

**APPENDIX M: SOLICITOR OPINIONS  
REGARDING BOUNDARY ISSUES**

---



UNITED STATES  
DEPARTMENT OF THE INTERIOR

OFFICE OF THE SOLICITOR

SANTA FE FIELD OFFICE  
P. O. BOX 1042  
SANTA FE, NEW MEXICO 87101  
June 16, 1969

Memorandum

To: Regional Director, Southwest Region, National Park Service

From: Field Solicitor, Santa Fe

Subject: Location of the Boundary between the Navajo Indian Reservation and Marble Canyon National Monument, Arizona

SEARCHED	INDEXED	SERIALIZED	FILED

Our opinion has been requested as to the location of the boundary between the Navajo Indian Reservation and Marble Canyon National Monument.

Marble Canyon National Monument was established under section 2 of the Act of June 8, 1906 (34 Stat. 255, 16 U.S.C. section 431), by Proclamation 3889 published in the Federal Register of January 22, 1969. The proclamation provides, as follows:

".....(1) federally owned or controlled lands within the exterior boundaries of the following described area are hereby reserved from all forms of appropriation under the public land laws and set apart as the Marble Canyon National Monument and (2) State-owned lands within those boundaries shall become and be reserved as parts of that monument upon acquisition of title thereto by the United States."

The east boundary is described in the proclamation as being located commencing from the northern part of the Monument, and:

".....in a generally southerly direction along the western boundary of the Navajo Indian Reservation (which is described by the Act of June 14, 1934, as the south bank of the Colorado River to its confluence with the Little Colorado River, excluding from the

confluence with the Little Colorado River .....There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the authority of the United States." (Emphasis supplied)

Although "other uses" are not defined, it is apparent that the President's proclamation setting aside the land for Park Service purposes would be a required use under the authority of the United States.

Upon request, the Land Office, Bureau of Land Management, Phoenix, forwarded to this office copies of withdrawals for water-power and power-site uses of land along the Colorado River within the general locale of the Monument. The information was requested inasmuch as under the Act of June 14, 1934 the boundary of the Navajo Indian Reservation is the south bank of the Colorado River except for those lands subject to water-power and power-site withdrawals issued under section 28 of the Act of June 20, 1910 and within 5 years from February 14, 1912.

In 1914, President Wilson issued Power Site Reserve No. 446, reserving lands for water-power sites and withdrawing them from settlement, location, sale, or entry. The lands were described as within a quarter mile of the Colorado River within certain townships. Although the withdrawal includes lands now within the Monument, such lands are located on the north or west bank of the Colorado River rather than the south or east bank.

On July 16, 1914, the Secretary issued Power Site Reserve No. 447. The withdrawal described lands in the Hualpai and Navajo Indian Reservation within a quarter mile of the Colorado River and within described, unsurveyed townships.

L1417

On February 9, 1917, Water Power Designation No. 7, Arizona No. 4 was issued pursuant to section 28 of the Act of June 20, 1910. The withdrawal designates the lands as "actually or prospectively valuable for the development of water powers or power for hydroelectric use or transmission." It provides that "notice is hereby given that under the terms of said act [the Act of June 20, 1910] said lands are reserved to the United States and exempted from the operation of any and all grants made or confirmed thereby to the State of Arizona." The lands are described as ones "which when surveyed will be included within legal subdivisions situated in whole or in part within a quarter of a mile of Colorado River." Included were T. 39 N., R. 6 E.; T. 39 N., R. 7 E.; T. 38 N., R. 6 E.; T. 37 N., R. 6 E.; T. 37 N., R. 5 E.; T. 36 N., R. 5 E.; T. 35 N., R. 5 E. and T. 34 N., R. 5 E. These unsurveyed townships are located along the south or east bank of the river from the NW<sup>1</sup>/<sub>4</sub> of Section 3, T. 39 N., R. 7 E., south to Grand Canyon National Park. The designation was issued under the Act of June 20, 1910 and within 5 years from February 14, 1912.

The remaining withdrawal was Power Site Reserve No. 605 dated April 28, 1917. It not only does not include lands within the Navajo Indian Reservation south and east of the Colorado River but it also was issued beyond the 5 year period.


In conclusion, considering, in particular, Water Power Designation No. 7, Arizona No. 4 and the Act of June 14, 1934, as well as the proclamation establishing the Monument, the east boundary of the Monument is located on a meandered line generally north-south, one-quarter mile to the east from the east or south bank of the Colorado River. This line is also the west boundary of the Reservation. Inasmuch as the Land Office, Phoenix, advised that the above withdrawals are the only ones affecting lands within the reservation, such line would be the present boundary of the Monument.

It might be advisable to detail someone familiar with Reclamation withdrawals and Land Office records to confirm with Reclamation and BLM that such orders and designations are the only ones affecting the Monument.

In the April 29, 1969 memorandum to you from the Acting Regional Director, Region 3, Bureau of Reclamation, it is stated that the Park Service map indicates that the boundary is the 3,150

foot contour while the Reclamation map indicates the boundary to be the south bank. The actual line will need to be platted to determine whether it generally follows the 3,150 foot contour.

Returned is your correspondence and the material received from the Land Office, Phoenix.

  
Gayle E. Manges  
Field Solicitor, Santa Fe

Enclosures

cc:  
Associate Solicitor, Division of Parks and Recreation  
Regional Solicitor, Denver



United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

NOV 25 1997

Honorable Earl Havatone  
Chairman, Hualapai Nation  
P.O. Box 179  
Peach Springs, AZ 86434

Dear Mr. Chairman:

This is in response to the request of the Hualapai Tribe for review and reconsideration of a February 6, 1976 opinion of the San Francisco Field Solicitor addressing the precise location of the northern boundary of the Hualapai Reservation along the Colorado River within Grand Canyon National Park, (i.e., between river miles 165 and 273). That Opinion concluded that the boundary of the Reservation was located along the south bank of the Colorado River, rejecting the arguments of the Tribe that the boundary is the thread or middle of the Colorado River.

Please accept my apology for our delay in responding. The delay has been due, in substantial part, to the efforts our Office spent in searching at the National Archives for any relevant documents bearing on the boundary location question. Enclosed for your reference are copies of all the documents we obtained from the Archives.

The Field Solicitor's opinion examined the historic circumstances leading up to the creation of the Hualapai Reservation in 1883, and concluded: "No intention to convey the bed of the Colorado River is made evident, either by the language of the Executive Order or by Congress and the Hualapai Indians." Field Solicitor's Opinion at 5. It further notes: "While well founded doubt should be resolved in favor of the Indians, . . . the Executive Order of January 4, 1883, did not include the bed of the Colorado River." *Id.* at 6.

After careful review, I believe this conclusion is correct.

The Supreme Court has analyzed these questions of boundary locations involving Indian Tribes or other entities as primarily a question of the intent of the parties. See Oklahoma v. Texas, 258 U.S. 574, 594-95 (1922) ("If by treaty or statute or the terms of its patent [the United States] has shown that it intended to restrict the conveyance to the upland or to that and a part only of the river bed, that intention will be controlling."); see also Choctaw Nation v. Oklahoma, 397 U.S. 620, 634 (1970) ("[Nothing] requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor."); Koch v. United States, 47 F.3d 1015, 1019 (10th Cir. 1995); Moore v. United States, 157 F.2d 760, 764 (9th Cir. 1946).

Hon. Earl Havatone  
November 25, 1997

The Field Solicitor relied primarily on the language of President Arthur's Executive Order, which drew the boundary in question as follows:

Beginning at a point on the Colorado River 5 miles eastward of Tinnakah Spring, thence south 20 miles to crest of high mesa, thence south 40° east 25 miles to a point of Music Mountains, thence east 15 miles, thence north 50° east 35 miles, thence north 30 miles to the Colorado River, thence along said river to the place of beginning....

Executive Order, January 4, 1883 (emphasis added). The Field Solicitor construed "along" to mean "bordering" the River. The Field Solicitor also found persuasive that the tribal proposal for a reservation in the area, submitted two years earlier, made no reference to the use of the river or its waters for any purpose. The Tribe's proposal instead focused on the requested land, which was characterized in the July 1, 1881 Report of Lieutenant Colonel Price in the following manner: "[T]here are no mineral deposits upon it, as it has been thoroughly prospected; that there is little or no arable land; that the water is in such small quantities, and the country is so rocky and void of grass, that it would not be available for stock raising." Letter, dated July 1, 1881, from Lieutenant Colonel W.M. Redwood Price, to Assistant Adjunct General, Department of Arizona (enclosed).

It seems to me a very close question whether these considerations, standing alone, are sufficient to overcome the canon of construction that doubtful or ambiguous expressions in treaties, statutes or documents involving Indians should be resolved in favor of the Indians. See, e.g., Bryan v. Iasca County, 426 U.S. 373, 392 (1976); United States v. Santa Fe Railroad Co., 314 U.S. 339, 354 (1941) (discussing in part the effect of the establishment of the Hualapai Reservation); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Therefore, I have gone on to examine the language used in the Hualapai Executive Order against nearly contemporaneous reservation boundary descriptions along the Colorado River in the vicinity of the Hualapai Reservation. The comparison is revealing.

Executive Orders signed a few years before the one at issue here by President Hayes set aside a reservation for the "Suppai or Havasupai" Indians immediately to the east of the area eventually set aside for the Hualapai. These Orders, dated June 8 and November 23, 1880, fixed one boundary of the reservation "at a point in the middle of Cataract Creek" and continued by measuring distances from "the middle of said creek."

Other Executive Orders fixed the boundary of the Navajo Reservation upstream on the Colorado. A January 6, 1880 Executive Order added lands to the Navajo Reservation and fixed its boundary as "commencing in the middle of the channel of the San Juan River . . . [and] thence up and along the middle channel of said river. . . ." Another later addition to the Reservation was made by President Arthur on May 17, 1884. It established a boundary

Hon. Earl Havatone  
November 25, 1997

Reservation. This conclusion is based on, and limited to, the particular facts of this matter.<sup>1</sup>

Having found that the intention in the 1883 Executive Order was to fix the reservation boundary at the high water mark of the Colorado River, I do not believe there is any need to determine whether this stretch of the Colorado River was or is navigable. The Field Solicitor's 1976 Opinion went on to conclude that the Colorado River was navigable, citing Arizona v. California, 283 U.S. 423 (1931).

The applicability of that conclusion may be questioned here on two grounds. First, the Supreme Court in that case was addressing the navigability of the Colorado River not for title purposes, but rather as a touchstone for Congress's exercise of its power under the Commerce Clause, Art. I, § 8, cl. 3. The precise question there was whether Congress had the authority to construct what was subsequently named the Hoover Dam. The Court answered in the affirmative, citing the navigability in fact of the relevant portion of the Colorado River. 283 U.S. at 452, 454, 456-7. Navigability for title is a somewhat separate proposition, turning primarily on whether a river was navigable at statehood. See, e.g., United States v. Appalachian Electric Power Co. 311 U.S. 377, 408-9 (1926) ("Although navigability to fix ownership of the river bed is determined . . . as of the formation of the Union in the original states or the admission to statehood of those formed later, navigability for the purpose of the regulation of commerce, may later arise."); see also A. Dan Tarlock, Law of Water Rights and Resources § 8.03(1), at 8-12 (1996) ("Unlike the federal regulatory test [for the Commerce Clause], however, the fact that the river could be made navigable by artificial improvements is irrelevant."). Thus, a finding that a river is navigable for purposes of the Commerce Clause ought not be conclusive as to whether it was navigable at statehood for title purposes.

Second, the Court in Arizona v. California took judicial notice that the Colorado River within Arizona was navigable at law as far north as the mouth of the Virgin River at Black Canyon, 283 U.S. at 452-3, but did not address the navigability of the Colorado further upstream, including the reach along the Hualapai Reservation, or the specific conditions that existed at statehood. *Id.* at 453 ("We knew judicially, from the evidence of history, that a

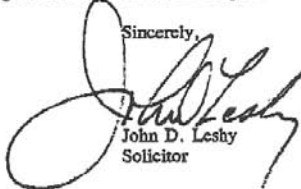
<sup>1</sup> Moreover, I believe that this conclusion is consistent with the Supreme Court's decisions in Donnelly v. United States, 228 U.S. 243 (1912) and Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918). In each of these cases, the Court concluded that the reservations created were intended to include the submerged lands based in part on the essential nature of the waters for fishing needed to sustain the respective reservations. In contrast, the description of the area in Lieutenant Colonel Price's 1881 Report demonstrates that the Colorado River was not essential to the Hualapai, and supports the conclusion that the River was not intended to lie within the reservation boundaries.

Hon. Earl Havatone  
November 25, 1997

large part of the Colorado river south of Black Canyon was formerly navigable."). Furthermore, navigability at law at one point is not dispositive of whether the entire river is navigable. *Id.* at 452; United States v. Utah, 283 U.S. 64 (concerning title to the bed of "portions" of the Colorado River located within Utah).

We are unaware of any case adjudicating the navigability of the sections of the Colorado River adjacent to the Hualapai Reservation at either statehood or any other time. For the reasons discussed above, the 1976 Opinion was incorrect in deciding otherwise. I therefore express no opinion on whether the Colorado River is or was navigable along the Hualapai Reservation.

I appreciate your patience in waiting for our Opinion on this subject.

Sincerely,  
  
John D. Lesby  
Solicitor

cc: Daniel Israel



IN REPLY REFER TO:

## United States Department of the Interior

OFFICE OF THE SOLICITOR  
Field Office, Southwest Region  
P.O. Box 1042  
Santa Fe, New Mexico 87504-1042

February 24, 2005

Received  
2-28-05

### VIA TELEFAX AND FIRST CLASS MAIL

Ms. Susan M. Williams  
Williams and Works, P.A.  
P.O. Box 1483  
Corrales, NM 87048

Re: Hualapai Indian Tribe - Grand Canyon National Park - Colorado River Management Plan

Dear Ms. Williams:

In an effort to clarify an important issue for the record and to help prepare for the upcoming mediation between the National Park Service (hereinafter "NPS") and the Hualapai Indian Tribe (hereinafter "Tribe"), I am responding to your January 31, 2005, letter to Grand Canyon National Park (hereinafter "GRCA") transmitting the Tribe's comments on the NPS's draft Colorado River Management Plan.<sup>1</sup> In this letter I will try to speak clearly and plainly; I do so in a sincere effort to facilitate mutual understanding and a more productive mediation.

On page 4 of your January 31 letter you state that the language of the January 4, 1883, Executive Order that created the Hualapai Indian reservation "plainly means that the Reservation includes part, if not all, of the river." We respectfully disagree. As you know, in a letter to Hualapai Tribal Chairman Earl Havatone dated November 25, 1997, the Solicitor of the Department of the Interior, John D. Leshy, concluded that "it was the intention of the United States not to include the bed of the Colorado River in the Reservation" and that the January 4, 1883, Executive Order fixed its boundary "at the high water mark of the [southern bank of the] Colorado River." Mr. Leshy's opinion remains the department's official position on that question.

No such question attends the location of GRCA's boundary near the reservation. Congress clearly and unambiguously established GRCA's boundary in the Grand Canyon National Park Enlargement Act (hereinafter "GCNPEA"), Pub. L. No. 93-620, 88 Stat. 2089 (1975), codified

<sup>1</sup>The mediation between our clients, which the Tribe requested when it announced its intention to terminate the Fall 2000 Memorandum of Understanding By and Among the Hualapai Tribe, the Grand Canyon National Park, and the Lake Mead National Recreation Area, now is scheduled to occur on March 7-9, 2005, in Flagstaff, Arizona.

primarily at 16 U.S.C. §§ 228a-228j (2000). Subsection 3(a) of the GCNPEA, codified at 16 U.S.C. subsection 228b(a), describes GRCA as comprising "all those lands, waters, and interests therein, constituting approximately one million two hundred thousand acres, located within the boundaries as depicted on the drawing entitled 'Boundary Map, Grand Canyon National Park,' numbered 113-20, 021 B and dated December 1974." The referenced map shows GRCA's boundary as following the river's southern bank; it also contains an annotation reading, "Boundary on South Bank of Colorado River (River Mile 164.8 to 273.1)." Thus there is no question that the entire Colorado River from River Mile 164.8 to River Mile 273.1 lies within GRCA's boundary. Even if the reservation included part or all of the river, as you assert, that portion of the reservation would lie within GRCA.

The NPS has clear authority to regulate all commercial activities on the Colorado River within GRCA. 36 C.F.R. § 1.2 (2004) describes the scope and applicability of the NPS regulations. 36 C.F.R. subsection 1.2(a) states in pertinent part:

(a) The regulations contained in this chapter [36 C.F.R. chapter I] apply to all persons entering, using, visiting, or otherwise within:

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

One of the regulations applicable to "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System" is 36 C.F.R. § 5.3, which states, "Engaging in or soliciting any business in park areas, except in accordance with the provisions of a permit, contract, or other written agreement with the United States, except as such may be specifically authorized under special regulations applicable to a park area, is prohibited." Thus all commercial activities on the Colorado River within GRCA, including activities conducted by the Tribe, must be conducted in accordance with a permit, contract, or other written agreement with the United States.<sup>2</sup> That is true regardless of whether the reservation includes part or all of the river or whether the Tribe owns an interest in part or all of the river's bed.<sup>3</sup>

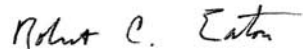
<sup>2</sup>The special regulation governing whitewater boat trips on the Colorado River within GRCA, codified at 36 C.F.R. subsection 7.4(b), does not "specifically authorize[]" anything. It simply imposes certain requirements and restrictions on whitewater boating upstream from Diamond Creek.

<sup>3</sup>36 C.F.R. subsection 1.2(a), which is a general regulation applicable to all units of the national park system, was amended and clarified in 1996. 61 Fed. Reg. 35,133 (1996). Furthermore, Solicitor Leshy issued his opinion concluding that the reservation did not include the bed of the Colorado River in 1997. Those developments occurred after the Ninth Circuit's

In my view, then, the question of the location of the reservation's boundary is not dispositive of the question of whether the NPS may regulate the Tribe's commercial activities on the Colorado River within GRCA. In fact, it is beside the point, and I see little value in focusing on that question during the upcoming mediation. Instead, I suggest that we encourage our clients to focus on the appropriate extent of the Tribe's commercial activities (given our clients' differing priorities and goals); to try to come to some agreement on that question; and to discuss the mechanism or instrument by which we might memorialize their agreement.

I hope that this letter contributes your understanding of our position and to a more successful mediation. Please call me if you would like to discuss these issues further before we meet in Flagstaff.

Sincerely,



Robert C. Eaton  
Attorney-Adviser

cc:  
Superintendent, Grand Canyon National Park  
Regional Director, Intermountain Region, NPS

---

decision in Lesoeur v. United States, 21 F.3d 965 (9<sup>th</sup> Cir. 1994), which you cite in your January 31 letter, and provide the basis for the NPS's taking a more active role in managing the entire Colorado River within GRCA.

Finally, subsection 4(b) of the GCNPEA, codified at 16 U.S.C. subsection 228c(b), transferred to the NPS administrative jurisdiction over all federally owned lands within the boundaries of the enlarged GRCA. It does not, as you assert on page 4 of your letter, "limit[ ] such jurisdiction to Federal lands within the boundaries of the park."