Office of Indian Affairs thereafter redrafted the proposed order in an attempt to meet the objections of the solicitor. The revised draft, however, was also disapproved.[50] 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 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.

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 changes in the boundaries of district 6, as revised, should be submitted to the Hopi Tribal Council for consideration. This was done and the Hopi Tribal Council, while considering the matter, wrote to the Commissioner under date of September 23, 1941, propounding ten questions of fact and law.

It was stated earlier in this opinion, after reviewing events to early 1936, that all administrative action and pronouncements from then until October, 1941, tended to indicate continued Secretarial settlement of Navajos as they entered the 1882 reservation for purposes of permanent residence. We think this is

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[49]This is further demonstrated by the fact that the solicitor suggested in his opinion that if the Hopis would assent to grazing regulations which did not purport to cut down their reservation, there would be no objection ". . . 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."

[50]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 outside of 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.

amply demonstrated by the preceding review of events between those two dates.

But, on October 27, 1941, in answering the questions propounded by the Hopi Tribal Council, Commissioner Collier made a statement which runs at cross purposes with the inference otherwise arising from the indicated administrative action of this 1936-1941 period.[51] In his reply the Commissioner stated, in effect, that the Hopis residing in 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 rights. As for Navajo rights, the Commissioner wrote:

> "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 in 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."

The quoted statement has two significations—one with respect to Navajo rights recognized, and the other with regard to Navajo rights denied. Concerning the first of these facets, the Commissioner recognized that all Navajos who entered the 1882 reservation up to October 24, 1936, had rights therein. He could not have thought that these rights arose because the reservation was for the joint use of Hopis and Navajos, else those entering after October 24, 1936 would also have rights therein. It must therefore have been his view that Navajo rights acquired before October 24, 1936 were based on Secretarial settlement.

Commissioner Collier's opinion as to previous settlement of Navajos would not be competent evidence of that fact, except for the period during which he had served as Commissioner. He entered that office on April 21, 1933. Thus, the quoted statement fully confirms the inference we have drawn from other evidence, that all Navajos who entered between early 1933 and late 1936, obtained rights of use and occupancy by virtue of Secretarial settlement.

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[51]The Commissioner's letter of this date was approved on January 8, 1942 by Assistant Secretary of the Interior Oscar L. Chapman.

The other facet of the Commissioner's statement of October 27, 1941, amounts to a disavowal of any Secretarial settlement between October 24, 1936 and October 27, 1941, when the statement was made. This disavowal appears to be at variance with administrative action during the latter period. All Navajos living within the part of the 1882 reservation outside of district 6 were dealt with alike, regardless of time of entry, and would have been similarly protected by the proposed boundary orders which the department sought to effectuate. While the order was not promulgated this was not due to any view expressed, prior to October 27, 1941, that any Navajos then residing in the reservation were without rights, but on the view that their rights, tacitly recognized, were non-exclusive.

We find it unnecessary, however, to resolve this apparent conflict between what the Commissioner said at the end of the 1936-1941 period, and what he did during that period.[52] We may in fact assume that, because of this statement, Navajos entering during that period may not be regarded as settled by Secretarial action during those years. Subsequent events establish to our satisfaction that, if that be true, they along with all other Navajos who entered for purposes of residence prior to July 22, 1958, were nevertheless thereafter settled by the later implied action of the Secretary.[53]

We now proceed to review the circumstances and events which lead us to this conclusion.

After October 27, 1941, as before, the practice continued of denying grazing permits to 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. The necessary effect of this restriction was to save non-district 6 grazing lands within the 1882

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[52]It is to be noted that the Commissioner's statement of October 27, 1941, was actually made in response to questions engendered by Hopi consideration of the proposed 1941 order which would have implicitly recognized that all Navajos living in the reservation in 1941 had rights of use and occupancy therein.

[53]In a report dated April 9, 1954, addressed to Orme Lewis, Assistant Secretary of the Interior, Commissioner Glenn L. Emmons expressed the opinion that it would be extremely difficult and expensive to determine the Navajos and their descendants who were in residence in the 1882 reservation on October 24, 1936.

reservation for exclusive Navajo use.[54] Such Navajo use was not limited to Navajos who had moved into the reservation prior to October 24, 1936.

On March 28, 1942, the Hopi Tribal Council passed a resolution disapproving the Rachford recommendations, as modified, for changes in the district 6 boundaries. On April 18 of that year Commissioner Collier instructed Willard R. Centerwall, associate regional forester at Phoenix, Arizona, to conduct a new study of the Hopi-Navajo boundary problem. Centerwall submitted his report on July 29, 1942. It carried the approval of Burton A. Ladd, then Superintendent of the Hopi "Reservation,"[55] and Byron P. Adams, Chairman of the Hopi Tribal Council.

Centerwall recommended a metes and bounds description for district 6 which would accomplish a substantial enlargement of that district. The acreage of district 6, applying his proposed description, would have been 641,797, as compared to the original 499,248, and Rachford's recommended 528,823.[56] The most im-

[54]Since approval of the Hopi Tribal Council had not been obtained, continuance of this practice was contrary to the legal advice provided by the solicitor in his opinion of February 12, 1941. While the solicitor had suggested that such a regulation might be promulgated, he also stated: "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 significance of this ruling by the Commissioner is more far reaching than at first might be supposed, as indicated by the following inquiry directed to the Commissioner. On September 23, 1941, the Hopi Tribal Council asked the Commissioner: "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.

[55]In the grazing regulations which were approved June 2, 1937, effective as of July 1, 1937, the term "Hopi Reservation" was defined as follows:

> "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 thereof are definitely determined in accordance with Article I of the Constitution and By-Laws of the Hopi Tribe."

[56]The Centerwall report contained a detailed "justification" for the boundary revisions recommended by him. In the four Navajo land management districts of the 1882 reservation (Nos. 3, 4, 7 and 5) which would lose land to district 6 under this proposal, approximately fifty-one Navajo families would have been adversely affected.

portant considerations which seem to have governed Centerwall in suggesting these revisions were the recognition of exclusive or predominant prior use and the full utilization of lightly loaded or idle grazing lands.[57]

Walter V. Woehlke, Assistant to the Commissioner, and J. M. Stewart, General Superintendent of the Navajo Service, raised objections to the Centerwall recommendations.[58] On September 23, 1942, however, the Hopi and Navajo superintendents joined in a letter to the Commissioner expressing the view that they could agree on adjustments in Centerwall's proposed boundaries for district 6. The Commissioner authorized them to proceed with that effort. The Hopi and Navajo superintendents then called a conference of field officials which was held at Winslow, Arizona on October 22, 1942.

Those attending the Winslow conference unanimously agreed to recommend Centerwall's proposed district 6 boundaries, with three modifications. The net effect of these modifications would be to reduce the district 6 acreage, as proposed by Centerwall, by 10,603 acres, leaving a district which would still be 131,946 acres larger than originally established. These boundary recommendations were submitted to the Commissioner on November 20, 1942. In doing so, the Hopi and Navajo superintendents suggested that policies be put into practice which would, in effect, divide the 1882 reservation between Hopis and Navajos, limiting the Hopis to the district 6 area and reserving the remainder for the exclusive use of the Navajos.[59]

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[57]Among other factors which Centerwall took into consideration 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.

[58]Woehlke, who had bitterly assailed the solicitor's opinion of 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 report, Woehlke said: "That memorandum was a fine example of the workings of the legalistic mind at its worst."

[59]This recommendation, however, contemplated certain exceptions from the over-all effect just stated. Navajos and Hopis who had established residence on either side of the district boundary would be permitted to

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On April 24, 1943, the Office of Indian Affairs approved the boundaries, carrying capacity,[60] and statements 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 boundary modifications proposed by the Hopi and Navajo superintendents on November 20, 1942. Nor was it asked to concur in their policy recommendations under which Hopis would, for the most part, be excluded from all of the 1882 reservation except district 6. In nevertheless approving these recommendations on April 24, 1943, and thereafter putting them in effect, the Office of Indian Affairs thus once again acted counter to the legal advice given by the solicitor on February 12, 1941.[61]

A considerable adjustment in place of residence and range use was thereafter made by both Hopis and Navajos in order to

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continue living there. Grazing "rights" would be established on the basis of past use. Rights to wood and timber on the whole reservation would be equal. Hopis would be assured the right to ingress or egress to areas "within Navajo jurisdiction" for ceremonial purposes.

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, in a letter from Assistant Commissioner J. Henry Scattergood to Senator Lynn J. Frazier. Like suggestions were made by Commissioner Rhoads in May and December, 1932; Navajo Superintendent Fryer in December, 1936; Commissioner Collier in July, 1938, April, 1939, and October, 1940; Walter V. Woehlke in December, 1939, and Rachford, in his report of March 1, 1940.

A specific provision to this effect was incorporated in the 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:

> "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."

[60] "Carrying capacity" refers to the ability of the land to support livestock. Carrying capacity was expressed in "sheep units," that is, the number of sheep which could be supported on the land for one year. It required five "sheep units" to support one horse or mule, four "sheep units" to support one head of cattle, and one "sheep unit" to support one goat.

[61] See note 54 above.

accommodate themselves to the new district 6 boundaries and the associated administrative policy of exclusive occupancy. 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 personal hardships were undoubtedly experienced by some.

The events which transpired between October 27, 1941 and April 24, 1943, as reviewed above, warrant the inference, which we draw, that all Navajos who entered the 1882 reservation between October 24, 1936 and April 24, 1943, were settled thereon by implied Secretarial action. Thus, accepting at face value, the Commissioner's statement of October 27, 1941, to the effect that no Navajos entering the reservation after October 24, 1936 had gained rights in the reservation, those Navajos nevertheless gained rights of use and occupancy by subsequent implied Secretarial action.[62]

In 1944, Commissioner Collier made two statements to the effect that there had never been any formal Secretarial action settling Navajos in the 1882 reservation. In the first of these, made to Hopi leaders at Oraibi, Arizona on September 12, 1944, the Commissioner plainly intimated that there had been implied action of this kind during his term of office.[63]

In the second, made in a letter dated December 16, 1944, addressed to Dr. Arthur E. Morgan, the Commissioner stated that

[62]The statement of October 27, 1941, purporting to exclude Navajos entering after October 24, 1936, from rights in the 1882 reservation, seems to be predicated on the notion that the Hopi Constitution, ratified on October 24, 1936, precluded Secretarial settlement of Navajos entering the reservation after that date. However, we find nothing in the Hopi Constitution which has the effect of cutting off the authority of the Secretary, provided for in the 1882 executive order, to settle "other Indians" in the reservation. Hence the October 24, 1936 statement, while here assumed to represent a disavowal of Secretarial settlement between October 24, 1936 and October 27, 1941, points to nothing which would bar subsequent Secretarial acts settling Navajos.

[63]The Commissioner said, on this occasion:

> ". . . Now, we don't need to debate as to the number of Navajos there were in the Executive order in 1882. I'll explain, whether any Navajos 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 schools for both the Navajos and the Hopis on the Executive order, and they gave it to him. . . ."

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there had never been any official Secretarial act settling Navajos in the reservation,

> ". . . 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."

In the quoted statement the Commissioner seems to be expressing his view as to the assumptions made by some previous official, and as to the legal status of Navajos in the reservation prior to his term of office, which began on April 21, 1933. So regarded, the statement is not, for reasons already stated, competent evidence on the question of settlement or non-settlement.

But the statement of Commissioner Collier of December 16, 1944 was also intended to reflect the assumption which he himself made in dealing with resident Navajos who moved into the reservation after he became Commissioner. Limited to those Navajos, the Commissioner's assumption that they were there with the consent of the Secretary, considered in the light of the concurrent administrative action reviewed above, establishes, in our opinion, that those Navajos were settled by the implied action of the Secretary under whom Commissioner Collier served.[64]

It is immaterial whether any such view with respect to Navajos moving into the reservation during his administration was prompted by a misconception as to assumptions made by previous officials, or as to the legal status of Navajos already residing in the reservation. Any such misconceptions would have relevance only as to the motivation of the Commissioner in settling newly-arrived Navajos, a matter which is not subject to judicial review.

In any event, nothing that Collier could say with respect to his own reasons for according Navajos equal status with Hopis in the reservation could restrict the authority of any subsequent Secretary or his authorized representative in settling Navajos. Events subsequent to the expiration of Collier's term of office on March 14, 1945, presently to be reviewed, amply demonstrate that all Navajos who entered the reservation prior to July 23, 1958, for purposes of residence, were settled therein by the implied action of the Secretary.

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[64]Harold L. Ickes was the Secretary of the Interior during all of the time that Collier served as Commissioner.

In February, 1945, fences were constructed by the Government along the revised district 6 line. The practice of excluding Hopi stockmen from areas outside of district 6 was continued, and with the aid of the fences, was more effectively enforced.

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. 59 Decisions of Dept. of Interior, 248. Stating that the department, on January 8, 1942, took the position that Navajos "would not be allowed to settle on the reservation after October 24, 1936,"[65] Cohen ruled that Navajos who had entered the reservation prior to that date were to be deemed settled therein pursuant to the 1882 executive order.[66]

Cohen predicated his October 24, 1936 cut-off date on Navajo settlement, on the October 27, 1941 statement of the Commissioner, and the Secretary's approval thereof on January 8, 1942. But we have indicated above that subsequent events demonstrate that no such cut-off date was in fact imposed. Navajos entering after October 24, 1936 for purposes of residence, were treated exactly the same as those who had entered prior thereto. All were dealt with as if they had rights of use and occupancy, and the only possible source of those rights was implied Secre-

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[65]The "Department" position to which Cohen made reference, was the Commissioner's statement of October 27, 1941, which was approved by the Secretary on January 8, 1942. See note 51 above. The Commissioner's statement, quoted earlier in this opinion, was not that Navajos "would not be allowed to settle on the reservation after October 24, 1936," but that only the Navajos residing on the reservation on October 24, 1936, "have rights on the Reservation."

[66]In this regard, Cohen stated in his opinion:

> ". . . I do not mean to imply that the Navajos could acquire rights in the reservation through the Secretary's inaction or through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Secretary has sought and obtained funds from Congress which have been used for the education of the children of Hopis and Navajos alike, and the grazing and 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."

tarial settlement. Indeed, the very 1941-1942 statement relied upon as expressing the department's "cut-off" position, was made in justification of the action of the Government in recognizing the legal status of all Navajos then (1941-1942) in the reservation. This belies, at the outset, any official intention to put the asserted "cut-off" policy into effect.

Insofar as Cohen, in the quoted statement, expressed an opinion as to the legal significance to be attached to the course of official conduct through the years, the statement is not competent evidence on the question of Navajo settlement. But to the extent that the statement reports what administrative action was taken while he was acting solicitor, the statement is authoritative and substantial evidence of those facts.[67] The facts so reported were that the Secretary had sought and obtained funds from Congress which were used for the education of the children of Hopis and Navajos alike, and that the grazing of the livestock of both groups had been permitted and regulated by the Secretary.

In the late 1940's there was a considerable increase in the amount of joint administrative activity in 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. 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 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.

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 Navajo," issued in March, 1948. It was his proposal that Navajo and Hopi families 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 14, 1949, sent by road engineer H. E.

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[67]Cohen served as acting solicitor for periods of varying length, beginning on June 4, 1942.

Johnson, employed by the Navajo Service at Window Rock, to Walter O. Olson, assistant Superintendent of the Hopi Agency. Johnson 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 wrote.

By July, 1951, the total population of the Navajo Indian Tribe was 69,167, about six thousand of whom lived within the 1882 reservation. By the summer of 1958, the Navajo population in the 1882 reservation was probably about 8,800, not including a few Navajos 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.

According to a comprehensive Navajo school census taken in 1955, there were 2,929 Navajo children then living in the 1882 reservation. By 1958 Government schools for Navajo children were being maintained within the 1882 reservation at Pinyon, Smoke Signal, White Cone, Sand Springs, Dinnebito Dam and Red Lake.

In 1951, the Hopi population within the 1882 reservation was about 3,200. By the summer of 1958, the Hopi population was probably something in excess of that figure. Most of these Hopis resided within district 6, as expanded in 1943.[68] A few had homes, farms or grazing lands in adjoining districts in the 1882 reservation.

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

We believe that it is indicated by the events and circumstances reviewed above that, during the last half of the 1940's, and up to enactment of the Act of July 22, 1958, all Navajos who entered the 1882 reservation for purposes of residence, were treated no

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[68]Not included in this figure are the several hundred Hopis living a few miles west of the 1882 reservation at Moencopi. The forebears of these Hopis had left "Old Oraibi" in the reservation area, and moved to Moencopi in a 1906 "revolt."

differently than those who had entered betwen 1936 and 1945, or those who had entered before October 24, 1936. All were dealt with administratively as Indians having rights of use and occupancy in that reservation, such rights being equally protected and the welfare of all such Indians being equally served by continuous and consistent Government action through the years.

No attempt was made to separately identify the Navajos who entered prior to October 24, 1936, and their descendants, much less were they accorded any privileges or assistance which was withheld from subsequent Navajo immigrants into the reservation.

In our opinion, the course of administrative action and accompanying pronouncements, from February 7, 1931 to July 22, 1958, with exceptions which we discount for reasons stated, warrant the finding, which we make, that all Navajos residing in the 1882 reservation in July, 1958 were impliedly settled therein by the Secretary of the Interior in the exercise of his authority to settle other Indians in that reservation.

The question remains whether, in settling Navajos in the reservation, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation.

Throughout the period from February 7, 1931, when Navajo rights of use and occupancy were first administratively recognized, to July 22, 1958, Navajos entered the 1882 reservation for purposes of residence without limitation as to number. Nor was any effort made to pick and choose between Navajos who might enter, all who came being administratively welcome. This course of administrative conduct is explainable only on the hypothesis that the Navajo Indian Tribe itself had been settled in the 1882 reservation.

There are other considerations which lead to the same conclusion.

Beginning at least by 1937, the Navajo Indian Tribe was administratively recognized as having duties and responsibilities as the representative of Navajos living in the 1882 reservation. The authority for the grazing regulations approved June 2, 1937, under which establishment of land management districts was authorized, rested in part on a resolution of the Navajo Tribal Council dated November 24, 1935.

Navajo residents everywhere in the reservation have always participated in the election of Navajo delegates to the Navajo

Tribal Council. Prior to 1953, these elections were supervised and conducted by the Bureau of Indian Affairs. Navajo tribal rangers were given authority to issue permits for the cutting and gathering of wood.

On January 1, 1955, the Commissioner approved resolutions of the Navajo Tribal Council, adopted in 1954, relating to traders' leases, under which the Navajo Indian Tribe granted leases to traders in the 1882 reservation.

Plaintiff, however, argues that settlement of the Navajo Indian Tribe after May 25, 1918, was precluded by the enactment of that date. That statute, 25 U.S.C. § 211, provides that 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. Plaintiff calls attention to the fact that defendant, for the Navajo Indian Tribe, has disclaimed any joint interest in the reservation with the Hopis. Plaintiff argues from this that the necessary effect of the exclusive Navajo tribal settlement which defendant asserts would be to add lands to Navajo Indian Reservation in Arizona, a result expressly prohibited by the 1918 Act.

At this point in the opinion we are considering only the question of Navajo settlement, and are not concerned with the character of any such settlement, as exclusive or joint. At a later point we will discuss the significance of the 1918 Act with regard to the character of any Navajo settlement which may be found to have occurred. In our view, the 1918 Act did not operate to terminate the authority of the Secretary, premised on the Executive Order of December 16, 1882, to settle other Indians, including Indian tribes, in the reservation area.

We conclude that the Navajo Indian Tribe has been settled in the 1882 reservation. See *Cherokee Nation v. Hickock,* 187 U.S. 294, 307; *The Cherokee Trust Funds,* 117 U.S. 288, 308.

Specific Rights Held by Hopis and Navajos on July 22, 1958

Earlier in this opinion, following footnote reference 11, it was stated that immediately upon the issuance of the Executive Order of December 16, 1882, the Hopis gained non-vested rights of use and occupancy in the entire 1882 reservation. These rights were then exclusive in the sense that unless and until the Secre-

tary thereafter settled other Indians in the reservation, the Hopis were the only Indians entitled to use and occupy that area. These rights were non-exclusive in the sense that the Hopis would be required to share the 1882 reservation with any other Indians the Secretary thereafter saw fit to settle in the reservation. Such rights as the Hopis had in the reservation on July 22, 1958, became vested on that date.

We have also found and concluded that, beginning on February 7, 1931, the Secretary saw fit to settle in the reservation, as they arrived (with indicated lapses), Navajos who entered the 1882 reservation prior to July 22, 1958 for the purpose of establishing permanent residence. We have further held that by at least June 2, 1937, but not prior to February 7, 1931, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation. Rights of use and occupancy thereby acquired were not vested prior to July 22, 1958, but became vested on that date.

It is now necessary to determine what specific rights of use and occupancy the Navajo Indian Tribe and individual Navajos held in July 22, 1958, by reason of such Secretarial settlement, and what specific rights of use and occupancy the Hopi Indian Tribe and individual Hopis held on that date in view of the settlement of Navajos and other circumstances.

In making this determination we must first decide whether the Navajo Indian Tribe and individual Navajos were authorized to settle in the entire 1882 reservation and, if not, what part was made available to them by such authorization.

It has previously been stated that some three hundred Navajos not identified on this record, were settled in the 1882 reservation in 1909-1911, during the second allotment period involving that reservation. It has also been indicated that there is some evidence, although perhaps not sufficient to warrant a finding, that Navajos residing in the reservation on February 29, 1924, were impliedly settled therein, in view of Commissioner Burke's statement of that date and the circumstances under which it was made. But substantial and, to us, adequate proof of implied settlement of Navajos, other than the three hundred settled in 1909-1911, came first on February 7, 1931. It was on that date that Secretary Wilbur and Commissioner Rhoads joined in a letter approving the Hagerman-Faris proposal that the reservation be divided between Hopis and Navajos.

It is therefore established that implied Secretarial settlement of Navajos and the policy of segregating Navajos from Hopis were initiated at the same time. In fact, it was the initiation of that policy which, under the indicated circumstances, warrants the inference that the Secretary settled Navajos in the reservation on February 7, 1931.

This segregation policy remained constant from the time it was initiated until the time Indian rights in the reservation became vested on July 22, 1958. This is evidenced by the efforts which were made through the years to effectuate that policy.

It was first sought to accomplish this by means of a provision to be incorporated in the proposed Navajo Indian Reservation Act. That plan failed of realization when, because of Hopi opposition, the Department of the Interior withdrew its proposal to incorporate such a provision in the bill.

The Office of Indian Affairs then sought to accomplish the same result by means of land-use regulations under which land management districts were created, one of which (No. 6) was designed to include most of the Hopis in the 1882 reservation.

When this plan was first put into operation in 1936, there was no intimation that Hopis were to be limited to the district 6 area. Nor was such a policy publicly proclaimed when comprehensive grazing regulations were approved on June 2, 1937, under which the administration of the land management districts was provided for in great detail. But shortly after the latter regulations became effective, the practice was initiated of forbidding Hopis to move outside district 6, or even to graze outside that district, without first securing permits. These permits were usually issued only on a showing of past Hopi use.

It was then sought to formalize this segregation practice by means of a Secretarial order. This attempt was abandoned when the solicitor ruled, on February 12, 1941, that such an order would be invalid unless consented to by the Hopis. But then the Office of Indian Affairs continued to accomplish the same result through its previous land-use regulations and associated practices, as modified from time to time, none of which was ever approved by the Hopis. It was on this basis that the segregation practice was continued without interruption until all rights became vested on July 22, 1958.

Secretarial settlement of the Navajo Indian Tribe and individual Navajos, between 1931 and 1958, has been implied from

the general course of administrative action and policy during that period. Thus, to the extent that administrative policy in effect during that period would not warrant such an implication, Secretarial settlement of Navajos did not occur. It follows that, since it was the continuing policy to segregate Navajos from Hopis during all of these years, the implied settlement of Navajos in the 1882 reservation was at all times subject to the restriction that they were not to use and occupy that part of the reservation in which the Hopi population was concentrated.

It therefore becomes necessary to delineate, consistent with the finding and conclusion just stated, the specific geographical area in which the Navajos were authorized to settle.

This geographical area was not fixed with precision when the first general manifestation of implied settlement of Navajos occurred in 1931.[69] On November 20, 1930, when Hagerman and Faris submitted a report recommending a division of the 1882 reservation, they provided a general description of the area which, in their view, should be set aside for the use of Hopis. This description, however, was not sufficiently precise for practical application, as they themselves recognized. It was their suggestion that if their recommendation was accepted in principle, a detailed reconnaissance of the lines as approximately proposed be made with a view of developing a detailed boundary description.

It follows that, in approving the Hagerman-Faris recommendation, on February 7, 1931, the Secretary and Commissioner did not fix a precise geographical area of authorized Navajo settlement. They did direct that field studies be undertaken for the purpose of formulating a specific boundary description.

These studies were made, and the boundary lines thus arrived at for the proposed exclusive Hopi area were set out in Hagerman's second report, dated January 1, 1932. In this report Hagerman expressed the view that the proposed boundaries for this area of exclusive Hopi occupancy were fair and just to both Hopis and Navajos. He added, however, that "(t)his does

[69] A part of the 1882 reservation excluded from Navajo settlement is not in dispute. Defendant has, in effect, conceded that no Navajos have ever been settled in a south-central area consisting of about 488,000 acres, as described in paragraph 12 of the findings of fact and depicted in the map which is a part of this opinion. See pretrial order No. 2, page 2.

not mean that they might not be changed in the future if conditions warrant."

The boundaries as proposed by Hagerman in his 1932 report were incorporated in the first draft of the Navajo Indian Reservation Act, tendered to Congress by the Department of the Interior on February 8, 1932. But, as stated earlier in this opinion, that feature of the bill was later withdrawn. Subsequent events establish that the exact boundaries of the proposed area of exclusive Hopi occupancy were still only tentative.

While the Navajo Indian Reservation bill was pending before Congress in early 1934, further studies were being carried on in the field concerning the exact boundaries of an exclusive Hopi area. A report thereon was submitted by range examiner Joseph E. Howell, Jr., on April 16, 1934. He proposed that the area for the Hopis be extended by adding 59,225 acres thereto stating, however, that this would still not include all Hopi fields.

In early 1936, the district land management plan was developed for the purpose of implementing the land-use regulations which had been issued on November 6, 1935. In order to simplify land-use administration it was determined to place in one district (No. 6) the part of the 1882 reservation in which most of the Hopis were concentrated. The record before us contains no metes and bounds description of the 1936 lines, but they are depicted on maps which are in evidence as plaintiff's exhibit 306 and defendant's exhibits 444 I and 537(f). The 1936 lines as so depicted are shown on the map which is a part of this opinion.

The 1936 lines of district 6, however, were only tentative. We say this not only because Howell's proposed modifications of those boundaries were then under consideration by the Office of Indian Affairs, but also in the light of immediately succeeding events.

In the summer of 1937, the Hopis began to complain that Navajos were encroaching upon long-held Hopi grazing and agricultural lands outside district 6. At an August, 1937 conference held to consider these complaints Navajo Superintendent Fryer made it clear that the 1936 district 6 boundaries did not include all established areas of Hopi occupancy. He stated that while it was attempted to include all Hopi range use within district 6, this proved impossible in several instances and there were still Hopis living, grazing and farming outside that district.

It was in 1937 that the effort got under way to obtain a Secretarial order which would, among other things, formalize the practice then being followed of forbidding Hopis from grazing or moving outside of district 6. In connection with this project, new studies were undertaken with respect to the boundary lines of that district. These studies eventually led to the Rachford boundary report of March 1, 1940, referred to earlier in this opinion, in which it was recommended that 21,479 acres be added to district 6.

The Rachford boundary proposals, as somewhat modified, were incorporated in the draft of the Secretarial order which was later disapproved by the solicitor on February 12, 1941. For some time thereafter the Office of Indian Affairs sought to formulate a revised form of order which would be acceptable. In this connection the boundaries of district 6 were further reviewed. This led to the preparation of a revised description which would have increased district 6 acreage by 8,096 over the Rachford proposal. Finally, all efforts to secure an order formalizing the segregation practice were abandoned. But the segregation practice itself was continued.

On April 18, 1942, Commissioner Collier instructed Centerwall to study the boundary problem. Centerwall submitted his report on July 29, 1942, recommending enlargement of district 6 to 641,797 acres, as compared to the original acreage of 499,248. The boundaries suggested by Centerwall to accomplish this enlargement were thereafter somewhat reduced by agreement between the Hopi and Navajo superintendents, resulting in a proposed district 6 acreage of 631,194.

On April 24, 1943, the Office of Indian Affairs approved the district 6 boundary lines proposed by Centerwall, as so modified.[70] It was therefore on that date that the lines within the 1882 reservation, utilized under administrative policy to segregate Hopis from Navajos, were first definitely fixed.

Accordingly, in our view, it is those lines which must be regarded as defining the part of the 1882 reservation in which Navajos were authorized to settle. Specifically, the Navajo Indian Tribe and all individual Navajos residing in the area on July 22,

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[70]The metes and bounds description of district 6, as so defined, is set out in paragraph 41 of the findings of fact and is depicted in the map which is a part of this opinion.

1958, were authorized to settle in all parts of the reservation outside of district 6 as defined on April 24, 1943, and neither the Navajo Indian Tribe nor individual Navajos were authorized to settle within that district as so defined.

Since no Navajos were authorized to settle within district 6, as thus defined, we find and conclude that, on July 22, 1958, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, had the exclusive interest in such area, subject to the trust title of the United States. Therefore, pursuant to section 2 of the Act of July 22, 1958, this area is henceforth a reservation for the Hopi Indian Tribe. A declaration to this effect is included in the judgment entered herein.

This leaves for determination the relative rights of the Hopis and Navajos in that part of the 1882 reservation lying outside of district 6 as defined on April 24, 1943.

By our holding that the Navajo Indian Tribe, and all individual Navajos residing in the reservation on July 22, 1958 were settled therein by Secretarial action, we have rejected the Hopi contention that Hopis have the exclusive interest in that part of the reservation now under discussion.

It is the further contention of the Hopis, however, that if the court finds and concludes that the Navajos have acquired by Secretarial settlement, rights and interests in any part of the reservation, such rights and interests are not exclusive as to any part of the reservation area, but are co-extensive with those of the Hopi Indians, subject to the trust title of the United States.

The Navajos, on the other hand, contend that as to the reservation area in which it is found and concluded that Navajos have been settled,[71] the Navajo Indian Tribe, for and on behalf of all Navajo Indians, has the exclusive right and interest therein, subject to the trust title of the United States.

The Navajos advance a number of arguments in support of the contention that the Navajo Indian Tribe, on July 22, 1958, had the exclusive interest in that part of the 1882 reservation in which it has been found to have been settled. One of these

[71]The Navajos contend that this area is larger than that part of the reservation lying outside of district 6, as defined on April 24, 1943, but we have found and concluded that no Navajos were settled by Secretarial action within district 6 as so defined.

is that, on July 22, 1958, the Navajos had actual exclusive use and occupancy of this area and, as used in the act of that date, "exclusive interest" means exclusive use and occupancy.

On July 22, 1958, a few Hopis were residing in that part of the reservation now under discussion. In addition, Hopis have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering plants and plant products, visiting ceremonial shrines, and hunting.

For present purposes, however, we will assume that actual Navajo use and occupancy of the area was exclusive or was so nearly so as to render Hopi use and occupancy *de minimis.*

Defendant's equating of "exclusive interest" with actual exclusive use and occupancy finds no support in the Act of July 22, 1958. Section 2 of that Act, which provides the authority for a judicial determination of the issue, speaks of "exclusive interest" and not "exclusive use and occupancy." Had Congress intended to make actual exclusive use and occupancy the sole test, it would have been easy for it to have so stated in the legislation.

Actual use and occupancy of land, without more, has no connotation of rightful possession. A trespasser may have actual use and occupancy of land. Indians may obtain actual use and occupancy of reservation lands belonging to other Indians by just moving in without any semblance or color of right. Or they may obtain such use and occupancy through invalid administrative action.

Similarly, even though use and occupancy is rightful, the fact that it is actually exclusive does not connote that the exclusive nature of the use and occupancy is rightful. Persons having the right to share lands with others may, by force or other illegal means, shoulder out the others and gain actual exclusive use.

But Congress was not interested in recognizing claims based on force or other illegal action. In section 1 of the Act of July 22, 1958, the 1882 reservation was declared to be held in trust for Indians who had established rightful claims thereto, either by virtue of the Executive Order of December 16, 1882, or by virtue of Secretarial settlement subsequent to that date. An indicated purpose of the litigation thereby authorized, as set out in section 1, was to determine the "rights and interests" of the par-

ties, not the fact of actual use and occupancy of the lands in question.

Another indicated purpose of the litigation, as set out in section 1, was to quiet title to the lands in the tribes or Indians establishing "such claims pursuant to such Executive order as may be just and fair in law and equity." Here, again, the authority was referenced to claims cognizable in law and equity. Section 2, as noted above, makes use of the term "exclusive interest," instead of "exclusive use and occupancy."

Defendant calls attention to a Committee Report comprising a part of the legislative history of the Act of July 22, 1958,[72] in which the Committee used these words: ". . . Because of the nature of the conflicting claims of use and occupancy interests. . . ."

We do not share defendant's view as to the significance of the quoted words. It is true that the claims in question relate to use and occupancy. But, as even this excerpt indicates, the claims must be of a kind which properly may be characterized as interests in land. An interest in land may be subject to paramount rightful claims, as in this case, where the claim of the United States was paramount prior to July 22, 1958. But, except for paramount rightful claims, an interest in land is one which is enforceable in court because it is grounded on recognized principles of law.

The principle of law which must be applied with reference to the Navajo claim to an exclusive interest in part of the reservation is that prior rights continue until lawfully terminated. On December 16, 1882, as we have concluded, the Hopis obtained non-exclusive rights of use and occupancy in the entire reservation. We have concluded that the Navajos obtained no rights in the reservation at that time and that, with immaterial exceptions, their only rights acquired by Secretarial settlement first came into existence in 1931.

Hence the Navajo rights are not exclusive as to any part of the reservation unless the pre-existing Hopi rights therein were lawfully terminated. As we see it, the Hopi rights could be lawfully terminated only by Congressional enactment, valid administrative action, or abandonment. Each of these possibilities will be explored later in this opinion.

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[72]H.R. Report No. 1942, 85th Cong. 2nd Sess., on S. 692.

Defendant contends that the Enabling Act of July 22, 1958, does not establish one criterion for the Hopis and another for the Navajos. Accordingly, it is argued, if proof of actual exclusive use and occupancy is enough to establish that the Hopis have an exclusive interest in part of the reservation, it is enough to establish that the Navajos have the exclusive interest in the remainder.

We have not held that proof of exclusive Hopi use and occupancy of district 6 is enough to establish an exclusive Hopi interest in the district 6 area. In addition to exclusive Hopi use and occupancy it was also established that they gained rights of use and occupancy therein (and in the entire reservation) by the self-operating effect of the December 16, 1882 order. It was also established that the Secretary had not settled any Navajos in the district 6 area.

A different criterion must be applied in evaluating the Navajo claim to an exclusive interest because their claim rests on a different foundation than that which supports the Hopi claim. The Hopi claim to an exclusive interest in the district 6 area rests on rights gained in 1882, undiminished by subsequent Secretarial settlement of other Indians. The Navajo claim to an exclusive interest in part of the reservation must rest on rights gained in 1931 and thereafter plus lawful termination of preexisting Hopi rights.

We now proceed to consider whether, as to that part of the 1882 reservation lying outside of district 6, the Hopi rights of use and occupancy, acquired on December 16, 1882, were ever lawfully terminated. As before indicated, this could only have been brought about by Congressional enactment, valid administrative action, or abandonment.

Turning first to Congressional enactments, it appears that on several occasions the question was raised as to whether the Hopi interest in part of the 1882 reservation should be legislatively terminated.

The first such occasion was in 1920, when the House Committee on Indian Affairs held hearings at Keams Canyon and Polacca, in the reservation, to investigate the conflicting claims of the Hopis and Navajos. The then Congressman Hayden inquired at this hearing as to whether it was advisable to "lay out a separate reservation for the Hopi Indians, which will be theirs and free

from further encroachment from the Navajos?" Robert L. Daniel, the Hopi School Superintendent at Keams Canyon, indicated that this would be desirable. No legislation of this character, however, resulted from this committee hearing.

The Senate Committee on Indian Affairs held hearings at Keams Canyon, Toreva, Hotevilla, Oraibi (within the reservation), and Tuba City, Arizona, in April and May of 1931. Hopi Superintendent Miller and Navajo witnesses urged that a division of the 1882 reservation be effectuated. But Congress took no action at that time.

While the Navajo Indian Reservation Act of June 14, 1934, 48 Stat. 960, was before Congress, the Department sought to include language which would have terminated Hopi rights in a large part of the reservation. As stated earlier in this opinion, this language was finally withdrawn, and instead, there was inserted in section 1 of that Act the words: ". . . however, nothing herein contained shall affect the existing status of the Moqui [Hopi] Indian Reservation created by Executive order of December 16, 1882. . . ."

While the bill (S. 2734; H.R. 3178, 81st Cong.) which was to become the Navajo-Hopi Rehabilitation Act of April 19, 1950, 64 Stat. 44, was before the House Subcommittee on Indian Affairs, the matter of dividing the 1882 reservation was discussed. Congressman Morris asked Theodore H. Haas, Chief Counsel of the Bureau of Indian Affairs, if Congress should attempt any settlement of the issue in that bill. Haas replied: "I should recommend most decidedly against bringing in this difficult, extraneous issue which would cause the resentment and opposition of the Navahos and Hopis."

The committee also had before it a letter from the Commissioner of Indian Affairs recommending against inclusion in the pending bill of any provision dealing with the 1882 reservation boundary problem. No such provision was included in that bill.

During the years subsequent to 1931 there were numerous appropriation bills in which funds were appropriated for the construction and maintenance of schools for Navajo children. As previously stated, a number of these schools were built within the 1882 reservation, beginning with the school at Pinon, erected in 1935. Federal funds, appropriated by Congress, were also utilized

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for the supervision of Navajo affairs and activities, and the rendition of aid to Navajos, within the reservation area.

The appropriation acts themselves, however, do not specifically mention a segregation of administration of Navajo and Hopi affairs in the 1882 reservation. Nor do any of them contain any declaration or other provision indicating an intent to terminate Hopi rights.

It therefore appears that the only occasion during this entire period on which the Congress legislatively dealt specifically with the problem (the Navajo Indian Reservation Act of June 14, 1934), it inserted a provision expressly disclaiming any intent to terminate Hopi rights and interests. As late as 1950, while the Navajo-Hopi Rehabilitation Act was under consideration, the boundary matter was considered an open question not previously resolved by Congress.

We conclude that Congress at no time enacted legislation designed to, or having the effect of, terminating Hopi rights of use and occupancy anywhere in the 1882 reservation.

We next consider whether the Hopi rights of use and occupancy, established on December 16, 1882, were at any time terminated by valid administrative action.

Since, with indicated immaterial exceptions, no Navajos or other non-Hopi Indians were settled in the reservation prior to February 7, 1931, there was no occasion prior to that date for administrative action designed to terminate Hopi rights in any part of the reservation. It is therefore not surprising that the record is barren of any evidence that administrative action of this kind was taken prior to 1931.[73]

Beginning on February 7, 1931, administrative officials followed a policy designed to exclude Hopis, for the most part, from those parts of the 1882 reservation not immediately adjacent to their villages. At the outset it was sought to accomplish this by legislation in the form of a provision in the bill which was to become the Navajo Indian Reservation Act of 1934, describing the area of concentrated Hopi population as an exclusive Hopi reservation. Had this been accomplished, the Hopis would un-

[73]For the reasons indicated later in this opinion administrative action of this character would not have been legally possible, without Congressional approval, after March 3, 1927, in view of section 4 (25 U.S.C. § 398d) of the act of that date, 44 Stat. 1347.

questionably have been legally ousted from the remainder of the 1882 reservation.

But this way of effectuating the indicated administrative policy failed of realization when the Department of the Interior found it necessary to revise the language of the proposed Navajo Indian Reservation Act. Thereafter, administrative efforts to exclude Hopis from parts of the reservation not immediately adjacent to their villages, took the form of administrative regulations and practices pertaining to land use. None of these administrative regulations and practices, however, with the possible exception of the abortive effort to obtain a Secretarial order in 1941 defining areas of exclusive occupancy, were designed to affect whatever rights the Hopis then had in the entire 1882 reservation.

This is established beyond question by the representations repeatedly and consistently made by departmental officials throughout this entire period, beginning on February 17, 1937. On that date Allan G. Harper submitted a plan of administrative interrelationships between the Hopi and Navajo jurisdictions. This plan, which was approved by the Commissioner on March 16, 1937, contains 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."

On December 28, 1937, the Commissioner signed and promulgated a map defining land-management districts. In advising Navajo Superintendent Fryer of this action, the Commissioner stated:

> "It is understood, also, and it should be clearly explained to the Navajo and the Hopi counsels [sic], that a 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."

On July 13, 1938, Commissioner Collier and six of his staff officials met with Hopi leaders at Oraibi, Arizona. The practice had by then already been established whereby Hopis could not

go outside of district 6, as then tentatively established, without first obtaining a Government permit. Commissioner Collier explained to the Hopis on this occasion that the permit system was a part of the grazing regulation procedure, adding: "That has nothing to do with the reservation boundary." At another point during this conference the Commissioner stated that nothing with regard to the plan for the administration of district 6, as outlined by him on that occasion, ". . . predetermines or settles anything with regard to the ultimate Hopi Tribal boundary. . ."

On April 24 and 25, 1939, four Hopi leaders met with the Commissioner and other agency officials in Washington, for the purpose of presenting their land claims. Discussing the question of the division of the reservation into "use" areas, the Commissioner assured the Hopis that: "any agreement which is made of use-rights will not be a giving up of this claim." Continuing, the Commissioner stated:

> "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."

On September 4, 1941, the Office of Indian Affairs ruled that proposed changes in the boundaries of district 6 should be submitted to the Hopi Tribal Council for consideration and approval. At this time Assistant Commissioner William Zimmerman, Jr., informed Navajo Superintendent Fryer that the proposed adjustment in the boundary could not "be considered as a permanent adjustment of the reservation boundary but must be considered merely as a change in the land management district."[74]

In a memorandum to the Forestry and Grazing Division, J. M. Stewart, Director of Lands, Office of Indian Affairs, dated October 9, 1941, it was stated:

> ". . . the establishment of such land use areas must not be confused with the establishment of reservation boundaries, as such reservation boundaries can be established only by Act of Congress. . . ."

In a letter dated October 12, 1941, signed by the Commissioner and approved by the Assistant Secretary, Seth Wilson, Superintendent of the Hopi Agency, was told that ". . . the proposed

[74]As noted earlier in this opinion, the Hopi Tribal Council did not approve this change.

change in the boundary of District 6 has no bearing on the establishment of the reservation boundary. . ."

In his report of July 29, 1942, Willard R. Centerwall, who had been commissioned to conduct a new study of the Hopi-Navajo boundary problem, submitted new boundary descriptions which, with modifications, were approved on April 24, 1943, as the revised lines of district 6. In this report Centerwall 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."[75]

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

> "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."

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[75]In arriving at adjustments in the Centerwall district 6 lines, the Navajo and Hopi superintendents agreed on certain principles to be applied, one of which was that the principal purpose of the establishment of the adjusted district 6 line was the erection of a barrier which would prevent the crowding in of new families of Navajos onto territory used by the Hopis.

Again, on May 3, 1945, the Commissioner gave the same assurance to Senator Burton K. Wheeler. Commenting upon a complaint the Senator had received from the Hopis concerning the fencing of district 6, the Commissioner stated:

> ". . . In the 1880s by Executive Order an area of about 3,000,000 acres, with the Hopi villages in the center, was set aside as a reservation for the Hopis and such other Indians as the Secretary might designate. At the time of the establishment of the Hopi Reservation several thousand Navajos were already using a large part of the area. The Navajo population grew faster than the Hopi population with the resulting gradual encroachment of Navajos upon the areas used by the Hopis, especially by Hopi livestock. In order to protect the Hopis against additional encroachment by Navajo livestock upon the Hopi range, certain limits were established beyond which Navajo livestock would not be allowed to graze. 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."[76]

At a later point in the same letter, Senator Wheeler was told:

> ". . . They [Hopis] have been assured several times that these fences do not establish any boundary line for the Hopi Reservation and that no new delimitation of the reservation boundaries is intended."

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. . . ."

In view of these repeated administrative assurances as to the limited purpose in establishing and fencing district 6, and the

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[76]Defendant argues that, in view of the context, the Commissioner was here referring to an "undefined inner boundary between the Hopis and the Navajos within the Executive Order area," rather than the boundary lines of the 1882 reservation. We do not agree.

It is also to be noted that the Commissioner's statement in this letter that "several thousand Navajoes were already using a large part of the area" in 1882, was in error, since there were then not more than three hundred Navajos in the 1882 reservation area.

express disavowal during all of these years of any intent to affect Hopi rights and interests in the entire 1882 reservation, the contention that the Department sought termination of Hopi rights outside of district 6 is without factual foundation.

But even if this had been the purpose of the Department, the question remains whether this could have been legally accomplished without a Congressional enactment.

Secretarial settlement of the Navajo Indian Tribe, and of individual Navajo Indians, with exceptions which must be disregarded for reasons already stated, did not occur prior to February 7, 1931. By that time there were in effect two statutes bearing upon the power of administrative agencies to create new reservations, and to make additions to or change the boundaries of, existing reservations.

The first of these is the Act of May 25, 1918, section 2 of which (25 U.S.C., § 211), provides that 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.

In his opinion of February 12, 1941, the solicitor of the Department of the Interior ruled that the proposed Secretarial order then under consideration, whereby the 1882 reservation would be divided into areas of exclusive Hopi and Navajo occupancy, would be contrary to the prohibitions set out in the 1918 Act.

We are in full agreement with this view. Moreover, we think the conclusion must be the same whether the claimed administrative division of the 1882 reservation rests on a formal departmental order (which was sought but disapproved in 1941, and never again sought), or on a course of official conduct from which such a division is sought to be implied.[77]

An Indian reservation consists of land validly set apart for the use of Indians, under the superintendence of the Government, which retains title to the lands. *United States v. McGowan,* 302 U.S. 535, 539. Where there is no statutory prohibition such as

[77]We have indicated above our reasons for believing that there was no course of official conduct from which an intention to bring about such a result could be implied, and that, in fact, such a result would be contrary to the repeated and express representations of authorized officials.

that here under consideration, the setting aside of a reservation may be effectuated by the Secretary of the Interior, since the acts of the heads of departments are the acts of the executive. *United States v. Walker River Irrigation District*, 9 Cir., 104 F.2d 334, 338.

At the time the Navajo Indian Tribe and individual Navajo Indians were settled in that part of the 1882 reservation lying outside district 6, as defined in 1943, the Hopis already had rights of use and occupancy in that part. Thus, absent possible prior Hopi abandonment, to be discussed below, the initial legal status of settled Navajos must have been that of Indians entitled to share, with the Hopis, in the use and occupancy of part of the 1882 reservation. Had the Department thereafter sought to terminate all rights of the Hopis in that part, thereby giving the Navajos exclusive rights therein, the result would have been to create a new reservation for the exclusive use of Navajos.[78]

If such action would not have created a new reservation for the Navajos, it would at least have operated to add lands to their existing contiguous Arizona Navajo reservation. Either result would be contrary to the 1918 act.

Defendant argues that the authority of the Secretary to settle other Indians in the 1882 reservation was not terminated by the 1918 act. With this we agree. But the question now under discussion is whether, after that enactment, the Secretary could, in connection with his acts of settlement or otherwise, change the character of the 1882 reservation to the extent of terminating rights therein which the Hopis had held since December 16, 1882, thus establishing the area as one for the exclusive use of settled Navajos. We hold that such a result was not administratively attainable after May 25, 1918.[79]

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[78]Expressing the same view, the solicitor said:

". . . 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."

[79]Defendant's statement, on page 13 of his reply brief, that the 1918 act "has no application to existing reservations, either those created by Statute or by Executive Order," is in error.

Defendant also argues, in effect, that if the 1918 act had been considered by the Congress to have had the effect the solicitor attributed to it, "the Enabling Act, approved July 22, 1958, would not have submitted to this court, as it did, the burden of hearing and determining all claims, including Navajo claims of settlement which are grounded upon settlement within the Executive Order area after May 25, 1918. . ."

Under the solicitor's ruling, and under our like ruling, the 1918 act is held to foreclose administrative termination of Hopi rights in any part of the 1882 reservation, and establishment of exclusive Navajo rights in part of the reservation, after May 25, 1918. Congress did not know, when it passed the Act of July 22, 1958, what rights, if any, the Hopis would be declared to have in the reservation, the extent to which Navajo claims would be based on events after May 25, 1918; or the extent to which Navajo claims, if established on the basis of events subsequent to that date, would be held to be joint or exclusive in character. Thus the 1958 enactment represents no expression of Congressional opinion as to the meaning of the 1918 act, or the effect it might have on the outcome of this case.

The second statute which has a bearing on the question now under discussion, is section 4 of the Act of March 3, 1927, 25 U.S.C., § 398d. This statute provides that 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, with the proviso that the Secretary may make temporary withdrawals.

In his opinion of February 21, 1941, the solicitor relied upon this act, as well as the 1918 act, in ruling that the Secretary was without power to divide the 1882 reservation into areas of exclusive Hopi and Navajo occupancy. In his opinion:

> "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."[80]

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[80]Our ruling herein that the Hopis have the exclusive interest in that part of the 1882 reservation consisting of district 6, as defined in 1943, does not run counter to the solicitor's quoted view. Our opinion as to

Again, we are in accord with the views expressed by the solicitor. Had the department, at any time after the 1927 statute became effective, sought to terminate Hopi rights in part of the 1882 reservation, so that such part would be for the exclusive use of the Navajo Indian Tribe or individual Navajo Indians, the result would have been to change the boundaries of the 1882 reservation by dividing it in two. In addition, there would have been, in effect, a change in the boundaries of the contiguous Navajo reservation, to include that part of the 1882 reservation in which Navajos were granted exclusive rights.

For the reasons indicated we hold that the Hopi rights of use and occupancy in that part of the 1882 reservation in which Navajos were settled were at no time terminated by valid administrative action, although after February 7, 1931, the Hopis were required to share equally, use and occupancy thereof, with Navajos validly settled in that part of the reservation.

Defendant argues, however, that even if the department was without authority and even if it acted in a tortious manner, the fact that the department protected the Navajos in the exclusive use and occupancy of a large part of the reservation, conferred upon the Navajos all the normal incidents of ownership which go with Indian title. Arguing from this that the Hopis now, at best, have a claim against the Government for a taking, defendant cites *United States v. Shoshone Tribe,* 299 U.S. 476, 304 U.S. 111, 116. Our attention is specifically directed to this language in the latter opinion: ". . . for all practical purposes, the tribe owned the land."

The Shoshone Tribe of Indians of the Wind River Reservation in Wyoming sued the United States in the Court of Claims for the breach of treaty stipulations, whereby the tribe had been permanently excluded from the possession and enjoyment of an undivided half interest in the tribal lands. By the treaty of July 3, 1868, 15 Stat. 673, the Shoshone Tribe relinquished to the United States a reservation of 44,672,000 acres in Colorado, Utah, Idaho and Wyoming, and accepted in exchange a reser-

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this is not predicated on any administrative action purporting to terminate existing Navajo rights in that part of the reservation. Rather, it is based on the fact that no Navajos were settled therein, and hence never acquired any interest in that part of the reservation.

vation of 3,054,182 acres in Wyoming. The United States agreed that the territory described in the treaty would be "set apart for the absolute and undisturbed use and occupation of the Shoshone Indians. . . and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them."

In 1878, acting upon the erroneous assumption by the Commissioner of Indian Affairs that the Shoshones had consented to the settlement of a band of the Northern Arapahoes on the Wind River Reservation, that band was brought to the reservation under military escort. The Shoshones immediately made known their opposition to this arrangement, but the Indian Commissioner persisted in protecting the Arapahoes in permanent residence in that reservation.

The agent on the reservation frequently communicated to the Washington office the protests of the Shoshones, but there was nothing in return but silence. "Months lengthened into years," the Supreme Court said (299 U.S., at page 488), "and the signs accumulated steadily that the Arapahoes were there to stay." Schools were built, irrigation ditches were dug, and in numberless ways the Arapahoes were officially treated as if they had equality of right and privilege with the Shoshones.

On August 13, 1891, the Commissioner officially ruled that the Arapahoes have equal rights with the Shoshones to the land in the reservation. Both that office and Congress thereafter dealt with the reservation and the two tribes as if the Arapahoes were there permanently and rightfully. In time the Arapahoes came into exclusive possession of the eastern section of the reservation, pushing the Shoshones to the west. Finally, in 1927, an act was passed to make atonement for the wrongs of half a century by permitting the Shoshones to prosecute a claim for damages in the Court of Claims. Act of March 3, 1927, 44 Stat. 1349, Part II.

The Court of Claims gave judgment for the Shoshones in the amount of $793,821.49. Both the Government and the Shoshones appealed. The Government did not contest the merits of the claim but only the amount awarded.

It was in this context that the court, in the first *Shoshone* case, 299 U.S. 476, held in effect that, by adopting the wrongful act of a Government officer, the United States appropriated part of

the Shoshone reservation in 1878. As the Court of Claims had based the award on a supposed taking as of August, 1891, the cause was remanded for a redetermination of damages. The Court of Claims then raised the award to $4,408,444.23, and this judgment was affirmed in 304 U.S. 112.

On the second appeal the only question presented was whether the Court of Claims erred in holding that the right of the Shoshone Tribe, which had been taken, included the timber and mineral resources within the reservation. The Supreme Court held that it did, rejecting the contention that these resources belonged to the Government.

When the Supreme Court said, in this second opinion, at page 116, that ". . . for all practical purposes, the tribe owned the land," it was speaking of the rights of the tribe for whom the reservation was set aside—there the Shoshones. It was not referring to rights acquired by a trespassing tribe with the tortious assistance of Government officials. Thus the *Shoshone* case does not support the view that because the Navajos, in rightful occupancy of 1882 reservation lands through Secretarial settlement, were thereafter secured in the exclusive use and occupancy of that land by the enforcement of an invalid permit system, the Navajos thereby gained an exclusive interest in the land.

Apart from this, there are obvious substantial distinctions between the *Shoshone* case and our case. The *Shoshone* case was a suit for damages by reason of the taking of lands obtained by treaty, it was not a suit against the other tribe to quiet title to reservation lands. In the *Shoshone* case the Government had no right to settle any other Indians in the reservation without the consent of the Shoshones. Here the consent of the Hopis was not required in order for the Secretary to settle Navajos in the 1882 reservation.

In the *Shoshone* case, it was the official position of the Government throughout, speaking administratively and legislatively, that the Arapahoes had the right to use and occupy the reservation. Here, the Government has never taken the position that the Navajos had the exclusive interest in any part of the reservation. Exclusive Navajo use and occupancy has at all times been justified only as a necessary grazing regulation, the intent to affect Hopi rights being officially disclaimed time after time.

We conclude that the *Shoshone* case does not support defendant's position that the Navajos have gained an exclusive interest in the 1882 reservation by Congressional or administrative action.

This leaves for determination the question of whether those Hopi rights were terminated by abandonment.

Arguing that the Hopis had no more than an interest that depended for its existence on occupancy and use, defendant contends that the Hopis lost this possessory right by failure to exercise it, prior to or after the settlement of Navajos.

In support of this argument defendant relies on that part of the opinion in *The Crow Nation v. United States,* 81 C. Cls. 238, 278, which is set out in the margin.[81]

Defendant states that this decision has been modified by subsequent Supreme Court opinions clearly establishing the rule that title to executive order reservations carries with it all the incidents of ownership. It contends, however, that Indian title to an executive order area is in the nature of tenancy by sufferance, citing *Hines v. Grimes Packing Co.,* 337 U.S. 86, 103.

We have already stated in this opinion and in our prior opinion, that rights under an unconfirmed executive order reservation are not vested, and are in the nature of a tenancy by sufferance. But this does not answer the question of whether, under the facts of this case, the failure of the Hopis to occupy and use all of the 1882 reservation, as distinguished from Government action, operated to terminate their non-vested right to do so, accorded to them by the Executive Order of December 16, 1882.

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[81]". . . the order of 1873 and the act of Congress of 1874 gave to the River Crows only the right to reside upon the reservation, so set apart by Executive order, and did not confer upon them any definite title or particular interest in the land. It was in the nature of a tenancy by sufferance or residential title. . . In all subsequent proclamations of the President which were ratified by acts of Congress, the River Crows were never recognized as having an interest in the area so set apart by this Executive order of 1873. It was simply a license or permission granted by the Government which could be withdrawn and ceased to exist when the River Crows returned to the Crow Nation Reservation. The Executive order reserves to the President the right to put other Indians on the reservation and this could not be done if a statutory title, as tenants in common, was given to these five tribes alone."

There is nothing in the facts or law of the *Crow Nation* decision to support the view that such non-user by the Hopis brought about a termination of such rights. In that case it appears that on July 5, 1873, the President had ordered that a tract of land, consisting of 23,000,000 acres, situated in the Territory of Dakota, be set apart as a reservation for the Gros Ventres, Piegans, Bloods, Blackfeet, River Crows, "and such other Indians as the President may, from time to time, see fit to locate thereon." This executive order was confirmed by Congress in the Act of April 15, 1874, 18 Stat. 28.

The River Crows then had their own reservation along with the Mountain Crows, and had lived therein from 1851 to 1859. In the latter year the River Crows went to the territory later described in the 1873 executive order. The purpose in creating the 1873 executive order reservation was to prevent hostilities among the tribes hunting and fishing in this territory, and to control the liquor traffic on the Missouri River.

In 1897 the River Crows finally returned to their pre-existing reservation and did not again use or occupy the 1873 executive order lands. The action of the River Crows in leaving the 1873 lands was voluntary, no force or coercion being exercised by the Government. The greater part of the 1873 lands was subsequently returned to the public domain by agreements entered into with the named tribes then living on the 1873 lands, which did not include the River Crows.

On these and other facts the River Crows made a claim against the Government for the value of their alleged interests in the 1873 lands. Rejecting this claim the court held that, under the facts, it was the clear intention of Congress and the executive departments that the River Crows were to take no interest in the 1873 reservation. Their abode thereon, the court ruled, was solely a temporary expedient in order to avoid bloodshed and to regulate the liquor traffic on the Missouri River.

The facts concerning the establishment of the instant 1882 reservation, and the use made thereof by the Hopis, are entirely different from those pertaining to the creation and use, by the River Crows, of the reservation involved in *The Crow Nation v. United States, supra.*

Here the reservation was not intended as a temporary expedient, but as a permanent reservation for the Hopis (who had no

other reservation), and such other Indians as the Secretary might see fit to settle thereon. Here, unlike the *Crow Nation* case, one of the prime purposes was to provide the Hopis with living space in addition to that which they were actually occupying in 1882, before encroaching white settlers and Navajos made this impossible. Here there was no movement by the Hopis from the part of the reservation which defendant asserts the Hopis abandoned.

The issue of abandonment is one of "intention to relinquish, surrender, and unreservedly give up all claims to title to the lands. . ." *Fort Berthold Indians v. United States,* 71 C.Cls. 308, 334. As the court stated in the *Fort Berthold Indians* case, the determination as to whether there was such an intention in a particular case depends on the facts and circumstances of that case.

It is true that the Hopis have never made much use of the part of the 1882 reservation outside of district 6 for residence or grazing purposes. But non-user alone, as the court said in the case last cited (at page 334), is not sufficient to warrant a finding of abandonment. The non-user must be of such character or be accompanied by such other circumstances as to demonstrate a clear intention to abandon the lands not used.

The failure of the Hopis, prior to the settlement of Navajos, to use a substantially larger part of the 1882 reservation than is embraced within district 6, was not the result of a free choice on their part. It was due to fear of the encircling Navajos and inability to cope with Navajo pressure.

We have outlined above the evidence pertaining to Navajo depredations against, and pressure upon the Hopis for the years prior to 1900. That this state of affairs continued for the thirty years which followed, prior to the official settlement of Navajos in the reservation, is equally well established in this record.

In his annual report of September 1, 1900, Charles E. Burton, school superintendent and acting Indian Agent at Keams Canyon, 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.

On July 10, 1908, Matthew W. Murphy, special allotting agent, reported:

". . . I find practically all the springs in the possession of the Navajos, and I find Navajos living within three miles of some of the Moqui villages."

In his letter of February 14, 1911, recommending discontinuance of the second allotment project, A. L. Lawshe, Hopi Superintendent, 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."

On May 26, 1914, H. F. Robinson, Superintendent of Irrigation for the Land Division, stated that the Hopis 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. . ." Characterizing the Hopis as peaceful and submissive, Robinson reported that they were discouraged "and feel that they are being crowded to the wall. . ."

On July 7, 1915, Leo Crane, Superintendent at Keams Canyon, reported to Washington that the problem was becoming "acute, as respects the depredations of Navajo Indians upon Hopi herds, and general differences arising because of overlapping grazing areas."

On April 6, 1916, the then Congressman Carl Hayden wrote to the then Commissioner Cato Sells stating it to be his understanding "that the Navajoes are crowding in upon these inoffensive people [Hopis] and are depriving them of the use of considerable areas that are necessary for grazing their flocks."

Inspector H. S. Traylor was assigned to make an investigation and report concerning Congressman Hayden's charges. In his report, filed June 6, 1916, Traylor stated that the Congressman's accusations concerning the Navajo's 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."

In a report submitted on March 12, 1918, Leo Crane expressed the view that the Hopis had been disciplined and advanced and had prospered because they could be reached. The Navajos, 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." Crane added that the Navajos "have never respected anything save one thing—the uniform of the United States Cavalry."

On August 23, 1918, Crane again reported at length concerning Navajo depredations and the need of effective enforcement. On November 10, 1918, H. F. Robinson sent a similar report to the Commissioner, stating that the "encroachments of the Navajo Indians on the lands occupied by the Hopi Indians on the Moqui Reservation in Arizona is [sic] becoming more acute. . . ."

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 to the Department for protection," he wrote, "for although aware of this condition for many years the Government has continued to neglect its duty in providing a remedy."

On January 7, 1925, Inspector A. L. Dorrington filed a report in which the old story was repeated. ". . . the Navajo Indians," he wrote, "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. . . ."

During all of these years the Government, while failing to protect the Hopis from the Navajos, was urging the Hopis to come down off of the mesas.[82] Despite this lack of protection Government officials more than once chided the Hopis for clinging to the mesa tops. In his report of June 22, 1914, Crane in effect stated that the Hopis were to blame for their troubles. Whereas the Navajos had an "industrious pushing nature," Crane observed, the Hopis, through indifference, timidity or superstition, persistently clung to the mesas.

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[82]As early as January, 1886, Thomas V. Keam had 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 his suggestion that the Government supply the Hopis with building materials to enable them to build wood homes in place of their adobe pueblo dwellings. The Government accepted this suggestion and the first two Hopi families moved down off of the mesas in 1888.

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In his report of June 6, 1916, 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."[83]

In the late 1920's and early 1930's the Hopis, overcoming their fears of the Navajos, and yielding to the constant urging of Government officials, began to come down off of the mesas and spread beyond their previous area of occupancy.[84]

On January 16, 1928, Miller reported that during the previous year:

> "... the Hopis have spread out so much, and we have located so many so far afield—and at such distances from their mesas—in new territories, that additional friction and misunderstanding has developed, and more determined opposition from the Navajos has been encountered. ..."

On July 12, 1930, Agricultural Extension Agent A. G. Hutton reported that, "the Hopi is crowding into territory that has been used entirely by the Navajos in the past. ..."

On July 25, 1930, Field Representative H. H. Fiske reported that 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.

But now that the Hopis, who had previously been labeled cowards for not coming down off of the mesas, saw fit to do so at Government urging, they were officially labeled "aggressors" and "trespassers" for doing so. In his report of July 25, 1930, Fiske stated that now the Hopis rather than the Navajos, were the aggressors. In their report of November 20, 1930, H. J.

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[83]Traylor added:

> "Were he otherwise than the coward that he is, he would prefer to die fighting rather than to surrender the resources of his territory to an enemy."

[84]There had apparently been some substantial expansion of the Hopis as early as 1917. Speaking of this period, Asdzaan Tsedeshkidni, a ninety-year-old Navajo woman, testified that about this time she and her family had been living in the reservation near Beautiful Mountain, where they had developed a spring. She testified that then we "heard the rumble of the Hopi hoes," as the latter began developing little farms in the area. So she and her family moved across Dinnebito Wash.

Hagerman and Chester E. Faris agreed with the view which had previously been expressed by Miller, Hutton and Fiske that most of the then-current "trespassing" was by the Hopis rather than the Navajos.

After the official settlement of Navajos in the 1882 reservation, the failure of the Hopis to make substantial use of the area beyond district 6 was not due to a lack of desire or a disclaimer of rights on their part. It was due to the fact that the Office of Indian Affairs, through its grazing regulations and associated permit system, was exerting the power of the Government to prevent any Hopi expansion into the area into which Navajos by then were solidly entrenched.

The administrative exclusion of Hopi Indians, without their approval and against their wishes, from that part of the 1882 reservation lying outside of district 6 was, for the reasons already stated, at all times illegal.[85] The Office of Indian Affairs was aware of this because the solicitor's opinion of February 12, 1941, reconfirmed by the acting solicitor's opinion of June 11, 1946, 59 I.D. 248, so advised. Yet the exclusion practice continued year after year and was, in fact, intensified.

But despite this obstacle over which the Hopis had no control, they continued to assert their right to use and occupy the area from which they were barred.

At a Senate subcommittee hearing held at Keams Canyon in May, 1931, the Hopi tribal delegates insisted that the 1882 reservation should be for the exclusive use of the Hopis and that all Navajos should be moved out.

On August 6, 1932, a conference of sixty-eight Hopis, meeting at Oraibi, Arizona, protested against the inclusion in the Navajo Indian Reservation Act then under consideration, of a proviso which would have given the Secretary of the Interior authority to determine and set apart for the exclusive use of the Hopis, only a portion of the 1882 reservation.

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[85]Pertinent here is the following comment, documented by other instances of illegal Governmental rule on page 309 of the Handbook of Federal Indian Law by Felix S. Cohen, published in 1945:

> "Tribal possessory right in tribal land requires protection not only against private parties but against administrative officers acting without legal authority and against persons purporting to act with the permission of such officers. . . ."

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On February 13, 1933, Otto Lomavitu, then President of the Hopi Tribal Council, wrote to Hopi Agency Superintendent Miller, asserting Hopi rights to the 1882 reservation "though occupied by the Navajos."

At a special meeting of the Hopi Tribal Council, held at Oraibi on October 5, 1937, a resolution was passed to the effect that, for several stated reasons, the land management districts should not be recognized. One of these reasons was that ". . . the Hopi people have not conceded any part of their reservation to the Navajos."

At a conference between Commissioner Collier and fifteen Hopi Tribal Council members and four Hopi chiefs, held at Oraibi on July 14, 1938, the statement was made for the Hopis that they considered the Navajos on the reservation as trespassers, that the entire 1882 reservation belonged to the Hopis, and that to prevent any misunderstanding as to this the 1882 boundary lines should also be made the boundary lines of district 6.

On April 24 and 25, 1939, four Hopi leaders met in Washington with the Commissioner, 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. But the Hopis also asked, as a bare minimum, that they be recognized as having exclusive rights in the entire 1882 reservation.[86]

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[86]This was one of many instances in which the Hopis, in addition to claiming all of the 1882 reservation, also laid claim to vast areas beyond that reservation. These so-called "traditional" claims are explained, as Dr. Harold S. Colton reported to a Senate subcommittee on May 20, 1931, 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.

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.

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 one time extended to the city of Albuquerque, New Mexico and included the Jicarilla Apache Reservation.

Early in 1942, the Hopis sought to make a test case out of their disagreement with the practice of denying permits to district 6 Hopis for use of lands outside of district 6. At that time they submitted 105 applications by Hopi stockmen for grazing permits on range lands outside of district 6. Navajo Superintendent Fryer returned all of these applications "without action" on February 27, 1942.

Byron P. Adams, then Chairman of the Hopi Tribal Council, approved the Centerwall report of July 29, 1942. That report contained the statement that the setting aside of a land management unit for the Hopis does not create a reservation boundary and that the Hopis would remain entitled to all beneficial use, including the right to any proceeds, within the remainder of the 1882 reservation.

Commissioner Collier met with Hopi leaders at Oraibi on September 12, 1944, at which time the Hopi claims to the entire 1882 reservation were once more aired.

In April, 1945, the Hopi chiefs of the Second Mesa in the 1882 reservation protested to Senator Burton K. Wheeler against the fencing of district 6. At a meeting held on November 6-7, 1945, at the Tareva Day School, in the reservation, Hopi leaders in effect told officials of the Office of Indian Affairs that the Hopis continued to claim the 1882 reservation lands outside of district 6.

Perhaps these Hopi claims subsequent to the settlement of Navajos would have been even more persistent and vehement had it not been for the constant assurances given to them by Government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims.

It is true that, as a practical matter, the entirely valid settlement of Navajos in the part of the 1882 reservation outside of district 6, even without the illegal restraint which the Government placed upon the Hopis, would have greatly limited the amount of surface use the Hopis could have made of the outer reaches of the reservation. Though Hopi and Navajo rights of use and occupancy were equal, members of both tribes could not physically utilize the same tract at the same time. This was a hazard to which the Hopis were at all times subject because of the authority reserved in the Secretary to settle other Indians in the reservation.

But without such Governmental restraint and without Navajo pressure in becoming joint occupants there would unquestionably have been a substantial movement of Hopis into the area outside of district 6, which they presumably would have still been using and occupying on July 22, 1958. Moreover, with or without such restraint, the Hopi rights in subsurface resources were not affected, either as to legal standing or practical opportunity to exploit.[87]

Defendant calls attention to Article I of the Hopi Constitution, adopted by the Hopis on October 26, 1936, and approved by the Secretary on December 19, 1956. It appears to be defendant's view that Article I of that Constitution amounts to a voluntarily accepted limitation upon the jurisdiction of the Hopi Tribal Council, confining such jurisdiction to the area of the Hopi villages and such other lands as might be added thereto by agreement with the Government and the Navajo Indian Tribe.

In his opinion of February 12, 1941, the solicitor relied upon this and two other provisions of the Hopi Constitution as requiring disapproval of the proposed Secretarial order dividing the 1882 reservation into areas of Hopi and Navajo exclusive occupancy.[88]

We agree with the solicitor's conclusion. The Hopi Constitution does not itself provide an affirmative foundation for the Hopi claim to an interest in the entire reservation. It does, however, negate the contention that the Hopis had abandoned or otherwise surrendered their asserted rights therein.

We therefore conclude that neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occcupy that part of the 1882 reservation in which Navajos were settled.

For the reasons stated above, Hopi rights of use and occupancy in that part of the reservation were not terminated by Congressional enactment, administrative action, or abandonment. This would appear to require the conclusion that the Navajo Indian Tribe does not have an exclusive interest in the part of the

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[87]See the opinion of acting solicitor Felix S. Cohen, dated June 11, 1946. 59 Dec. Dept. Int., 248.

[88]See note 48 above, at the end of which this part of the solicitor's opinion is quoted.

reservation in which it has been settled, but has only a joint, undivided, and equal interest therein with the Hopi Indian Tribe.

But defendant points out that, unless the Navajo Indian Tribe is held to have an exclusive interest in that part of the 1882 reservation lying outside of district 6, it will not be possible in this action to completely divide the reservation between Hopis and Navajos. Arguing that it was the purpose of Congress in passing the Act of July 22, 1958, to obtain such a division of the reservation, defendant urges us to fulfill this purpose by declaring that the Navajos have such an exclusive interest.

It was indeed the hope and probably the expectation of the Congressional sponsors of the legislation that this litigation would result in a clear-cut division of the reservation, leaving no undisposed issues.[89] Thus, at the hearing on June 18, 1958, before the House Committee on Interior and Insular Affairs, held on S. 692 and H.R. 3780, the then Congressman Udall stated that: ". . . it is either a matter of Congress attempting to determine the boundaries which would be an impossible situation, or having a judicial determination."[90]

But the fact that Congress hoped and expected that this litigation would put an end to the Navajo-Hopi controversy does not warrant the court in disregarding facts and law which

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[89]The jurisdictional statute was first introduced on July 16, 1956, by Senator Goldwater, as S. 4086, 84th Cong. That bill passed the Senate but not the House. Similar measures were introduced in both the Senate and House in the 85th Congress. S. 692, 85th Cong., was introduced by Senators Goldwater and Hayden. H.R. 3789, 85th Cong., was introduced by Congressman Udall.

[90]Later during this hearing the following colloquy occurred:

"Mr. Saylor. The next question is:

"Since the purpose of this bill is to determine the rights of both the Navaho and Hopi Tribes, does the committee expect there will be a division of the lands in question?

"Mr. Udall. The legislation so provides, that the Court will make determination where the boundary lies, and the lands that are determined to belong to the Navaho will go to the Navaho, and you will have a new boundary determined.

"Mr. Saylor. In other words, instead of the existence of this no-man's land we have right now, where both tribes do not know what their jurisdiction is, when the decision of the Court is arrived at there will be a section of it probably set aside for the Hopi and a certain section set aside for the Navaho?

"Mr. Udall. That is exactly the case."

dictate a different result. Congress appreciated this, as revealed by the language of the 1958 act, and its pertinent legislative history.

The act places no mandatory duty on this court to accomplish a complete division of the reservation, as between Hopis and Navajos. Lands, "if any," in which the Navajo Indian Tribe or individual Navajo Indians are determined to have an exclusive interest are henceforth to be a part of the Navajo Indian Reservation. Lands, "if any," in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined to have an exclusive interest are thereafter to be a reservation for the Hopi Indian Tribe. But there is no direction that all reservation lands must be classified as exclusively Navajo or exclusively Hopi, or that lands which were neither exclusively Navajo or Hopi must nevertheless be distributed to one tribe or the other.

This goal could have been realized if the bill had been enacted in its original form. Section 2 of the bill, as introduced, provided that:

> ". . . (1) any lands in which the court finds that the Navaho Tribe or individual Navahos have the exclusive interest shall thereafter be a part of the Navaho Reservation, (2) any lands in which the court finds that the Hopi Tribe, village, clan, or individual has the exclusive interest shall thereafter be a reservation for the Hopi Tribe, and (3) any lands in which the Navaho and Hopi Indians have a joint or undivided interest shall become a part of either the Navaho or the Hopi Reservation according to the court's determination of fairness and equity. . . ."

Referring to section 2, as it was then worded, Hatfield Chilson, Assistant Secretary of the Interior, made this comment to Congressman Clair Engle, Chairman of the House Committee on Interior and Insular Affairs, in a letter dated February 26, 1957:

> ". . . This provision will assure that one or the other of the tribes will have administrative jurisdiction over the land in the future, without prejudice, however, to the undivided interests."[91]

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[91]Page 5 of House Report No. 1942, 85th Cong., 2nd Sess., dated June 23, 1958, to accompany S. 692, 85th Cong., (which became the Act of July 22, 1958).

The department thus recognized that the court might find that some reservation lands were held jointly rather than exclusively by one tribe or the other. But since the bill, in its original form, provided for the distribution of jointly-held lands as well as exclusively-held lands, a complete division of the reservation would nevertheless have been attained. The distribution of the jointly-held lands, if any were found to be so held, would have been in the nature of a judicial partition of lands then vested by reason of the trust declaration under the first section of the act.

But then it was decided to delete the provision which would give the court power to distribute jointly-held land. This was accomplished by amending the bill to strike the third numbered clause contained in the above-quoted part of section 2 of the bill. The request for this revision came from the department, in a letter from Chilson to Honorable James A. Haley, Chairman of the subcommittee. The reason given for this deletion was as follows:

> ". . . The purpose is to leave for future determination the question of tribal control over lands in which the Navahos and Hopis may have a joint and undivided interest. The two tribes feel that this question cannot be adequately resolved until the nature of their rights is adjudicated, and that the question is properly one for determination by Congress rather than by the courts. We agree with that position. Until the nature of the respective interests is adjudicated it is difficult to determine whether any part of or interest in the lands should be put under the exclusive jurisdiction of either tribe."[92]

It thus appears that the reference to "joint and undivided" interests was omitted not because the court was to be precluded from finding such interests. Rather, it was because of the feeling that if joint and undivided interests were found to exist, the court ought not to be given the further duty, under the deleted clause 3, to distribute such lands between the two reservations, "according to the court's determination of fairness and equity."

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[92]Page 6 of House Report No. 1942.

In Chilson's letter of March 19, 1957, the reason given why this additional function should not be placed upon the court was that the two tribes felt that, as to any joint and undivided interests found to exist, the question of a partition or other disposition thereof "is properly one for determination by Congress rather than by the courts."[93]

In commenting upon this amendment, Perry W. Morton, Assistant Attorney General, told the Senate Committee on April 1, 1957, while H. R. 3789, 85th Cong., was under consideration:

> ". . . The very fact that the sentence now proposed to be deleted is in the bill assumes that there must be, possibly at least, some land in which these two organizations have a joint or undivided interest. If the court is to proceed upon

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[93]An explanation as to why the parties and the Department thought it would be better for Congress, rather than the court, to distribute lands found to be held jointly, was made by Lewis Sigler, Legislative Division, Office of the Solicitor, when he appeared before the House Committee considering H.R. 3789, 85th Cong., at a hearing held on April 2, 1957, as follows:

> "Under the Department's present position, that is, the Solicitor's opinion of 1946, those rights are now vested in the Hopi Tribe, and in individual Navahos jointly. That may or may not be a correct conclusion as a matter of law. The Navaho Tribe, as I understand it, is now differing with that position, and asserting that the rights are not in the individual Navahos, but are in the tribe. The Hopis, however, are still insisting that whatever rights there are are in the individual Navahos, rather than the tribe. So that is one of the issues still in dispute.
>
> "Because of that dispute, and because it is possible that the court might aware [sic] the surface to one group and the subsurface to another group, we propose omitting this sentence which would define what happens to the lands in which there are joint interests, if that happens to be the end result.
>
> "I should indicate that was the suggestion of both Mr. Boyden as a representative of the Hopis, and Mr. Littell as a representative of the Navahos, that if there should be such joint interest adjudicated, then Congress ought to take another look at it to decide where to put the joint interests.
>
> "I should indicate, in all fairness, that both the Navahos and the Hopis, I think, will contend there are no joint interests, they are exclusive one way or the other. But you cannot rule out the possibility there will be a decision of joint interest."

the basis of exclusive occupancy, then how can there be a joint or undivided interest?"[94]

The applicable facts and law of this case do not permit of a declaration that one tribe or the other has the exclusive interest in all of the 1882 reservation; or that all of the 1882 reservation is divisible into areas of exclusive interest for one tribe or the other. The only part of the reservation which may be, and herein is, so classified is the district 6 area, as defined on April 24, 1943, the Hopi Indian Tribe having the exclusive interest therein. As to the remainder of the reservation, the Hopi and Navajo Indian Tribes have joint, undivided, and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States.

It is just and fair in law and equity that the rights and interests of the Hopi and Navajo Indian Tribes be determined in the manner just stated, and that the respective titles of the two tribes in and to the lands of the 1882 reservation be quieted in accordance with that determination.

It has been the consistent position of the defendant throughout this suit that the Navajo Indian Tribe has the exclusive interest in all of the 1882 reservation lying outside of the area described on page 2 of Pre-Trial Order No. 2. In that pre-trial order he also took the position that "No other interests were asserted" by defendant than those described. During the pre-trial hearing which led to the entry of Pre-Trial Order No. 2, counsel for defendant twice stated that defendant made no claim to a joint interest in any part of the reservation.

In our view, however, this disclaimer of any Navajo joint interest, does not preclude this court from judicially determining

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[94]Lewis Sigler of the solicitor's office, appearing before the House Committee on April 15, 1957, also advised of the possibility that the court might find some joint-user. He told the committee:

"If the courts decide, of course, that there are exclusive rights in either group, then the two sentences that are left in the bill will take care of it. It is only in the event there is this split ownership adjudicated that the feeling was Congress ought to take a look at the nature of that split ownership before it decided which tribe would get the control."

that the Navajo Indian Tribe has a joint interest in a part of the reservation, as we have concluded, if the facts and law warrant such a determination and do not permit an adjudication that the Navajo Indian Tribe has an exclusive interest in such part.

Conclusion

Under the judgment being entered herein about one quarter of the 1882 reservation, consisting of district 6 as defined in 1943, will be completely removed from controversy, having been awarded exclusively to the Hopi Indian Tribe. As to the remainder of the reservation, the facts and law, as herein determined and applied, and our lack of jurisdiction to partition jointly-held lands, preclude a complete resolution of the Hopi-Navajo controversy.

But even as to this remaining part of the reservation in which the two tribes are herein held to have joint, undivided and equal rights and interests, the judgment will have the effect of narrowing the controversy. At least three crucial questions which have heretofore hampered a fair administration of this part as a joint reservation, or a division thereof by agreement or Congressional enactment, have now been settled. No longer will it be tenable for the Hopis to take the position that no Navajos have been validly settled in the reservation. No longer will it be tenable for the Navajos to take the position that they have gained exclusive rights and interests in any part of the reservation. No longer will there be uncertainty as to the boundaries of the area of exclusive Hopi use and occupancy.

It will now be for the two tribes and Government officials to determine whether, with these basic issues resolved, the area lying outside district 6 can and should be fairly administered as a joint reservation. If this proves impracticable or undesirable, any future effort to partition the jointly-held area, by agreement, subsequently-authorized suit, or otherwise, will be aided by the determination in this action of the present legal rights and interests of the respective tribes.

In the course of this opinion it has been necessary to say some unkind things about the activities of the Navajo Indians in the reservation area in years long past. We wish to make it clear that the record contains nothing concerning the conduct of the

Navajos in this area in recent years with which they can be reproached. They as well as the Hopis are now conducting themselves as good citizens of which the West and the nation can be proud.

FREDERICK G. HAMLEY, Circuit Judge

LEON R. YANKWICH, District Judge

JAMES A. WALSH, District Judge

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. 818

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

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

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

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. Plf. 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 Plf. 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 Plf. 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 Plf. 57 Plf. 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

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

south, embracing the Hopi villages, be set aside for the Hopi Indians. In his communication Eastman rejected, as impracti- Def. 16
cable, 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."

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. Def. 17
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 Def. 17
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.

In the summer of 1882, United States Indian Inspector C. H. Howard visited the general area in the course of an investigation Def. 19
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.

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, Def. 25, 39
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 Def. 58, 74
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.

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 Def. 21
roaming far beyond their then established reservation. His reasons for including the Hopis were to protect them from en-

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 ex-

Plf. 1, 2, 6, 9

tending 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.

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

Def. 23

17, 1882, advising that he had expelled one Jer. Sullivan, a white meddler, from the Hopi villages, and requested authority for

Def. 24

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. 54, 55, 56

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. 57

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. 21

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:

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

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

Plf. 431 Fleming. In 1945, Dr. Harold S. Colton, then Director, Museum of Northern Arizona, placed the Navajo population on the 1882 Plf. 428, 430 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 Def. 205 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.

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. R. 206 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 R. 208 these specimens were cut and presumably used in structures prior R. 221 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.

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.

"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 Plf. 46

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

Def. 85 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):

> "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,

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

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

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.

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." Plf. 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. Plf. 72 Plf. 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. Plf. 75 Plf. 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 Plf. 77 Plf. 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-

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

Def. 138 Collins' November recommendation went unheeded. On December
Plf. 91 16, 1890, Special Agent George W. Parker sent a telegram 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,

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 Plf. 100
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."

On the same day, and probably without having seen Collins' telegram, Capt. H. K. Bailey at Los Angeles, wrote to Lt. Grier- Plf. 102
son, 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.

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 whe 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.

As 1891 opened, Lt. Grierson was still at Keams Canyon with his detachment. Having received the lieutenant's report of De-
Plf. 104 cember 28, 1890, Brigadier General McCook, on January 3, 1891, submitted recommendations to the Adjutant General of the Army.

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
Def. 150 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.

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
Plf. 139 and Navajos were agreeable thereto. He apparently acquiesced in the arrangement, although it was never expressly confirmed by

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 Plf. 113
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 Def. 154
plan to place Hopi children in the school at Santa Fe. This was apparently arranged and the troops remained until the middle Def. 155
of March, 1891.

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 Def. 155
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.

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 Def. 159
progress and that more than fifty houses were under construction.

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 Plf. 116
a plan to allot lands to individual Indians on the 1882 reservation, pursuant to the Act of February 8, 1887, 24 Stat. 388, as Plf. 117
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:

> "No person should be allowed an allottment [sic] on said Plf. 118
> 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."

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

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. . . ." Plf. 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

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.

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

Def. 196-197

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

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

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

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
Def. 218-219 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.

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.
Def. 222 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. 223 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 ". . . 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

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

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 In-

Plf. 182 dians had lately visited him at the agency to make inquiries as to the location of the boundary.

Responsive to this report the Commissioner of Indian Affairs wrote to the Commissioner of the General Land Office, under date

Plf. 184 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."

Just as the continuance of the second Hopi allotment project brought to light perplexing problems, so did its discontinuance.

Plf. 186 On November 14, 1911, William E. Freeland, the Hopi school

Plf. 190 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

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

resulted which Crane found most perplexing to solve. He therefore renewed a recommendation which he had previously made,
Def. 243 and which Superintendent Lawshe before him had made, that the reservation be divided so that there would be a separation of the Indians' interests.

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. . ."

In his letter Robinson stated that Navajos were occupying some three hundred choice allotment sites which had been granted
Pif. 197, 198 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

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

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.

Crane also recommended that a delegation of Hopis be sent
Def. 254 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"

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

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."

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

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 hun-

Def. 270

dred 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. 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-

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

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

Plf. 244 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. 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,

Plf. 252, 253 stated that five day-schools were then being maintained there for the Hopis only. Daniel stated that the only reason he could give

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,

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."

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

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
Def. 292 the Hopi Indians back and back, until they are now confined to comparatively small area immediately adjoining their mesas. . ."

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
Def. 293 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.

It was Dorrington's recommendation that a rectangular area
Def. 293-294 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
Def. 294 the Moqui reservation." This was, as Dorrington pointed out, the same suggestion Hopi Superintendent Daniel had made in 1922.

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
Def. 295 part of the southern half of the 1882 reservation.

Def. 296
Def. 299 The Assistant Commissioner requested Hopi Superintendent Miller, who had been at the reservation about sixteen months, to submit his recommendations concerning the Dorrington report.
Def. 297 These were forthcoming on February 27, 1925. In his opinion, Dorrington's report presented only the Hopi's side of the con-

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

other Indians as the Secretary of the Interior may designate." Burke continued: "There were undoubtedly some Navajo In-
Def. 303 dians 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."

Plf. Prop. F.F. p. 59 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.

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
Def. 304 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."

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. Commis-
Def. 305 sioner 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.

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 rec-
Def. 306 ommend 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.

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

reservation. . .” A third new factor was the increasing bold- Def. 307
ness 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.

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 Def. 308
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.

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 Def. 309
Chester E. Faris, District Superintendent at the Southern Pueblo Def. 321
Agency, Albuquerque, New Mexico, to make a careful investiga- Def. 310
tion 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 Def. 310
as likely to aggravate rather than ameliorate conditions. 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 Def. 318
riding at “prohibitive” cost was carried on. Faris favored Def. 319
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-

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

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

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

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

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

Def. Ex. 439 p. 48

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.

A letter dated February 7, 1931, written to Hagerman by Commissioner Rhoads, and countersigned by Ray Lyman Wilbur,

Def. Ex. 439 p. 48

Secretary of the Interior, indicates their agreement with the proposal to segregate the two tribes and with the boundaries recommended by Hagerman.

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

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

Def. 362

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

Def. 362, 363

favored a division of the reservation, while the Hopi tribal delegates insisted that the 1882 reservation should be for the exclu-

Plf. 302

sive 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-

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

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

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. 299

Plf. 303

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

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

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

Plf. 324

five meetings at various Hopi villages were thereafter held to discuss the matter. The Hopis in the three villages on the First

Plf. 325

Mesa (Walpi, Tewa and Sichumovi) were for allowing the land and agency situation to remain as it then existed.

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

Def. 400

would include about all of the Navajo reservation were present and presented their views.

Senator Hayden stated, as he had done on other occasions, that the 1882 reservation "was reserved for the benefit of both the

Def. 397

Hopis and Navajos." Senator Hayden advocated the setting aside

Def. 400

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. 409

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

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. 341 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 Plf. 211 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 Def. 421 the previous year. He proposed extension of the Hopi area which would add 59,225 additional acres, bringing total Hopi acreage Def. 419 in the proposed segregated area to 528,407. This would still not include all Hopi fields, Howell stated.

Plf. 312 On May 5, 1934, Harold L. Ickes, then Secretary of the Interior, Def. 423 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:

> Def. 424 "It is of importance to observe that section 1. . . contains a Plf. 343 provision safeguarding the rights of the Hopi Indians to their lands, which are centrally located within the present Navajo Reservation."

Plf. 342, 344 The Senate and House bills were favorably reported by the re-
Def. 423 spective committees, with amendments which, however, left undis-
Def. 427, 430 turbed the proviso saving the 1882 reservation area from the effect
Plf. 349 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

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

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.

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. 858 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

Def. 470, 471

The plan outlined in this memorandum, which was approved 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-

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:

"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-

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
Def. 555 the Hopi Council's suggestion stating that it would "break up the entire land-management scheme."

On December 28, 1937, the Commissioner signed and promulgated a map defining land-management districts established
Plf. 372 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:

> "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.

Plf. 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.

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 adready 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

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 Def. 571, 605, 609

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. 613 Def. 625 Def. 336

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

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. 695

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.

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

> ". . . 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
Def. 655 permit system as the Navajos, when it was necessary for them to seek wood in district 4 to the north.

Def. 657 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.

The branch of forestry of the Bureau of Indian Affairs later became responsible for timber management and for the issuance
Def. Prop. F.F. 295 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
Def. Prop. F.F. 299 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.

In a conference held in Washington, D.C., on April 24, 1939, Commissioner Collier, obviously referring to the entire 1882 reser-
Def. 675 vation, 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
Def. 753 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. 671, 685 On April 24 and 25, 1939, four Hopi leaders met in Washing-
Def. 671 ton 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

182

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

Gordon B. Page submitted his report covering district 6 in December, 1939. He reported that 2,619 Hopis and 160 Navajos

Def. 727

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

According to Page, almost all Hopi range use outside the then existing boundaries of district 6 was by cattle men, although

Def. 727, 728

there was some sheep grazing outside the district. One reason Hopi cattle ranged so far was that they ranged without super-

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

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
Def. 817, 819 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
Def. 820 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. 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
Def. 821 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 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

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. . ." 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, Def. 848

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

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
Def. 846 order would be compensated for unremovable improvements through the granting of rehabilitation work or other means at the disposal of the superintendent.

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 Solici-
Def. 858 tor 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:

"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

92-819 O - 73 - 26

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

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. 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. 895 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

Plf. 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

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

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 Def. 932 Woehlke, who had bitterly assailed the Solicitor's opinion of 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

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

Def. 946

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. 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

Def. 942

"rights" would be established on the basis of past use. Rights to wood and timber on the whole reservation would be equal.

Def. 943

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.

Plf. 302-303

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,

> ". . . 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,

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
Plf. 424, 425 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:

". . . 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,"

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.

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

Def. 969

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:

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

through his failure to exercise the discretion vested in him by the Executive order. But the Secretary is not chargeable with neglect in this matter. Throughout the years the Secretary has sought and obtained funds from Congress which have been used for the education of the children of Hopis and Navajos alike, and the grazing of the livestock of both groups has been permitted and regulated by the Secretary. This, to my mind, is conclusive evidence that the settlement of the Navajos on the reservation has been sanctioned and confirmed by the Secretary, and that their settlement is therefore lawful, resulting in the necessity of recognition of their rights within the area."

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.

92-819 O - 73 - 27

". . . 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.

Def. 980 District 6 and several other districts which included 1882 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."

Def. 977, 607 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 Navajo" issued in March, 1948, that Navajo and Hopi families

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

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-

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

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.

Def. Ex. 579

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

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.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882, *Plaintiff,* vs. PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, *Defendants.*	No. Civil 579 Prescott

The court having considered all of the evidence and being fully advised makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jurisdiction

1. This United States District Court for the District of Arizona, comprised of three judges and convened in the manner authorized by section 1 of the Act of July 22, 1958, 72 Stat. 402, and 28 U.S.C., section 2284, has jurisdiction to entertain and determine this action.

Parties

2. Plaintiff Dewey Healing is the duly authorized chairman of the Hopi Tribal Council of the Hopi Indian Tribe and appears herein for and on behalf of said tribe, including all villages and clans thereof, and on behalf of any and all Hopi Indians claiming any interest in the lands described in paragraph 4 of these findings of fact.

3. There are two defendants one of whom is Paul Jones, the duly authorized chairman of the Navajo Tribal Council of the Navajo Indian Tribe. He appears herein for and on behalf of said tribe and every member thereof, and for each and every Navajo Indian using and occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in paragraph 4 of these findings of fact. The other defendant is the Attorney General of the United States, on behalf of the United States.

Nature of the Case

4. At issue in this action are the competing claims of the Navajo and Hopi Indians and their respective tribes in and to the lands described in an executive order issued on December 16, 1882, by President Chester A. Arthur. This order reads:

"Executive Mansion,
December 16, 1882.

"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 the place of beginning, be and the same is hereby withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui, and such other Indians as the Secretary of the Interior may see fit to settle thereon.

CHESTER A. ARTHUR."

5. By inadvertence the land description set out in the order of December 16, 1882, makes reference to "longitude 35° 30′

north," whereas the reference should have been to "latitude 35° 30′ north." As correctly described the tract, situated in what is now northeastern Arizona, is rectangular, being about seventy miles long, north to south, and fifty-five miles wide. It contains approximately 2,500,000 acres, or 3,900 square miles.

6. By section 1 of the Act of July 22, 1958, the lands described in the Executive Order of December 16, 1882, were declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the Secretary of the Interior pursuant to such executive order.

7. By the same section of the 1958 act, the Navajo and Hopi Indian Tribes, acting through the chairmen of their respective tribal councils for and on behalf of the tribes, including all villages and clans thereof, and on behalf of any Navajo or Hopi Indians claiming an interest in the area set aside by the executive order dated December 16, 1882, and the Attorney General on behalf of the United States, were authorized to commence or defend in the United States District Court for the District of Arizona, comprised of three judges and convened in accordance with the provisions of 28 U.S.C., section 2284, an action against each other and any other tribe of Indians claiming any interest in or to the area described in such executive order:

> ". . . for the purpose of determining the rights and interests of said parties in and to said lands and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive Order as may be just and fair in law and equity. . ."

8. Under section 2 of the 1958 act, the court was authorized to determine whether the Navajo Indian Tribe or individual Navajo Indians have the exclusive interest in any lands within that reservation, it being provided that lands, if any, in which that tribe or individual Indians thereof are determined to have the exclusive interest shall thereafter be a part of the Navajo Indian Reservation. Likewise, and under the same section of the 1958 act, the court was authorized to determine whether the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians have the exclusive interest in any lands within the reservation, it being provided that lands, if any, in

which that tribe, or any village, clan or individual Indians thereof are determined to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe.

9. This action was instituted pursuant to the authority and jurisdiction thus conferred and for the purposes thus described. The words "Navajo" and "Navaho" refer to one and the same Indian people. The words "Moqui" and "Hopi" refer to one and the same Indian people.

Claims of Parties

10. Plaintiff claims that all of the lands described in the order of December 16, 1882, are held in trust by the United States exclusively for the Hopi Indians and that neither the Navajo Indian Tribe and its villages, clans or individual members, nor any other Indian or Indian tribe, village or clan, has any estate, right, title or interest therein or any part thereof. Plaintiff seeks a decree of this court quieting title to all of these lands in the United States in trust exclusively for the Hopi Indians.

11. Plaintiff further claims that if (but not conceding) some Navajo Indians have been settled on the reservation lands in the manner provided in the order of December 16, 1882, rights and interests thereby acquired, if any, do not inure to the benefit of the Navajo Indian Tribe in general, or to Navajo Indians who have not been settled on the reservation, but only to the group of Navajo Indians actually settled thereon and to their descendants, collectively. Plaintiff also claims that such rights and interests, if any, acquired by a group of Navajo Indians, are not exclusive as to any part of the reservation area, but are co-extensive with those of the Hopi Indians.

12. Defendant Jones concedes that the United States holds in trust for the Hopi Indians a portion of the executive order lands, constituting about 488,000 acres and including the Hopi villages located on three mesas, situated in the south central part of the executive order reservation. The lands so conceded to be held in trust for the Hopi Indians are described as follows:

> "Beginning at the northeast corner of section 19, township 28 north, range 14 east, Gila and Salt River Meridian, Arizona, on the southeast bank of the Dinnebito Wash, surveyed; thence in a southeasterly direction to the northeast corner of

township 25 north, range 17 east; thence in a northeasterly direction to the northwest corner of section 33, township 27 north, range 19 east, survey of July, 1891; thence due east four miles to the northeast corner of section 36, township 27 north, range 19 east, survey of July, 1891; thence in a northeasterly direction to the northeast corner of section 30, township 27 north, range 20 east, resurvey of July, 1910; thence in a northerly direction approximately 16 miles to the northeast corner of section 6, township 29 north, range 20 east, unsurveyed; thence west approximately 7 miles to the southwest corner of township 30 north, range 19 east; thence north 2 miles to the northeast corner of section 25, township 30 north, range 18 east, survey of March, 1909; thence west approximately 20¼ miles to the point of intersection of the southeast bank of the Dinnebito Wash with the section line between sections 22 and 27, township 30 north, range 15 east, survey of May, 1909; thence down the southeast bank of the Dinnebito Wash to the point of beginning."

13. Defendant Jones claims that all of the lands described in the order of December 16, 1882, except that which is described in paragraph 12 of these findings of fact, are held in trust by the United States exclusively for the Navajo Indian Tribe. No claim is made on behalf of any member of the Navajo Indian Tribe, or any Navajo Indian using or occupying, or who has or has had any claim of any right, title or interest in the use and occupancy of, any part, parcel or portion of the lands described in the order of December 16, 1882, except as a beneficiary under the Navajo tribal claim. He seeks a decree of this court quieting title to all of the executive order lands, except those described in paragraph 12 of these findings of fact, in the United States in trust exclusively for the Navajo Indian Tribe.

14. Defendant United States, the conceded trustee of all the lands described in the order of December 16, 1882, claims no beneficial interest therein. Assuming the position of stakeholder, it takes no position as between the claims of plaintiff and defendant Jones and asserts no claim on behalf of any other Indian or Indian tribe. The United States, however, originally contended that this court is without jurisdiction because, in its view, the rights and interests to be determined herein present a

political and not a judicial question. This court has heretofore rejected this contention. *Healing v. Jones,* 174 F. Supp. 211, decided May 25, 1959.

15. Hereinafter, in these findings of fact, unless otherwise indicated, references to "defendant" will mean Paul Jones, Chairman of the Navajo Tribal Council, and references to the "parties" will mean Dewey Healing and Paul Jones, representing the Hopi and Navajo Indians and Indian Tribes, respectively.

Establishment of Executive Order
Reservation of December 16, 1882

16. The executive order reservation of December 16, 1882, was established for the following purposes: (1) to reserve for the Hopis sufficient living space as against advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against Hopis, (3) to provide a legal basis for curbing white intermeddlers who were disturbing the Hopis, and (4) to make available a reservation area in which Indians other than Hopis could, in the future, in the discretion of any Secretary of the Interior, be given rights of use and occupancy.

17. It was the official intention, in creating this reservation, that the Hopi Indians would immediately have, subject to the limitation stated in the next succeeding paragraph of these findings, the usual Indian title in and to all parts of the described area, whether or not then actually used and occupied by them, and without the need of any action on the part of the Secretary, express or implied, settling them on the reservation or otherwise confirming their rights therein.

18. Notwithstanding what is said in the next preceding paragraph of these findings, it was also the official intention to reserve the authority in the Secretary, acting within his discretion, subsequently to settle other Indians on the reservation or specified points thereof, thereby effecting whatever limitation upon, or reduction in, then existing Hopi rights of use and occupancy the Secretary might thus desire to accomplish consistent with the law in effect at the time the Secretary exercised such reserved authority.

19. In issuing the Executive Order of December 16, 1882, it was not the official intention thereby to grant immediate rights of any kind or nature to Navajos then living upon or otherwise

using or occupying any part of the reservation area. It was the intention that any such Navajos would remain only by sufferance, subject to being removed upon administrative direction unless and until thereafter settled on the reservation by the Secretary pursuant to his reserved authority under the executive order. It was the intention that any Navajos thereafter entering the reservation area, unless and until settled thereon as stated above, would be trespassers subject to removal upon administrative direction.

Settlement of the Navajos in the 1882 Reservation

20. Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958. The Navajo population in the reservation has steadily increased all of these years, growing from about three hundred in 1882 to about eighty-eight hundred in 1958. During the same period the Hopi population in the reservation increased from about eighteen hundred to something over thirty-two hundred.

21. None of the twenty-one Secretaries of the Interior who served from December 16, 1882 to July 22, 1958, or any official authorized to so act on behalf of any of these Secretaries, expressly ordered, ruled or announced, orally or in writing, personally or through any other official, that, pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajos in the 1882 reservation, or had authorized any Navajos to begin, or continue, the use and occupancy of the reservation for residential purposes.

22. Prior to the years 1909 to 1911, while the second allotment project in the 1882 reservation was in progress, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, authorized the Navajo Indian Tribe or any Navajos whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.

23. The Act of March 1, 1907, 34 Stat. 1015, 1018, authorized the Secretary of the Interior 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. Pursuant to this statute, and on September 16, 1907, the Secretary authorized such a project.

24. On February 25, 1909, Matthew W. Murphy, the special allotting agent, received instructions from Acting Commissioner R. G. Valentine which read in part as follows:

> "Executive Order of December 16, 1882, creates the Moqui or Hopi reserve for the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon and the Act of March 1, 1907 (34 Stat. L., 1021), authorizes the Secretary of the Interior to make allotments to the Indians on this reservation in such quantities as may be to their best interest. There is ample authority, therefore, . . . 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."

25. The instructions, quoted above, which the Acting Commissioner gave with respect to the second allotment program manifested the intention of the Secretary, proceeding under his authority to settle other Indians, as reserved in the executive order, to confer upon Navajos then residing in the 1882 reservation who intended to remain therein and who agreed to accept allotments therein the right to use and occupy the reservation, consistent with usual Indian title, such rights of use and occupancy, however, being limited to parts of the 1882 reservation not then used and occupied by Hopis. Such rights were not extended to Navajos, though residing in the reservation and intending to remain therein, who declined to accept allotments. The latter were not recognized, pursuant to the authority reserved in the executive order, or otherwise, as having any rights of use and occupancy in the reservation. Nor were such rights extended, at this time, to the Navajo Indian Tribe, as distinguished from individual Navajo Indians.

26. About three hundred Navajos residing in the reservation and who intended to remain there indicated a willingness to receive allotments in the 1882 reservation. Each of them was

designated to receive a described allotment. In 1911 this second allotment project was abandoned and none of the allotments to Navajos or others were approved.

27. The record does not disclose who the three hundred Navajos were who received tentative allotments in the period from 1907 to 1911, or which of these Navajos, if any, were still alive on July 22, 1958 and living on the 1882 reservation, or then had descendants living in the reservation and, if so, who such descendants were. It is therefore not possible to find that any Navajos residing in the reservation on July 22, 1958 derived rights of use and occupancy by reason of the action of the authorized representative of the Secretary, in the years 1909 to 1911, in conferring such rights upon three hundred Navajos who agreed to accept allotments.

28. 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.

29. On September 29, 1924, an official as high as the Commissioner of Indian Affairs for the first time expressed an official view to the effect that Navajos had rights of use and occupancy in the reservation. This was, in fact, the first of thirteen instances during the twenty-year period from 1924 to 1944, when a Commissioner made an official statement or ruling which expressly, or by necessary implication, recognized Navajos as having rights in the 1882 reservation.

30. The statement of September 29, 1924, was made in answer to a protest which Hopi leaders had made against the plan to convert the Keams Canyon facilities into a school for Navajo children residing in the reservation. Referring to the "such other Indians" provision of the executive order, Commissioner Charles H. Burke said: "It is believed this language was intended to permit Navajo Indians who had lived on the reserve for many years to continue there."

31. In one respect there appears to be an inconsistency between what the Commissioner said and what he did. By his statement he seems to have indicated, in effect, that he was settling in the reservation Navajos who had lived therein for many years prior to 1882. But he was apparently, at the same time, making the school facilities at Keams Canyon available to

all resident Navajo children without regard to the number of years their families had lived in the reservation. This is but the first of several instances in which the Commissioner, while verbally seeming to indicate a limited exercise of the discretionary power in favor of Navajos, sanctioned administrative action consistent with a much broader exercise of such power.

32. The 1924 statement and the surrounding circumstances have some tendency to indicate that some Navajos were then settled in the reservation pursuant to an implied exercise of authority under the executive order. This evidence, however, is not sufficient to warrant a finding of fact that Navajos were then settled in the reservation.

33. 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.

34. What is stated in paragraph 32 of these findings of fact concerning a statement made by the Commissioner on September 29, 1924, is likewise true regarding a statement made by the Commissioner on July 17, 1930, to the effect that ". . . it has always been considered that the Navahos have the right to use part of the reservation."

35. Prior to February 7, 1931, except for the settlement of three hundred unidentified Navajos during 1909-1911, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, authorized the Navajo Indian Tribe or any Navajos whether or not then living in the reservation area, to use and occupy any part of the 1882 reservation for residential purposes.

36. On February 7, 1931, Indian Commissioner C. J. Rhoads and Secretary of the Interior Ray Lyman Wilbur, joined in a letter to H. J. Hagerman accepting the recommendations made by Hagerman and Chester E. Faris on November 20, 1930, that the 1882 reservation be divided between Hopis and Navajos. This 1931 blanket and all-inclusive recognition of Navajo rights of use and occupancy is explainable on no other basis than that the Secretary, impliedly exercising the authority reserved to him in the executive order, was then and there settling in the 1882 reservation all Navajos then residing in that reservation.

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37. The events and official pronouncements between February 7, 1931 and July 22, 1958, indicate that all Navajos entering the reservation for purposes of permanent residence were impliedly settled therein by the Secretary or his authorized representative, at or shortly after the time of entry, and that on July 22, 1958, all Navajos residing in the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.

38. Beginning with the approval, on June 2, 1937, of grazing regulations the authority for which rested in part on a resolution of the Navajo Tribal Council, dated November 24, 1935, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation pursuant to an exercise of the authority conferred by the Executive Order of December 16, 1882.

39. Implied Secretarial settlement of Navajos and the administrative policy of segregating Navajos from Hopis, were initiated at the same time. The implied settlement of Navajos in the 1882 reservation was at all times subject to this segregation policy. Accordingly, there was never any administrative intention to settle Navajos in that part of the reservation in which the Hopi population was concentrated, and neither individual Navajos nor the Navajo Indian Tribe were ever so settled.

40. This limitation upon the area of Navajo settlement was not administratively fixed by the establishment of final and exact boundary lines until April 24, 1943. The boundary line was then finally and exactly fixed by the Office of Indian Affairs in approving revised boundaries for land management district 6, as proposed by Willard R. Centerwall, with certain modifications. District 6, as so defined, was thus reserved exclusively for Hopis.

41. The boundary line of district 6, as approved on April 24, 1943, is as follows:

> Starting at the section corner between Sections 3 and 4, Township 28 North and Range 14 East. This corner is located 24.75 chains due South and then 54.35 chains due West from Windmill M-174. The corner is steel and is located on the West bank of the Dinehbito Wash. It is located a few chains West of the wash. The boundary runs South of this corner to the center of the wash which distance is about 2 chains. From the above mentioned corner the boundary runs North 25° 10′ West to Howell Mesa escarpment in

Section 20, Township 29 North, Range 14 East. It then goes in a northerly direction along said escarpment until the Tuba City-Hotevilla road is intersected in the South half of Section 28, Township 30 North, Range 14 East. The boundary then follows the road until it reaches the center of the Dinehbito Wash about on the section corner common to Sections 22, 23, 26 and 27, Township 30 North, Range 15 East. The boundary then follows the center of the Dinehbito Wash in a northeasterly direction until it intersects a line going North 45° West from the quarter corner between Sections 17 and 20, Township 30 North and Range 16 East. This line is approximately 43 chains long. The boundary then follows said line Southeast to the quarter corner between Sections 17 and 20, Township 30 North, Range 16 East. The boundary then follows the section line due East from the said quarter corner for 4.5 miles to the section corner common to Sections 13 and 24, Township 30 North, Range 16 E, and Sections 18 and 19, Township 30 North, Range 17 East, then turns an angle and goes North 42° East for a distance of approximately 2.2 miles until the escarpment on the East side of the valley is encountered in the NW¼ of Section 8, Township 30 North, Range 17 East. The boundary then follows this escarpment in a southerly direction until the most southerly point in the escarpment is reached in the E/2 of Section 16, Township 30 North, Range 17 East. The boundary then goes .4 miles South 23° East at which point it reaches the Oraibi Wash in the NW¼, Section 22, Township 30 North, Range 17 East. The boundary then follows the West bank of the Oraibi Wash in a northeasterly direction until a point 200 yards above the Hardrocks Diversion Dam is reached. The boundary then turns an angle and follows a line South 57° 30′ East for a distance of approximately five miles until it reaches the buck pasture fence in the SW¼, Section 15, Township 30 North, Range 18 East.

The boundary then follows the buck pasture fence Southwesterly for approximately .4 miles in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Southeasterly along the buck pasture fence for approximately .4 mile in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Northeasterly along the buck pasture fence for ap-

proximately 3 miles to a point in the NW¼, Section 18, Township 30 North, Range 19 East. Then Southeasterly along the buck pasture fence for approximately 1 mile to the SE¼, Section 18, Township 30 North, Range 19 East. Thence Northeasterly along the buck pasture fence approximately .2 mile to the point on the section line between the SW quarters of Sections 17 and 18, Township 30 North, Range 19 East. Then South 76° 30′ East following the Existing Boundary fence to a point 1,879 feet due North of Section corner between Sections 23, 24, 25 and 26, Township 30 North, Range 19 East. This section corner is located near water well H 11 which is known as Cat Springs. Then South 54° 15′ East following the Existing Boundary fence to a point in Bingham's Lake approximately 8 miles South of Latitude 36° 00′ and 4.25 miles West of Longitude 110° 00′.

From this point in Bingham's Lake the boundary then runs South 38° 00′ West following the Existing Boundary fence until it intersects the Jeddito Wash. The intersection takes place at the same point as Longitude 110° 15′ intersects the wash. The boundary then follows the center of the wash to the point where the Township line between Townships 24 and 25 North intersects the wash. The boundary then follows the Township line due West following the Existing Boundary fence for 2.3 miles at which point it goes North 45° 57′ West following the Existing Boundary fence for approximately 25.6 miles until it intersects the Dinehbito Wash at the same point as the Township line between Townships 27 and 28 North. The boundary then follows the center of the Wash 8 miles up to the point where it intersects the line running due South of the corner between Sections 3 and 4 Township 28 North, Range 14 East.

42. The Navajo Indian Tribe and all individual Navajos residing in the area on July 22, 1958, were authorized to settle in all parts of the reservation outside of district 6 as defined on April 24, 1943, and neither the Navajo Indian Tribe nor individual Navajo Indians were authorized to settle within that district as so defined.

43. No Indians or Indian tribes other than Navajos were ever settled in the 1882 reservation pursuant to the authority vested

in the Secretary under the Executive Order of December 16, 1882, and no Indians or Indian tribes other than Hopis and Navajos have any right or interest in the 1882 reservation.

Other Events and Circumstances Bearing upon Relative Rights and Interests of Hopis and Navajos in Part of Reservation outside of District 6, as Defined in 1943

44. Only a very few Hopis have ever resided, or grazed livestock, in that part of the reservation lying outside of district 6, as defined on April 24, 1943. During the years, however, they have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, and hunting.

45. Congress at no time enacted legislation designed to, or having the effect of, terminating Hopi rights of use and occupancy anywhere in the 1882 reservation.

46. Beginning on February 7, 1931, administrative officials followed a policy designed to exclude Hopis, for the most part, from the part of the reservation in which Navajos were being settled by implied Secretarial action. At first they sought to accomplish this by legislation in the form of a provision in the bill which was to become the Navajo Indian Reservation Act of 1934. This attempt failed of realization. Thereafter, and beginning about 1937, the administrative effort to exclude Hopis from the part of the reservation in which Navajos were being permitted to settle, took the form of grazing regulations and a permit system under which Hopi use of reservation lands was restricted.

47. In 1941, Indian Affairs officials sought to formalize this exclusion policy by means of an order of the Secretary of the Interior defining areas of exclusive occupancy. But the solicitor of the department, on February 12, 1941, ruled that this could not be done without the consent of the Hopis, and no such consent was sought or obtained. Despite this legal advice the Office of Indian Affairs, through enforcement of the grazing regulations and permit system, continued the practice of excluding Hopis without their consent from that part of the reservation lying outside of district 6, insofar as residential or grazing use was concerned.

48. None of these administrative regulations and practices, however, were designed to affect whatever rights the Hopis then had in the entire 1882 reservation. This is established by the repeated and consistent representations made by administrative officials during all of this period.

49. The failure of the Hopis, prior to the settlement of Navajos, to use a substantially larger part of the 1882 reservation than is embraced within district 6, was not the result of a free choice on their part. It was due to fear of the encircling Navajos and inability to cope with Navajo pressure.

50. After the official settlement of Navajos in the 1882 reservation, the failure of the Hopis to make substantial use of the area beyond district 6 was not due to a lack of desire or a disclaimer of rights on their part, but to their exclusion from that area by Government officials. Throughout this entire period they continued to assert their right to use and occupy the entire reservation area. These Hopi protestations would doubtless have been even more persistent and vehement had it not been for the constant assurances given to them by Government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims.

51. As a practical matter, the Secretarial settlement, of Navajos in the part of the 1882 reservation outside of district 6, even without Governmental restraint, probably would have greatly limited the amount of surface use the Hopis could have made of that part of the reservation. But there still would unquestionably have been a substantial movement of Hopis into the area had it not been for the administrative barrier and improper Navajo pressure.

52. Neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in which Navajos were settled.

CONCLUSIONS OF LAW

1. This United States District Court for the District of Arizona, comprised of three judges and convened in the manner authorized by section 1 of the Act of July 22, 1958, 72 Stat. 402, and 28 U.S.C., section 2284, has jurisdiction to entertain and determine this action.

2. By the force and effect of the Executive Order of December 16, 1882, and without the necessity of any concurrent or subsequent act of the Secretary of the Interior settling it thereon, and without restriction to the parts of the reservation then used and occupied by it, the Hopi Indian Tribe, on December 16, 1882, for the common use and benefit of the Hopi Indians, acquired the non-vested right to use and occupy the entire reservation described in that executive order, both as to the surface and subsurface including all resources, subject to the paramount title of the United States, and subject to such diminution in the rights of use and occupancy so acquired as might thereafter lawfully result from the exercise of the authority reserved in the Secretary to settle other Indians in the reservation.

3. Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the Executive Order of December 16, 1882, or by reason of any other fact or circumstance, save and except by the exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation.

4. Prior to the years 1909 to 1911, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the executive order, expressly or by implication, settled the Navajo Indian Tribe or any individual Navajo Indians anywhere in the 1882 reservation.

5. In the years 1909 to 1911, the Secretary of the Interior, acting through his authorized representative, impliedly settled in the 1882 reservation about three hundred individual Navajo Indians who then resided in the reservation and intended to remain therein, and who had agreed to accept allotments therein of land not then being used or occupied by Hopi Indians, but since these Navajo Indians are unidentified in this record, and since it is not established in this record that any of these three hundred Navajo Indians or their descendants, also unidentified, were residing in the 1882 reservation on July 22, 1958, the settlement of such Indians in 1909-1911, created no rights of use and occupancy which are cognizable in this suit.

6. Except for Navajo Indians, if any, who may have been settled in the years 1909-1911 in that part of the 1882 reservation

referred to in this paragraph, and whose rights in any event are not now cognizable, neither the Secretary of the Interior nor any authorized representative of the Secretary, acting in the exercise of the authority reserved under the Executive Order of December 16, 1882, ever expressly or by implication settled the Navajo Indian Tribe or any individual Navajo Indians in land management district 6 of the 1882 reservation, as such district was defined on April 24, 1943, such district being described in paragraph 41 of the findings of fact herein.

7. Beginning on February 7, 1931, and continuing to July 22, 1958, all Navajo Indians who entered that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, for purposes of permanent residence, were impliedly settled therein by the Secretary of the Interior or his authorized representative at or shortly after the time of entry, and on July 22, 1958, all Navajo Indians then residing in the indicated part of the 1882 reservation were accordingly settled therein pursuant to the Executive Order of December 16, 1882.

8. Beginning on June 2, 1937, the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, was impliedly settled in that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, pursuant to the valid exercise of the authority conferred in the Secretary by the Executive Order of December 16, 1882.

9. No Indians or Indian tribes other than Navajos were ever settled in the 1882 reservation pursuant to the authority vested in the Secretary of the Interior under the Executive Order of December 16, 1882, and no Indians or Indian tribes other than Hopis and Navajos have any right or interest in the 1882 reservation.

10. On July 22, 1958, the Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, had the exclusive interest in and to that part of the 1882 reservation lying inside district 6, as defined on April 24, 1943, subject to the trust title of the United States, and pursuant to section 2 of the Act of July 22, 1958, such area is accordingly a reservation for the Hopi Indian Tribe.

11. The rights of the Hopi Indian Tribe, acquired on December 16, 1882, under the executive order of that date, to use and occupy the entire 1882 reservation for and on behalf of the

Hopi Indians, were never terminated by Congressional enactment, administrative action, or abandonment, but after February 7, 1931, the Hopi Indian Tribe was validly required to share equally with settled Navajo Indians and, after June 2, 1937, with the settled Navajo Indian Tribe, the use and occupancy of that part of the reservation in which individual Navajos and the Navajo Indian Tribe were validly settled.

12. The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal.

13. Neither the Navajo Indian Tribe nor any individual Navajo Indians have the exclusive interest in and to any part of the 1882 reservation.

14. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided, and equal interests both as to the surface and subsurface, including all resources, in and to that part of the reservation lying outside of land management district 6, as defined on April 24, 1943, and described in paragraph 31 of the findings of fact herein.

15. The quieting of title in and to the lands within the 1882 reservation, in the Hopi and Navajo Indian Tribes, in accordance with the conclusions of law stated above will be just and fair in law and equity.

FREDERICK G. HAMLEY, Circuit Judge,

LEON R. YANKWICH, District Judge,

JAMES A. WALSH, District Judge.

September 28, 1962

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL HOPI INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882,

Plaintiff,

vs.

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE FOR AND ON BEHALF OF THE NAVAJO INDIAN TRIBE, INCLUDING ALL VILLAGES AND CLANS THEREOF, AND ON BEHALF OF ANY AND ALL NAVAJO INDIANS CLAIMING ANY INTEREST IN THE LANDS DESCRIBED IN THE EXECUTIVE ORDER DATED DECEMBER 16, 1882; ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Defendants.

No. Civil 579 Prescott

JUDGMENT

This cause having been submitted to the court on August 2, 1961, following trial, oral argument, and the filing of proposed findings of fact, objections thereto, and briefs, and the court having made and entered its findings of fact and conclusions of law, now therefore it is hereby declared, adjudged and decreed that:

1. The Hopi Indian Tribe, for the common use and benefit of the Hopi Indians, but subject to the trust title of the United States, has the exclusive right and interest, both as to the surface and subsurface, including all resources, in and to that part of the executive order reservation of December 16, 1882, lying within

land management district 6, as defined on April 24, 1943, the said district 6 being described as follows:

Starting at the section corner between Sections 3 and 4, Township 28 North and Range 14 East. This corner is located 24.75 chains due South and then 54.35 chains due West from Windmill M-174. The corner is steel and is located on the West bank of the Dinehbito Wash. It is located a few chains West of the wash. The boundary runs South of this corner to the center of the wash which distance is about 2 chains. From the above mentioned corner the boundary runs North 25° 10′ West to Howell Mesa escarpment in Section 20, Township 29 North, Range 14 East. It then goes in a northerly direction along said escarpment until the Tuba City-Hotevilla road is intersected in the South half of Section 28, Township 30 North, Range 14 East. The boundary then follows the road until it reaches the center of the Dinehbito Wash about on the section corner common to Sections 22, 23, 26 and 27, Township 30 North, Range 15 East. The boundary then follows the center of the Dinehbito Wash in a northeasterly direction until it intersects a line going North 45° West from the quarter corner between Sections 17 and 20, Township 30 North and Range 16 East. This line is approximately 43 chains long. The boundary then follows said line Southeast to the quarter corner between Sections 17 and 20, Township 30 North, Range 16 East. The boundary then follows the section line due East from the said quarter corner for 4.5 miles to the section corner common to Sections 13 and 24, Township 30 North, Range 16 E, and Sections 18 and 19, Township 30 North, Range 17 East, then turns an angle and goes North 42° East for a distance of approximately 2.2 miles until the escarpment on the East side of the valley is encountered in the NW¼ of Section 8, Township 30 North, Range 17 East. The boundary then follows this escarpment in a southerly direction until the most southerly point in the escarpment is reached in the E/2 of Section 16, Township 30 North, Range 17 East. The boundary then goes .4 miles South 23° East at which point it reaches the Oraibi Wash in the NW¼, Section 22, Township 30 North, Range 17 East. The boundary then follows the West bank of the Oraibi Wash in a northeasterly direction until a point 200 yards above the

Hardrocks Diversion Dam is reached. The boundary then turns an angle and follows a line South 57° 30′ East for a distance of approximately five miles until it reaches the buck pasture fence in the SW¼, Section 15, Township 30 North, Range 18 East.

The boundary then follows the buck pasture fence Southwesterly for approximately .4 miles in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Southeasterly along the buck pasture fence for approximately .4 mile in the NW¼, Section 22, Township 30 North, Range 18 East. Thence Northeasterly along the buck pasture fence for approximately 3 miles to a point in the NW¼, Section 18, Township 30 North, Range 19 East. Then Southeasterly along the buck pasture fence for approximately 1 mile to the SE¼, Section 18, Township 30 North, Range 19 East. Thence Northeasterly along the buck pasture fence approximately .2 mile to the point on the section line between the SW quarters of Sections 17 and 18, Township 30 North, Range 19 East. Then South 76° 30′ East following the Existing Boundary fence to a point 1,879 feet due North of Section corner between Sections 23, 24, 25, and 26, Township 30 North, Range 19 East. This section corner is located near water well H 11 which is known as Cat Springs. Then South 54° 15′ East following the Existing Boundary fence to a point in Bingham's Lake approximately 8 miles South of Latitude 36° 00′ and 4.25 miles West of Longitude 110° 00′.

From this point in Bingham's Lake the boundary then runs South 38° 00′ West following the Existing Boundary fence until it intersects the Jeddito Wash. The intersection takes place at the same point as Longitude 110° 15′ intersects the wash. The boundary then follows the center of the wash to the point where the Township line between Townships 24 and 25 North intersects the wash. The boundary then follows the Township line due West following the Existing Boundary fence for 2.3 miles at which point it goes North 45° 57′ West following the Existing Boundary fence for approximately 25.6 miles until it intersects the Dinehbito Wash at the same point as the Township line between Townships 27 and 28 North. The boundary then follows the center of the Wash 8 miles up to the point where it intersects the line running

due South of the corner between Sections 3 and 4 Township 28 North, Range 14 East.

2. Title in and to the part of the 1882 reservation described in the preceding paragraph of this judgment is quieted in the Hopi Indian Tribe for the common use and benefit of the Hopi Indians, subject to the trust title of the United States, and such land is henceforth a reservation for the Hopi Indian Tribe.

3. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and subsurface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described district 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation.

4. No Indians or Indian tribes other than Hopis and Navajos have any right or interest in and to any part of the executive order reservation of December 16, 1882.

FREDERICK G. HAMLEY, Circuit Judge,

LEON R. YANKWICH, District Judge,

JAMES A. WALSH, District Judge.

September 28, 1962

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